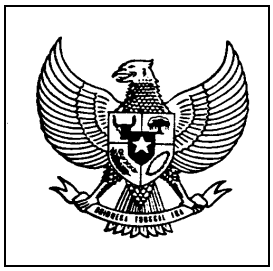

DECISION

Number 2-3/PUU-V/2007

FOR THE SAKE OF JUSTICE UNDER THE ONE ALMIGHTY GOD

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF INDONESIA

[1.1] Examining, hearing and deciding upon constitutional cases at the first and final level, has passed a decision in the case of petition for judicial review of Law Number 22 Year 1997 regarding Narcotics against the 1945 Constitution of the State of the Republic of Indonesia, filed by:

[1.2] The Petitioners of Case Number 2/PUU-V/2007

1. **Edith Yunita Sianturi**, having her address at Jalan Wijaya Kesuma IX/87, RT 09/06, Depok Jaya Sub-District, Pancoran Mas District, Depok, as **PETITIONER I**;

2. **Rani Andriani (Melisa Aprilia)**, having her address at Jalan Prof. Moh. Yamin Gg. Edy II RT 003/03 No. 555, Cianjur, West Java, as **PETITIONER II**;

3. **Myuran Sukumaran**, Holder of Passport Number M1888888, having his address at 16/104 Woodville Rd, Granville, Sydney, 2142, as **PETITIONER III**;

4. **Andrew Chan**, Passport Holder Number L3451761, having his address at 22 Beaumaris St Enfield, Sydney, 2136, as **PETITIONER IV**;

based on Special Powers of Attorney respectively dated October 18 and October 20, 2006 having authorized Dr. Todung Mulya Lubis, S.H., LL.M., Ir. Alexander Lay, S.H., LL.M., and Arief Susijamto Wirjohoetomo, S.H., M.H., and choosing their legal domicile at the attorneys' office, having their address at Mayapada Tower (formerly Wisma Bank Dharmala), 5th floor, Jalan Jenderal Sudirman Kav. 28, Jakarta 12920, hereinafter referred to as -------- **Petitioners I**;

[1.3] The Petitioner of Case Number 3/PUU-V/2007

Scott Anthony Rush, Place and Date of Birth/Age: Brisbane Australia, December 03, 1985/21 years old, Religion: Catholic, Occupation: Laborer, Nationality: Australian, Address: Correctional Institution of Kerobokan, Jalan Tangkuban Perahu, Denpasar (formerly at 42 Glenwood St. Chelmer, Brisbane, Australia), based on the Special Power of Attorney dated on January 18, 2007 having authorized Denny Kailimang, S.H., M.H., Harry Ponto, S.H., LL.M., J. Robert Khuana, S.H., Benny Ponto, S.H., M.H., Victor Yaved Neno, S.H., M.H., M.A., and Drs. I Ketut Ngastawa, S.H., all of whom are advocates acting for and on behalf of the Petitioner, of the Law Office of Kailimang & Ponto, Menara Kuningan, 14th floor / A, Jalan H. R. Rasuna Said Block X-7 Kav. 5, Jakarta 12940, hereinafter referred to as ---------- **Petitioner II**;

[1.4] Having read the Petition of Petitioners I and Petitioner II;

Having heard the statements of Petitioners I and Petitioner II;

Having heard and read the written statement of the Government;

Having heard and read the written statement of the People's Legislative Assembly;

Having heard and read the written statement of the National Narcotics Agency;

Having heard and read the written statement of the National Commission on Human Rights;

Having heard the statement of the Former Member of Ad Hoc Committee I of Working Committee of the People's Consultative Assembly;

Having heard the statement of the Drafting Team of the New Indonesian Criminal Code;

Having heard the statements of the Experts presented by Petitioners I, Petitioner II, the Government, and the National Narcotics Agency and the Experts called by the Constitutional Court;

Having examined the evidence;

Having read the written conclusion presented by Petitioners I, Petitioner II, the Government, and the Directly Related Party of the National Narcotics Agency;

3. LEGAL CONSIDERATIONS

[3.1] Considering whereas in this case the Petitioners and the objectives of their petition are as follows:

[3.1.1] Whereas the Petitioners in case Number 2/PUU-V/2007 are Edith Yunita Sianturi (Indonesian Citizen, Petitioner I), Rani Andriani (Melisa Aprilia, Indonesian Citizen, Petitioner II), Myuran Sukumaran (Foreign Citizen, Petitioner III), and Andrew Chan (Foreign Citizen, Petitioner IV) through their attorneys-in-fact Dr. Todung Mulia Lubis, S.H., LL.M., et.al. and the Petitioner in case Number 3/PUU-V/2007 is Scott Anthony Rush (Foreign Citizen) through his attorneys-in-fact Denny Kailimang, S.H., M.H., et.al;

[3.1.2] Whereas the Petitioners filed a petition for judicial review of Article 80 Paragraph (1) Sub-Paragraph a, Paragraph (2) Sub-Paragraph a, and Paragraph (3) Sub-Paragraph a, Article 81 Paragraph (3) Sub-Paragraph a, and Article 82 Paragraph (1) Sub-Paragraph a, Paragraph (2) Sub-Paragraph a, and Paragraph (3) Sub-Paragraph a of Law Number 22 Year 1997 regarding Narcotics (State Gazette of the Republic of Indonesia Year 1997 Number 67, Supplement to the

State Gazette of the Republic of Indonesia Number 3698, hereinafter referred to as the Narcotics Law) against 1945 Constitution of the State of the Republic of Indonesia (hereinafter referred to as the 1945 Constitution). All of the aforementioned Articles of the Narcotics Law contain provisions regarding **capital punishment**, which according to the Petitioners are contrary to Article 28A and Article 28I Paragraph (1) of the 1945 Constitution that guarantee the right to life which cannot be reduced under any circumstances whatsoever (non-derogable right);

[3.1.3] Whereas besides, Petitioner III and Petitioner IV (in Case Number 2/PUU-V/2007) also petitioned for the judicial review of Article 51 Paragraph (1) Sub-Paragraph a of Law Number 24 Year 2003 regarding the Constitutional Court (State Gazette of the Republic of Indonesia Year 2003 Number 98, Supplement to the State Gazette of the Republic of Indonesia Number 4316, hereinafter referred to as the Constitutional Court Law) which stipulates that only Indonesian Citizens are allowed to file a petition for judicial review of Law against the 1945 Constitution. According to the Petitioners, this is due to the fact that constitutional rights or human rights (HAM) is not only for Indonesian Citizens, but also for foreign citizens, so that Article 51 Paragraph (1) Sub-Paragraph a of the Constitutional Court Law is contrary to Article 28D Paragraph (1) of the 1945 Constitution;

[3.2] Considering whereas there are three legal issues that must be taken into account, namely as follows:

a. Authority of Constitutional Court (hereinafter referred to as the Court) to examine, hear, and decide upon the *a quo* petition, considering that the Law petitioned for review is a Law enacted prior to the Amendment to the 1945 Constitution on October 19, 1999;

b. Legal standing of the Petitioners, especially the legal standing of foreign citizens to petition for judicial review of Law against the 1945 Constitution;

c. Constitutionality of the capital punishment provisions in the Narcotics Law petitioned for review and the constitutionality of Article 51 Paragraph (1) of the Constitutional Court Law;

AUTHORITY OF THE COURT

[3.3] Considering whereas based on the provision of Article 24C Paragraph (1) of the 1945 Constitution, the Court has the authority to adjudicate at the first and final level, the decision of which shall be final, among other things to review laws against the 1945 Constitution. The abovementioned provision is reaffirmed in Article 10 Paragraph (1) of the Constitutional Court Law *juncto* Article 12 Paragraph (1) of Law Number 4 Year 2004 regarding Judicial Power (State Gazette of the Republic of Indonesia (LNRI) Year 2004 Number 8, Supplement to the State Gazette of the Republic of Indonesia (TLNRI) Number 4358);

[3.4] Considering the Petitioners filed a petition for judicial review of the Narcotics Law which was enacted on September 1, 1997, prior to the First Amendment to the 1945 Constitution on October 19, 1999. However, since Article 50 of the Constitutional Court Law including its elucidation which might have become an obstacle to the review of the Narcotics Law has been declared as having no binding legal force by Court Decision Number 066/PUU-II/2004, the Court has the authority to examine, hear, and decide upon the *a quo* petition;

LEGAL STANDING OF THE PETITIONERS

[3.5] Considering whereas based on Article 51 Paragraph (1) of the Constitutional Court Law, parties that can file a petition for review of laws against the 1945 Constitution shall be individual Indonesian citizens who deem their constitutional right and/or constitutional authority granted by the 1945 Constitution has been impaired by the coming into effect of a particular law. Meanwhile, following its Decision Number 006/PUU-III/2005 and subsequent decisions, the Court has had the stand that the impairment of constitutional rights and/or Authorities must fulfill the following five requirements:

a. the Petitioners must have constitutional rights and/or authorities granted by the 1945 Constitution;
b. the Petitioners deem that such constitutional rights and/or authorities have been impaired by the coming into effect of the law petitioned for review;

c the constitutional impairment shall be specific and actual or at least potential in nature which, pursuant to logical reasoning, will take place for sure;

d. there is a causal relationship *(causal verband)* between the impairment concerned and the coming into effect of the law petitioned for review;

e. If the petition is granted, it is expected that the constitutional impairment concerned will not or does not occur any longer.

[3.6] Considering whereas two Indonesian citizens as the Petitioners in case number 2/PUU-V/2007, namely Edith Yunita Sianturi and Rani Andriani (Melisa Aprilia) have constitutional rights granted by Article 28A and Article 28I Paragraph (1) of the 1945 Constitution (the right to life which is non-derogable in nature) which has been actually impaired by capital punishment provisions in the Narcotics Law, because the two *a quo* Petitioners have been sentenced by the court with capital punishment that has had permanent legal force and just waiting for the execution. Therefore, the two Petitioners have the legal standing to file a petition for review of the Narcotics Law;

[3.7] Considering whereas, as described above, since the *a quo* petition has also been filed by three foreign citizens, namely Scott Anthony Rush, Myuran Sukumaran, and Andrew Chan, the Court must also first consider whether the foreign citizens have the legal standing to be Petitioners for the review of laws against the 1945 Constitution.

Considering whereas with respect to the legal standing of the foreign citizen Petitioners in the *a quo* case, the Court is of the following opinion:

a. Article 51 Paragraph (1) Sub-Paragraph a of the Constitutional Court Law and its elucidation expressly and clearly *(expressis verbis)* state that the individuals who has the right to file a petition for review of a law against the 1945 Constitution (in the sense that they have constitutional right granted by the 1945 Constitution) shall be Indonesian citizens only, and foreign citizens do not have such right.

b. The impossibility for foreign citizens to question a particular law of the Republic of Indonesia does not mean that the foreign citizens do not obtain legal protection based on the principle of due process of law, *in casu* in relation to capital punishment provisions with respect to which the Petitioners still can take legal remedies in the form of appeal, cassation, and judicial review.

c. Elucidation of Article 51 Paragraph (1) Sub-Paragraph a of the Constitutional Court Law regarding “individual” including a group of people having a common same interest must be related to the text of Article 51 Paragraph (1) Sub-Paragraph a namely “individual Indonesian citizen”, and therefore together with its the elucidation, Article 51 Paragraph (1) Sub-Paragraph a must be read as whole as “individuals including the people who have the same interest with Indonesian citizens”. Therefore, a foreign citizen Petitioner does not fulfill the qualifications as provided for in Article 51 Paragraph (1)

Sub-Paragraph a and its elucidation, and that the foreign citizen Petitioners shall have no legal standing in the *a quo* case.

In other words, the foreign citizen Petitioners have wrongly interpreted the elucidation of Article 51 Paragraph (1) Sub-Paragraph a of the Constitutional Court Law namely that the *a quo* Petitioners has taken the absence of the word “Indonesia” in the elucidation of Article 51 Paragraph (1) Sub-Paragraph a of the Constitutional Court Law as implying that foreign citizens have legal standing to petition for review of laws against the 1945 Constitution because the foreign citizens concerned belong to the group having a common interest. Such an opinion of the Petitioners has been out of the context of the elucidation of Article 51 Paragraph (1) Sub-Paragraph a of the Constitutional Court Law. The reason is that the elucidation of Article 51 Paragraph (1) Sub-Paragraph a of the Constitutional Court Law provides an explanation of the meaning of the word “individual” in Article 51 Paragraph (1) Sub-Paragraph a of the Constitutional Court Law which mentions that contains, “a. individual Indonesian citizens”. Therefore, the expression “including the group of people having a common interest” in the elucidation of Article 51 Paragraph (1) Sub-Paragraph a of the Constitutional Court shall refer to the group of Indonesian citizens having a common interest.

[3.8] Considering whereas therefore, because the foreign citizen Petitioners have no legal standing to file the *a quo* petition, the Principal Issue of

the Petition of Petitioner III and Petition IV for the review of Article 51 Paragraph (1) Sub-Paragraph a of Constitutional Court Law shall not need *mutatis mutandis* to be considered, so that the petition cannot be accepted *(niet ontvankelijk verklaard)*;

PRINCIPAL ISSUE OF THE PETITION

[3.9] Considering whereas because two Indonesian citizen Petitioners (Petitioner I and Petitioner II) in Case Number 2/PUU-V/2007 have the legal standing, the Principal Issue of the Petition filed which is regarding the issue of constitutionality of capital punishment provisions in the Narcotics Law must therefore be considered. Whereas for Case Number 3/PUU-V/2007, because the Petitioner in the case has no legal standing, the Principal Issue of the Petition shall not need further consideration;

[3.10] Considering whereas Petitioner I and Petitioner II of Case Number 2/PUU-V/2007 (hereinafter referred to as the Petitioners) have argued that the Articles of Narcotics Law petitioned for review are contrary to the 1945 Constitution, as follows:

- Article 80 Paragraph (1) Sub-Paragraph a, "*Whosoever without any right or illegally: produces, processes, extracts, converts, prepares or provides Narcotics Category I shall be punished with a* ***capital punishment*** …".

- Article 80 Paragraph (2) Sub-Paragraph a, "*If the criminal act referred to in: Paragraph (1) Sub-Paragraph a is preceded by conspiracy the punishment shall be a* ***capital punishment***…".

- Article 80 Paragraph (3) Sub-Paragraph a, "*If the criminal act referred to in: Paragraph (1) Sub-Paragraph a is committed as an organized crime, the punishment shall be a* ***capital punishment****…".*

- Article 81 Paragraph (3) Sub-Paragraph a, "*If the criminal act referred to in: Paragraph (1) Sub-Paragraph a is committed as an organized crime, the punishment shall be a* ***capital punishment***…".

- Article 82 Paragraph (1) Sub-Paragraph a, "*Whosoever without any right or illegally: imports, imports, exports, offers for sale, distributes, sells, buys, delivers, acts as broker or exchanges Category I shall be punished with a* ***capital punishment***…".

- Article 82 Paragraph (2) Sub-Paragraph a, ""*If the criminal act referred to in: Paragraph (1) is preceded by a conspiracy, the punishment shall be a* ***capital punishment***…".

- Article 82 Paragraph (3) Sub-Paragraph a, "*If the criminal act referred to in: Paragraph (1) Sub-Paragraph is committed as an organized crime, subject to* ***capital punishment****…*"

[3.11] Considering whereas the arguments presented the Petitioners are as follows:

(1) Capital punishment is contrary to the right to life which is guaranteed by Article 28A and Article 28I Paragraph (1) of the 1945 Constitution.

According to the Petitioners, the existence of the phrase “cannot be reduced under any circumstances whatsoever” in Article 28I Paragraph (1) of the 1945 Constitution is the evidence that the 1945 Constitution does not provide for any limitation of the right to life. In other words, according to the Petitioners, Article 28I Paragraph (1) of the 1945 Constitution does not provide for the capital punishment because it is a denial of the right to life.

The Petitioners also base their arguments regarding the relationship between the right to life and capital punishment on the systematization of Article 6 of the International Covenant on Civil and Political Rights (ICCPR), which has been ratified by Indonesia with Law Number 12 Year 2005, which has caused the Petitioners to come to a conclusion that capital punishment is incompatible with the right to life. Then, after comparing the provision on *non-derogable rights* in the ICCPR with the provision of Article 28I Paragraph (1) of the 1945 Constitution, the Petitioners has come to a conclusion that both provisions have many similarities. In fact, the Petitioners argue that the 1945 constitution, *in*

casu Article 28I Paragraph (1), implements a higher standard than that of the ICCPR.

(2) Capital punishment is contrary to Article 28I Paragraph (4) of the 1945 Constitution.

In this connection, the Petitioners base their arguments on the the imperfection of the criminal judicature system. As a result, there is always the possibility of punishment being imposed against innocent people. Meanwhile, capital punishment is irreversible, so that if a particular person is punished with a capital punishment and she/he has been executed while it is then found that she/he is not guilty, it will be a fatal mistake which is impossible to be corrected.

According to the Petitioners, with The fact that the criminal judicature system is imperfect which may (and this has occurred) punish innocent people, while Article 28I Paragraph (4) of 1945 Constitution obligates a state (especially government) to protect human rights actively, the implementation of capital punishment is contrary to the Government's obligation based on Article 28I Paragraph (4) of the 1945 Constitution namely to protect human rights, including the right to life as regulated in Article 28A and Article 28I Paragraph (1) of 1945 Constitution.

(3) International human rights instruments opt for the abolition of capital punishment.

In this connection, the Petitioners refer to a number of provisions of various international human rights instruments, such as the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, and other international instruments which, according to the Petitioners, opt for the abolition of capital punishment. Based on these provisions, the petitioners build their arguments as follows:

a. As a part of the international community, Indonesia is obligated to respect value and uphold the principles contained in such international human rights instruments;

b. The intended respect was then realized in the discussion of the second Amendment to the 1945 Constitution. In the discussion, the international human rights instruments were made as reference for the People's Consultative Assembly in drafting Chapter XA of the 1945 Constitution regarding human rights. Therefore, it would be proper that the interpretation of the articles regarding human rights in the 1945 Constitution should be made by referring to such international instruments.

(4) The international community tends to opt for the abolition of capital punishment.

In this connection, the Petitioners present the data that show the increasing number of states that year by year have abolished capital

punishment. Based on the data the Petitioners conclude that Indonesia, as a part of the international community, also should consider the facts to abolish capital punishment from the Indonesian legal system.

(5) Capital punishment is contrary to the criminal punishment philosophy in Indonesia.

Having referred to one of legal considerations of the Constitutional Court's Decision Number 013/PUU-I/2003, Law Number 12 Year 1995 regarding Correctional Institution and experts' opinion, the Petitioners state their arguments that (a) the criminal punishment philosophy in Indonesia is more focused on the efforts of rehabilitation and social reintegration for perpetrators of criminal acts, and that the criminal punishment philosophy which focuses on retributive aspect has been abandoned by the Indonesian legal system, (b) Criminal punishment shall be the effort to make the prisoners realize their mistakes in order to regret their crime and to make them return to be good community members, abide by law, uphold religious, social and moral values, so that the safe, organized and peaceful community life can be achieved, (c) that which must be eradicated shall be the factors that can cause people to commit criminal acts, not the prisoners concerned.

(6) The deterrent effect of capital punishment in decreasing the number of criminal acts is doubted.

In this connection the Petitioners present statistic data, from both local and foreign countries, that have ultimately brought the Petitioners to a conclusion that capital punishment does not have any deterrent effect. In other words, according to the Petitioners, the opinion that capital punishment will have a deterrent effect is just speculation. Therefore, it is irresponsible to maintain capital punishment which is merely based on speculation.

[3.12] Considering whereas in order to support their arguments, the Petitioners have presented written evidence (Evidence of PI-1 through PI-53b) the complete list of which have been included in the explanation regarding Principal Case, and in addition to the written evidence the Petitioners also presented the following experts who have given their statements under the oath:

[3.12.1] Expert Prof. Dr. J.E. Sahetapy, S.H., M.A. has given his oral and written statement as completely set out in the Principal Case, which principally state as follows:

a. rejecting capital punishment, because capital punishment is contradictory to the *Weltanschauung* of *Pancasila* that not only being “Leitstar” of state and national life, but also being the source out of all legal sources, so that capital punishment has no “*raison d’etre*” in the state and national life of Indonesia;

b. Capital punishment cannot be explained from the aspect of penal law, let alone from positivistic-legalistic aspect, either from the retributive or

"deterrent" aspects, but must be seen from the aspect of criminology and victimology that will in fact reject the "*raison d'etre*" of capital punishment;

[3.12.2] Expert Prof Philip Alston (New York University, USA) has given a statement as completely set out in the Principal Case, which principally states that in essence, Article 6 of the ICCPR rejects capital punishment, but still tolerates the countries still adopting capital punishment, despite being limited only for the most serious crimes.

[3.12.3] The Petitioner's Expert in Case Number 3/PUU-V/2007, Rachland Nashidik (Impartial Executive Director) has given a statement as completely set out in the Principal Case, which principally states as follows:

a. Whereas it is rather difficult to identify the characteristics of non-derogable rights with a single understanding, because there are different kinds of rights as included in the international instruments;, the International Covenant on Civil and Political Rights (ICCPR) mentions seven types, the European Convention on Human Rights (ECHR) mentions only four types, while in the American Convention on Human Rights (ACHR) there are eleven types. According to the expert, four of such rights are truly non-derogable namely the right to life, the right to the freedom from torture and from inhuman and degrading treatment and the right to the freedom from oppression, the right to be acknowledged as the legal subject and as being equal before the law, and the right not to be adjudicated by retrospective laws (*ex post facto laws*);

b. Article 28J Paragraph (2) of 1945 Constitution cannot limit, abolish or even delay the fulfillment of such non-derogable human rights, even in the condition of war, not to mention in peaceful condition;

c. Whereas the right to life must become one which everybody can enjoy, so that Constitutional Court must be brave to abolish capital punishment in Indonesia;

[3.12.4] The Petitioner's Expert Prof. William A. Schabbas (National University of Ireland) has given a statement as completely set out in the Principal Case, which principally states as follows:

a. Based on the perspective of international law, capital punishment is a violation of the right to life, not merely the limitation or exception of the right to life;

b. Whereas there is a tendency that there is an increasingly greater number of countries that have abolished capital punishment compared to the number of countries that still defend the capital punishment;

c. Whereas it is true that Article 6 of ICCPR still gives possible exception possibility of capital punishment namely for the most serious crimes, but that international drugs trafficking does not belong to the most serious crimes category;

d. Whereas from the aspect of deterrent effect, based on various according to many scientific studies, capital punishment is not effective in creating a deterrent effect;

e. Whereas from the aspect of constitutional law, Indonesian Constitution, being different from ICCPR, has categorized the right to life as a non-derogable character right, so that capital punishment should be abolished from the all legislations of Indonesia;

[3.12.5] The Petitioner's Expert Prof. Jeffrey Fagan (Columbia University, USA) has given a statement as completely set out in the Principal Case, which principally states as follows:

a. Whereas many scientific studies show that capital punishment (death penalty) is not effective in creating a deterrent effect, also in drugs crimes matters in general and drugs trafficking in particular;

b. Whereas the precision or accuracy of judicial decision in the pronouncement of capital punishment cannot be guaranteed, so that the mistakes are very likely to happen;

c. whereas life sentence without parole is more effective in creating a deterrent effect;

[3.12.6] The Petitioner's Expert in Case Number 3/PUU-V/2007, Prof. Andrew C. Byrnes (University of New South Wales, Australia), has given a

statement as completely set out in the Principal Case, which principally states the following matters:

a. Whereas there are two issues in this hearing, namely first, equality issue regarding the right of foreign citizens (non Indonesian citizen) to file a petition for judicial review, and second, death penalty issue for drugs offences including drugs trafficking;

b. Whereas with respect to the first issue, Indonesia is bound by the international law and obligation, so that Article 51 of that Constitutional Court Law that discriminate against foreign citizen as opposed to Indonesian citizen to become petitioners in this case must be set aside;

c. Whereas with respect the second issue, capital punishment is clearly contradictory to the right to life which is also protected in Indonesian Constitution;

[3.13] Considering whereas the People's Legislative Assembly (DPR) of the Republic of Indonesia has given its oral and written statement as completely set out in the Principal Case, which principally states the following matters:

a. Whereas an individual of foreign citizenship has no constitutional right to file a petition for review of a law against the 1945 Constitution, because Article 51 Paragraph (1) of the Constitutional Court Law has clearly and expressly stated that only individual Indonesian citizens are allowed, and the matter has been in accordance with the principle of equality before the law and

government as provided for in Article 27 Paragraph (1) of the 1945 Constitution;

b. Whereas narcotics crimes in Indonesia have been categorized as serious crimes, so that it is appropriate if such crimes are subject to capital punishment;

c. Whereas as long as the punishment system in Indonesian Criminal Code (KUHP) which is our positive law still adopts the capital punishment as one of principal punishments, therefore capital punishment is still legally applicable in Indonesia;

d. Whereas capital punishment is not contradictory to the right to life as guaranteed by Article 28A of the 1945 Constitution, because in accordance with the provision of Article 28J Paragraph (2) the right is not absolute, but can be limited;

e. Whereas therefore, the Court must reject the petition of the Petitioners;

[3.14] Considering whereas Government has given its oral and written statement as completely set out in the Principal Case, which principally states the following matters:

a. Whereas Article 51 Paragraph (1) of the Constitutional Court Law has clearly and expressly provided that one of the parties that have the legal standing to file a petition for review of laws against the 1945 Constitution is individual Indonesian citizen, so that foreign citizens have no legal standing. Besides, if the petition for review of the *a quo* article is granted, it will close the

Indonesian citizens' right to file a petition for review of laws against the 1945 Constitution. Therefore, the Government expects the Court to reject the *a quo* petition;

b. Whereas criminal acts related to narcotics and psychotropic drugs (narcotics and dangerous substances) are crimes against humanity which is aimed at killing and destroying human beings slowly but sure, so that such crimes can be categorized as serious crimes. Therefore, it is appropriate if the perpetrators shall be subject to severe punishments including capital punishment;

c. Whereas indeed there is a tendency that many countries abolish capital punishment, but there are also many countries that still maintain capital punishment, including those that reinstate capital punishment after previously having abolished it;

d. Whereas the existence of capital punishment in Indonesia is not only in the Narcotics Law, but also spread in other laws, so that granting the petition would create legal uncertainty and injustice because would be impossible for the Court to abolish capital punishment in other laws not petitioned for review;

e. Whereas capital punishment is not contradictory to Article 28A and Article 28I Paragraph (1) of the 1945 Constitution regarding the right to life, because the understanding of the provision must be related to Article 28J Paragraph (2) that can make exception, limitation, decrease, even abolish the intended right,

provided that they are 1) in accordance with the laws; 2) in accordance with moral considerations; 3) in accordance with religious values; and 4) in accordance with public security and order;

[3.15] Considering whereas the National Narcotics Agency (BNN) as the directly related Party has given a statement as completely set out in the Principal Case, which principally states the following matters:

a. Whereas capital punishment in the Narcotics Law is aimed at narcotics dealers, producers of narcotics and psychotropic drugs Category I, either organized or unorganized;

b. Whereas the crimes referred to in item a are categorized as extraordinary crimes, and therefore the handling of such crimes must also be conducted with extra efforts in order to prevent destructive impacts to the state from happening and to create a deterrent effect for others;

c. Whereas not only have narcotics crime perpetrators abolished “the right to life” of other people (there are 15,000 deaths per year or 41 deaths per day from narcotics addiction), but they have also disturbing the society, destroying young generation/children of the nation. Narcotics and/dangerous substances can eliminate the right to the freedom of thought and conscience, religion, and the right not to be enslaved;

d. Whereas illicit trafficking of narcotics and dangerous substances is mostly from foreign countries, so that so substantial amount of money has been

gone in such a meaningless way that it can cause the state to be financially bankrupt;

e. Whereas therefore, the capital punishment for the *a quo* crime is still needed and its must be maintained and must be enforced proportionately with due observance of the national interest, especially for the victims who have been killed in a sadistic, savage and inhuman way;

[3.16] Considering whereas the Related Party namely the National Narcotics Agency (BNN) presented the experts who has given their oral and written statements as completely set out in the Principal Case, which principally state the following matters:

[3.16.1] Expert Prof. Dr. Ahmad Ali, S.H., M.H. (Professor in Hasanudin University/Member of the National Commission on Human Rights):

a. Whereas according to the expert, Article 28J Paragraph (2) of the 1945 Constitution shall be the exception to Article 28A and Article 28I Paragraph (1) of the 1945 Constitution, and therefore none of the rights including the right to life does not recognize limitation, with the limitation requirements as stated in Article 28J Paragraph (2) of 1945 Constitution;

b. Whereas the abolitionists' opposition to capital punishment for serious crimes, including crimes committed by narcotics and dangerous substances dealers for example, is, according to the expert inconsistent, because arguing that the right to life is incontestable under any circumstances would have required that

they should ask the government to dissolve the Indonesian National Armed Forces and the National Police and also ask the United Nations to dissolve all armed forces (army/police) all over the world. Therefore, such an exception is in fact possible, including when a doctor must choose to save either the mother or her baby which is also a killing because of *overmacht*;

c. Whereas with respect to the preamble to the 1945 Constitution in which *Pancasila* is included, the expert is of the opinion that there are two principles which really support the imposition of capital punishment for the serious crimes, namely The One and Only God principle in which all religions recognize capital punishment and Just and Civilized Humanity principle which means there should be balancing justice by also considering the position of the victims of narcotics crimes, not only considering the criminals. All ASEAN members still maintain capital punishment, so that it cannot be imagined if only Indonesia abolishes capital punishment;

d. Whereas the opinion of anti-capital punishment community is wrong in drawing an analogy between capital punishment and murder, which is the same as drawing an analogy between imprisonment and kidnapping or between penalty punishment and expropriation or theft;

e. Whereas anti-capital punishment community always echoes the idea that based on their research capital punishment does not decrease crimes, while other researches show that capital punishment clearly decreases crimes. For example, when England abolished capital punishment in 1965, the curve of

murder increased significantly, so did in South Africa when capital punishment was abolished in 1995, the number of crimes increased drastically, and also in Harris Country Texas U.S. , crimes decreased drastically when capital punishment execution was reinstated in 1982. It should be known that 38 out of 50 states in U.S. still maintain capital punishment. Therefore, capital punishment has a general deterrent effect;

[3.16.2] Expert Dr. Rudi Satrio, S.H., M.H. (Penal Law Lecturer at the Faculty of Law, University of Indonesia) has stated as follows:

a. Whereas discussing about the effect of capital punishment or other punishments by setting aside the retributive and deterrent effect is like living in a virtual world, because it is certainly unavoidable in the perspective of the victim or the perpetrator, so that it is always subjective in nature. Particularly regarding capital punishment in the Narcotics Law, it is certainly expected that it will create a deterrent effect in the community, and it really can not be imagined if capital punishment is abolished from the Narcotics Law;

b. Whereas capital punishment is not related to the philosophy of correctional institution, because the philosophy of correctional institution is related to imprisonment;

c. Whereas the placement of capital punishment which is separated from other principal criminal sanctions in the new Draft Indonesian Criminal Code, does not mean that capital punishment is eliminated from the Indonesian Criminal

Code, but that it still exists and that the implementation is to be clarified and confirmed, and the time can be delayed for 10 years, and if the convict has good behavior, the punishment can be changed into life sentence;

d. Whereas capital punishment can not be viewed through an analogy between the capital punishment and "*Petrus*" (*penembakan misterius* or mysterious shooting) and "*Matius*" (*mati misterius* or mysterious death) because both of them violate the law and human rights in respect of their deterrent effect;

e. Whereas from the aspect of sociological advantages, punishments including capital punishment, are intended for 1) maintaining social order; 2) protecting community members from crimes, loss, or dangers done by the other people; bringing lawbreakers back to the community (except for capital punishment), and 4) maintaining and preserving the integrity of particular basic principles regarding social justice, human dignity, and individual justice. Moreover for narcotics crimes which have been very serious, capital punishment must be maintained;

[3.16.3] Expert KRH. Henry Yosodiningrat, S.H. (Advocate, the Chairman of Anti-Narcotics Movement/*Granat*) has stated as follows:

a. Whereas the provision of capital punishment in the Narcotics Law in the form of punishment sanction applied and aimed only at organized perpetrators or for crimes preceded by a conspiracy, which is intended as the effort to prevent the occurrence of illicit narcotics trafficking in Indonesia that has

claimed victims of about 40 deaths per day. Besides, the people's fund which are spent is about 292 trillion per year, because if there are 4 million victims and each of them spend 200 thousand rupiah per day, there will be 800 billion per month being spent, with such a widespread illicit narcotics trafficking going on;

b. Whereas the right to life as regulated in Article 28A of the 1945 Constitution is not violated by the provision of capital punishment in the Narcotics Law, because Article 28A of the 1945 Constitution can not be understood without being related to the provision of Article 28J Paragraph (2) and Article 28I Paragraph (5) of the 1945 Constitution which limit the right;

c. Whereas in Law Number 39 Year 1999 regarding Human Rights, capital punishment is also recognized, as also stated by the expert of the Petitioner namely Prof. Alston, that ICCPR still allows the application of capital punishment for very serious crimes with respect to which every country has the right to interpret it;

[3.16.4] Expert of the National Narcotics Agency (BNN), Brigjen Pol (Purn) Jeane Mandagi, S.H., has stated as follows:

a. Whereas the problem of narcotics is not only a national problem of any particular country, but also an international problem of all countries all over the world. Therefore, the majority of United Nations members have acceded to the United Nations Convention Against Illicit Traffic in Narcotic Drugs and

Psychotropic Substances in 1988 which has been ratified by Indonesia with Law Number 7 Year 1997 and that Law Number 22 Year 1997 is the further explanation of the convention. Of course, like any convention in general, the severity of punishment for the *a quo* crime is turned over to every country and since Indonesia has set out capital punishment in the Narcotics Law which is still applicable, such punishment shall be legal;

b. Whereas in relation to the 1945 Constitution, we must not interpret the 1945 Constitution part by part, namely that Article 28A and Article 28I Paragraph (1) regarding the right to life must be read and interpreted as a unity with Article 28J Paragraph (2) which provides for its limitation;

c. Whereas Article 6 Paragraph (1) of ICCPR guarantees the right to life, but Article 6 Paragraph (2) allows the capital punishment for serious crimes, including the crimes with extremely grave consequences, that based on the experts the narcotics crime is categorized as a serious crime with great effects;

d. Whereas therefore, the expert argue that capital punishment in Narcotics Law must be defended and also because indeed it is not contradictory to the 1945 Constitution;

[3.17] Considering whereas the directly related party, the National Commission on Human Rights (*Komnas HAM*), represented by its chairman Abdul Hakim Garuda Nusantara, S.H., LL.M., has made a statement as

completely set out in the Principal Case, which principally states the following matters:

a. Whereas Indonesia still adhere to capital punishment as regulated in many statutory legislation (about 11 laws). In this case the constitutionality of capital punishment provision can indeed be disputed, considering that the right to life based on Article 28I Paragraph (2) of the 1945 Constitution *juncto* Article 4 Law Number 39 Year 1999 regarding Human Rights shall be a non-derogable right;

b. Whereas from the perspective of International Law, it is worth noting that today there are more countries in the world that do not implement or limit the capital punishment just for the particular matters, such as the state of condition or the other exigencies. The Second Optional Protocol of ICCPR Year 1989 in principle forbids capital punishment except in certain conditions. However, it still should be asked whether the capital punishment is a violation of human rights based on the international law. The International Covenant on Civil and Political Rights (ICCPR) of the year 1966 which has been ratified by Indonesia states that the right to life shall be the basic right and can not be violated under any circumstances whatsoever. There are some Articles that regulate the exception to the right to life by ICCPR in relation to the capital punishment, namely article 6 Paragraph (1) which does not forbid capital punishment, while Article 6 Paragraph (2) and Paragraph (6) sets forth a number of its limitations and implementation. Five specific limitations against

capital punishment can be identified from the provision of Article 6 Paragraph (2) and Article 6 Paragraph (6), as follows:

1) First limitation, namely that capital punishment can not be implemented except for the most serious crimes and should be in accordance with the applicable punishments when the crimes happen. Therefore, although Article 6 of ICCPR does not abolish capital punishment, it limits its role in the most serious crimes;

2) Second limitation, namely that capital punishment in Article 6 of ICCPR shall be the required absence of life deprivation which is contradictory to covenant provisions, so that there must be a guarantee for fair examination, though there is no a discrimination in severe punishment and execution method not being a torture or cruel, inhuman punishment, or degrading human dignity;

3) Third limitation, namely that capital punishment can only be implemented based on a final decision imposed by a competent court;

4) Fourth limitation, namely that everyone who is punished with capital punishment shall have the right to ask for indulgence or leniency in punishment and he/she can be granted the amnesty, indulgence or more lenient punishment;

5) Fifth limitation, namely that capital punishment can not be imposed on teenagers under 18 years of age and can not be executed against pregnant women;

c. Based on Islamic law, because Indonesia is a big Moslem country that still applies capital punishment, thus the Chairman of the National Commission on Human Rights quotes the observation of a Moslem scholar in the field of human rights, namely Mashud Baderin in his book "*International Human Rights and Islamic Law*" which states that most of Moslem countries which apply the Islamic Penal Law have put it more efforts to avoid capital punishment through procedural and commutative provisions which are available in the Islamic law instead of implementing a direct prohibition against it. The Islamic Law applies strict demands for substantiation for the violations which may lead to capital punishment;

d. With respect to the issue of constitutionality of the Indonesian legal product which still adheres to capital punishment, there are two opinions at the National Commission on Human Rights; the majority of them argue that capital punishment has no constitutional basis, because such legal product has been deprived of its soul, while some of the members of the National Commission on Human Rights still agree with capital punishment, by arguing that a cruel criminal act does deserve capital punishment;

[3.18] Considering whereas the Court has presented Ex-Ad Hoc Committee I BP of the People's Consultative Assembly Year 1999-2004 which was represented by Patrialis Akbar, SH. and Drs. Lukman Hakim Saefuddin who were positioned as experts to provide statements concerning the history of the formulation of Human Rights articles in the 1945 Constitution and their relationship with the capital punishment, whose statements are essentially as follows:

[3.18.1] Patrialis Akbar, S.H states the following matters:

a. The Second Amendment to the 1945 Constitution formulated 10 (ten) very complete articles on Human Rights, in the sense that every human being in Indonesia, both citizen and resident, is included within the category of Human Rights that must be protected by our state;

b. Whereas although basically it is a recognition of the existence of Human Rights in general, the Human Rights formulated in the 1945 Constitution are not universal in nature, in the sense that they do not constitute absolute liberty, but in fact there have been implementation procedures and limitations provided for by the Constitution itself. In the implementation, Article 28I Paragraph (5) states "To enforce and protect human rights in accordance with the principle of a democratic constitutional state, the exercise of human rights shall be guaranteed, regulated and set forth in laws and regulations". Thus, laws and regulations serve as a means provided by the state to enforce and protect Human Rights.

c. Whereas although set forth in nine articles (Article 28A through Article 28I), Human Rights are regulated in a universal manner, the implementation of the aforementioned Human Rights is restricted by the 1945 Constitution itself, namely by Article 28J Paragraph (1) which states that “Every person shall be obligated to respect the human rights of another person in the orderly life of community, nation and state” and by Article 28J Paragraph (2) which states, “In exercising his/her right and freedom, every person must submit to the limitations stipulated in laws and regulations with the sole purpose to guarantee the recognition of and the respect for other persons’ rights and freedom and fulfill fair demand in accordance with the considerations of morality, religious values, security, and public order in a democratic society”;

d. Thus, while we do have human rights, we are not allowed to exercise them so as to violate the rights of other people and the constitution restricts their exercise by law which is solely intended to guarantee recognition and respect of the rights and freedom of other people and to fulfill a fair demand based on the considerations of morality, religious values, public safety and order within a democratic society;

[3.18.2] Drs. Lukman Hakim Saefuddin states the following matters:

a. Whereas the birth of 10 (ten) articles of the Human Rights in the Second Amendment to the 1945 Constitution (Article 28A through Article 28J) did not occur automatically, yet it was preceded by the existence of Assembly Decree

Number XVII/MPR/1998 regarding Human Rights in Assembly Special Session Year 1998 which comprises seven articles containing two basic matters; the first one relates to the viewpoint and stance of the Indonesian people towards Human Rights and the second one relates to the Human Rights Charter, both constituting an inseparable unity;

b. Whereas in the first part of the aforementioned Assembly Decree Number XVII/MPR/1998 which contains the viewpoint and stance of the Indonesian people towards Human Rights, particularly in the Preamble Chapter, it is stated that the Indonesian people are determined to partake in implementing world order on the bases of independence, eternal peace and social justice which are essentially the obligations of every state, and thus the Indonesian people view that human rights cannot be separated from their obligations. Furthermore, in item B, Fundamentals, it is stated that the Indonesian nation have a viewpoint and a stance concerning Human Rights which originate from religious teachings, universal moral values and noble values of the national culture, as well as based on the Five Principles of Indonesia (*Pancasila*) and the Constitution. Moreover, in item C, History, Approach, and Substance of Human Rights which were further described in the Human Rights Charter, it is stated that the Indonesian nation realize and recognize that every individual is a part of the society and conversely, the society comprises individuals who possess human rights, living within an environment which serves as the resource in their life. Therefore, every individual, in addition to possessing human rights, also assumes obligations and responsibilities to respect the

human rights of other individuals, the societal norms, as well as the preservation of order improvement function and the improvement of environmental quality;

c. Whereas in Human Rights Charter, prior to article by article provisions, the Preamble section comprises several paragraphs where in the second last paragraph it is stated that the Indonesian nation essentially realize, recognize and guarantee, as well as respect the Human Rights of other people, and also view them as an obligation. Therefore, the human rights and human obligations are integrated and attached to a human being as a person, as a member of his/her family, his/her society, his/her nation, and himself/herself as a citizen, and also as a member of nations. Thus, there is an affirmation that obligations constitute a part which is attached to every human being in addition to their rights;

d. Whereas initialized by the aforementioned Assembly Decree Number XVII/MPR/1998, in 1999 Law Number 39 Year 1999 regarding Human Rights (the Human Rights Law) was issued; in certain matters the law has a substance which is in line with Assembly Decree Number XVII/MPR/1998. In Chapter VI regarding Limitations and Prohibitions in Article 73, it is stated that “Rights and freedom as stipulated in this Law may only be limited by and by virtue of law, primarily for assuring the recognition and respect towards human rights and other persons’ fundamental freedom, ethics, public order, and the national interest”. Elucidation of Article 73 of the Human Rights Law

states, “The limitation referred to in this Article shall not apply to non-derogable rights in view of Elucidation of Article 4 and Article 9”. Article 4 of the Human Rights Law states that “The right to live, not to be tortured, the right of personal freedom, thoughts, and conscience, right of religion, right not to be slaved, right to be recognized as an individual and equality before the law, and the right not to be prosecuted under retroactively laws shall be human rights that can not be diminished under any circumstances whatsoever and by any person whomsoever”. Meanwhile its elucidation states, ““Under any circumstance whatsoever” shall include the state of war, armed conflicts, and or state of emergency, Referred to as “whomsoever” shall be the State, Government and or members of society”. The right not to be prosecuted under retroactive laws may be an exception in the case of serious violation against Human Rights. Article 9 Paragraph (1) of the Human Rights Law states “Every person shall have the right to live, survive and improve his quality of life” and its Elucidation reads, “Every person shall have the right to live, preserve life, and improve the quality of his/her life. This right to live is also attached to unborn children or criminals on death row. In extraordinary cases or circumstances namely for the sake of the life of the mother in abortion cases or by virtue of a court decision in death sentence cases, abortion or death sentence in the cases or condition, may still be permitted. Only in those two cases the right to life may be limited”.

e. Thus, according to the expert, from the beginning, the Human Rights adopted by the Indonesian nation indeed recognized such limitations as referred to in

Assembly Decree Number XVII/MPR/1998, the Human Rights Law, and even in the 1945 Constitution itself, namely in Article 28J Paragraph (1) and Paragraph (2) which include the limitations of all stipulations regarding Human Rights which are stated in Article 28A through Article 28I of the 1945 Constitution.

[3.19] Considering whereas the Court has also heard the statements of the experts presented by the Indonesian Criminal Code Revision Team which was represented by Dr. Mudzakir, S.H., M.H. and Prof. Dr. Nyoman Serikat Putrajaya, S.H. as follows:

[3.19.1] Expert Dr. Mudzakir, S.H., M.H. presents statements which for the sake of conciseness have been quoted regarding capital punishment in the Draft Law of Indonesian Criminal Code as follows:

a. Whereas in the development of the discussion on capital punishment, there are at least three opinions, the first one favoring the abolition of capital punishment, the second one supporting capital punishment to remain one of the forms of principal criminal sanctions, and the third one preferring capital punishment to remain as a form of criminal sanction but it should be special in nature, namely regulated under special conditions. The formulation of capital punishment in the Draft Law of the Indonesian Criminal Code assumes the third position which is the compromise between the two contrasting opinions where one supports and the other rejects capital punishment;

b. Whereas capital punishment is alternatively imposed as the last resort to protect the society, so as to guarantee the principle of social protection. In its implementation, capital punishment is executed by shooting the convict to death by a firing squad, not in public, while if it is to be executed against a pregnant woman or a mentally-ill person then it shall be postponed until the woman gives birth or the mentally-ill person recovers, and capital punishment may only be executed after the convict's appeal for pardon has been rejected by the President;

c. Whereas the Indonesian Criminal Code Revision Team attempts to respond by stating that it should not be the case that the person on death row is to be kept waiting too long which may cause the convict to experience even greater misery, and therefore, it is necessary to formulate a provision that the execution of capital punishment may be postponed with a probation period of ten years, under the conditions that the reaction from the society towards the committed crime is mild, the convict shows regret, and there is a hope for his/her actions to be corrected;

d. Thus, it can be concluded that the politics of law regarding capital punishment in the Draft Law of the Indonesian Criminal Code:

- positions capital punishment as a special or extraordinary punishment;

- capital punishment may be converted into life sentence or imprisonment for a certain period after undergoing the 10-year probation period;

- tends not to utilize capital punishment as a principal and priority type of punishment;

- the utilization of capital punishment must be selective, only to be imposed upon criminal acts which have resulted in death or threatened the life of human beings and humanity, or state security;

- the execution of capital punishment may be postponed by the granting of 10-year probation period, by waiting for pregnant women to give birth, and for mentally-ill person to recover.

[3.19.2] Expert Prof. Dr. Nyoman Serikat Putrajaya, S.H presents a statement concerning capital punishment in the Draft Law of the Indonesian Criminal Code as follows:

- whereas capital punishment in the concept of the Draft Law of the Indonesian Criminal Code is removed from the set of principal criminal punishments as contained in Article 10 of the current Indonesian Criminal Code, namely that principal punishments constitute capital punishment, imprisonment, detention, fine, and confinement which is added based on Law Number 20 Year 1946. The concept of capital punishment is regulated as a special type of punishment, even in Article 87 of the Draft Law of the Indonesian Criminal

Code it is stated that capital punishment is alternatively imposed as the last resort to protect the society;

- thus, the essence of capital punishment is actually to protect the society as well. The continued adoption of capital punishment in the Draft Law of the Indonesian Criminal Code is in fact not automatic because based on the research conducted by Universitas Diponegoro with the Supreme Court on the threat of capital punishment in criminal punishment, there are apparently 50% respondents agreeing that capital punishment should be maintained in the context of protecting individuals and simultaneously the society;

- a theoretical ground which may be referred to in justifying the adoption of capital punishment despite its special nature is to provide a channel for those in the society who desire to take revenge because if there is no channel through the laws namely through the penal law, the concern is that the society will take the law into their own hands.

[3.20] Considering whereas the Court has also presented experts in various fields of study from various universities in Indonesia to present their views concerning capital punishment in Indonesia as experts under oath as follows:

[3.20.1] Dr. Didik Endro Purwo Laksono, S.H., M.Hum. (penal law expert from Universitas Airlangga Surabaya) presents the following statements:

- The expert reviews the specific and general functions of penal law. Specifically, the function of penal law is to protect the interest of the state, the interest of the society, and the interest of the public, in this matter, narcotics criminal acts have threatened the three aforementioned interests which must be protected, so it will be very natural if the perpetrator of the aforementioned crime is sentenced with capital punishment. Meanwhile, in general, the function of penal law is to threaten and educate, thus in the penal law, there is a criminal sanction which constitutes an *ultimum remedium* (utilized as the last resort when other non-criminal sanctions have become impotent) and *primum remedium* (as the first tool to handle criminal acts).

- As to whether or not the provisions of capital punishment in the Narcotics Law are contrary to Article 28A and Article 28I Paragraph (1) of the 1945 Constitution, when seen grammatically, it indeed seems that the existence of the threat of capital punishment in the Narcotics Law is contrary to Article 28A and Article 28I of the 1945 Constitution. Even so, if seen from the perspectives of law politics, philosophical foundation, sociological foundation, and the purpose and objective of the legislators, it becomes evident that Article 28A and Article 28I are not intended to protect the criminal who has threatened the right to life possessed by the state, the society, and the individuals who have fallen victim to the narcotics criminal acts;

- Whereas comparing the situation in Indonesia with that of other countries is certainly legal, yet one must bear in mind that every nation has its own history

of law, the spirit, the soul and the viewpoint of every nation regarding justice are certainly different, so it is not appropriate to always compare this issue of capital punishment with the viewpoint adopted by other states;

- Whereas the content of the 1945 Constitution itself, namely Article 28J has limited the articles on Human Rights formulated in the articles of the 1945 Constitution, including the ones stated in Article 28A and Article 28I Paragraph (1);

- Hence, if narcotics dealers were only sentenced with imprisonment, the fact remains that they could still control their narcotics business from behind the bars of the correctional institution, so the only way to cut the chain of narcotics distribution by large dealers or ex-convicts is by capital punishment. In other words, the articles on capital punishment in the Narcotics Law are not contrary to the 1945 Constitution;

- With respect to the opinion that capital punishment does discourage the perpetrators of the narcotics crime (in the sense that capital punishment does not have any deterrent effect), it may be proposed, *a contrario*, that let alone minor punishment, the perpetrators are not even discouraged after being sentenced with capital punishment;

- Whereas if the petition of the Petitioners is granted, it will imply that all laws and regulations containing provisions on capital punishment must also be

abolished from the criminal punishment system in Indonesia, which will mean a threat to the aspects of life of the Indonesian society, nation and state.

[3.20.2] Dr. M. Arief Amrullah, S.H., M.Hum. (Penal Law Expert from Universitas Negeri Jember) presents the following statements:

- Whereas narcotics crime is a part of an organized crime, basically included in one of the crimes against social development and prosperity, which has increasingly become both national and international center of attention and concern, and since it encompasses a broad scope and dimension, the activities therefore have the characteristics of organized crime, white collar crime, corporate crime, and transnational crime. In fact, owing to the advance in the information technology, narcotics crime may constitute a form of cyber crime;

- Whereas in order to protect the greater interest of national law, as contained in the Preamble to the 1945 Constitution, namely "… (to) protect the entire Indonesian nation and the entire Indonesian native land, and in order to advance general welfare", the legislators of the Narcotics Law considered it necessary to include a severe criminal sanction in the form of capital punishment in Article 80 Paragraph (1) Sub-Paragraph a, Paragraph (2) Sub-Paragraph a, Paragraph (3) Sub-Paragraph a, Article 81 Paragraph (3) Sub-Paragraph a, and Article 82 Paragraph (1) Sub-Paragraph a, Paragraph (2) Sub-Paragraph a, and Paragraph (3) Sub-Paragraph a of the Narcotics Law. The inclusion of the aforementioned capital punishment, when related to the

objective of penal law as proposed by Remelling, is to enact law order, protect legal society, so that by the imposition of capital punishment upon a criminal, potential victims will be protected;

- Whereas the penal law policy contained in the Draft Law of the Indonesian Criminal Code which emphasizes the protection of social interest, it is therefore natural to maintain the sanction of capital punishment;

- Whereas the imposition of capital punishment upon narcotics criminals does invite pros and cons, namely in its relation with the issue of Human Rights which is whether the imposition of capital punishment upon narcotics criminals violate Human Rights and/or is contrary to the 1945 Constitution. It is true that according to Barda Nawawi Arif, one of the most fundamental aspects of humanity is the right to live and to live one's life; this right is extremely fundamental because it has been directly granted by God to every human being. Therefore, considering that the right to live is one of the Human Rights, deprivation a person of his/her life in the form of murder or by the state in the form of capital punishment is essentially a violation of Human Rights, when it is executed arbitrarily without any legal basis according to applicable laws;

- Thus, capital punishment is prohibited when it is imposed without any legal basis or executed arbitrarily. When related to the theory of social contract, only the law which reflects the agreement between the society and the legislators of the Narcotics Law who included the provision of capital

punishment represented the entire society. Therefore, it is relevant to relate Article 28A and Article 28I Paragraph (1) of the 1945 Constitution with the limitations provided for by Article 28J Paragraph (1) and Paragraph (2) because the narcotics crimes bring about daunting impacts, thus it is not appropriate to focus on the perpetrator while ignoring the victims of narcotics;

- Whereas the Petitioners' opinion in favor of the abolition of capital punishment for the reason that it is contrary to the Human Rights and considered as not having any deterrent effect, by quoting Sudarto's opinion that threatened punishment alone will not cause significant effect if it is not accompanied by a the imposition of severe sanctions, hence for the deterrent effect to be effective, narcotics criminals must be sentenced with a severe punishment namely capital punishment;

- Whereas indeed, in the international context recently, according to Remelling, movements to abolish capital punishment have reemerged. Even so, Article 6 Paragraph (2) of ICCPR itself does not prohibit capital punishment, not even for an extremely serious crimes. Thus, in order to protect the greater national interest, the provision on capital punishment should be maintained in the national penal law system and such action is in line with the constitution.

[3.20.3] Dr. Mahmud Mulyadi, S.H., M.Hum. (Penal Law Expert from USU Medan) presents the following statements:

- Whereas in the philosophy of the objective of criminal punishment, there are several objectives expected to be achieved in the penal law adopted by various states and also fields of study, namely, first, retributive aspect, second, deterrent effect, third, treatment, fourth which is a variant of treatment namely social defense, and restorative justice which is soon to be developed in the penal law;

- The notion of capital punishment abolition has been developed by abolitionism which considers capital punishment as form of cruel and inhuman criminal punishment, and was originated from the retributive theory which legitimates revenge against criminals. The movement led by abolitionists aims not only at abolishing capital punishment, but also at abolishing all forms of criminal punishments. The movement was born from the idea of positivism suggesting the method of treatment as the objective of criminal punishment. This positivism is followed by a radical social defense belief founded by Philippo Gramatica. The method of treatment states that criminal punishment will be very much appropriate if it is aimed at criminals instead of their crimes, so the direction is to provide treatment and rehabilitation for criminals instead of punishment, based on the argument that criminals are sick people, and therefore they need treatment and legitimacy. The method of treatment has inspired the birth of the social defense belief, both radical and moderate, which desires penal law to be replaced with social protection law. In reality, the journey of the treatment method was not very smooth and it harvested criticisms because only few states have the facility to

implement rehabilitation program and the treatment method was regarded as inviting individual tyranny and rejecting Human Rights;

- Whereas the existence of diverse beliefs in criminal punishment has indeed created a dilemma with respect to the issue of criminal punishment. The objective of criminal punishment in the retributive belief is considered too cruel and contradictory to the values of humanity, while the objective of criminal punishment as a deterrent is considered failed based on the fact that the number of criminals becoming recidivists continues to increase, while the treatment belief with its rehabilitation program to support the abolition of punishment including capital punishment has lost direction. Therefore, the retributive and deterrent beliefs have regained strength namely to legally accommodate the tendency of human nature to avenge those people who have caused misery. Oppositions to abolitionism have also emerged from the school of moderate social defense (new social defense);

- From the viewpoint of judicial approach, an extremely crucial question arises: Is capital punishment in narcotics crime or any other laws outside the Indonesian Criminal Code contrary to *Pancasila* and the 1945 Constitution? *Pancasila* positions the Belief in The One and Only God as the first principle and Just and Civilized Humanity as the second principle. The recognition that the Indonesian nation has the Belief in The One and Only God proves that the Indonesian nation is a religious nation, so the discussion of capital punishment from the perspectives of Pancasila and the 1945 Constitution can

never be separated from the discussion in religious perspective. Every religion certainly teaches goodness and the battles against evil deeds and it also prohibits anyone from engaging in evil deeds, disregarding humanity including by depriving a person of his/her life, because only the One and Almighty God shall determine a person's life and death. Therefore, the right to life provided for in Article 28A and Article 28I Paragraph (1) of the 1945 Constitution is one of the Human Rights granted by God to all human beings on earth. According to the expert, it is true that only the One and Almighty God shall determine a person's life and death, yet the manner of which a person lives or dies is not decided by God, but is instead by the choices of human beings themselves, so when a person is sentenced with capital punishment for his/her offenses, it does not imply that it is the state which decides on his/her life or death, but how he/she dies has been personally chosen by himself/herself in full awareness;

- Therefore, it can be concluded that:

    a) The idea of capital punishment abolition pioneered by positivism through the method of treatment and also adopted by the radical social defense belief has failed, because: in reality, only few states are capable of facilitating rehabilitation programs; it encourages individual tyranny; and all fields of study cannot rehabilitate an antisocial person;

    b) This failure finally led experts back to the retributive and deterrent beliefs based on the argument that naturally, human beings tend to

seek revenge and it therefore needs to be legalized, namely the imposition of punishment according to the moral quality of a person's crime, in order to preserve social order, as well to protect individuals and the society;

c) The sanction of capital punishment is not rooted in the philosophy of revenge, but more in the imposition of punishment proportionate to the perpetrator's crime (balancing justice) with due observance of the qualities of the aforementioned crime which consist of intention *(mens rea)*, the free will to decide one's behavior (free will), the moral quality of the crime (moral blameworthiness) and individual responsibility for his/her crimes (individual responsibility). The sanction of capital punishment is also philosophically aimed at providing protection for individuals and the people at large;

d) Capital punishment is not contrary to Religion, *Pancasila* or the 1945 Constitution because the right to life cannot be reduced under any circumstances as provided for in Article 28A and Article 28I Paragraph (1) of the 1945 Constitution which are actually based on the argument that the life and death of a person have indeed been determined by God, but the way to live and die is decided by the person himself/herself because God has provided choices and guidelines to live this life. Therefore, when a person is sentenced with capital punishment by the state because of the crimes regulated in the

Narcotics Law, it does not imply that it is the state which determines the life and death of a person, but rather that the person has personally and in full awareness decided on his/her manner of death;

e) The limitation formulated in Article 28J of the 1945 Constitution is also applicable for the provision of Article 28I Paragraph (1), because one's basic rights must also be balanced with basic responsibilities to respect the basic rights of other people, including others' rights to life, thus if one violates the law, he/she must be punished and therefore capital punishment is not contrary to the 1945 Constitution.

[3.20.4] Prof. Dr. Bambang Poernomo, S.H. (Penal Law Expert from Universitas Gadjah Mada Yogyakarta) presents the following statements:

- The expert differentiates capital punishment threat, capital punishment implementation and capital punishment execution, in which threat is a formulation in law, implementation is the judicial decision, while execution is the carrying out of such decision by the prosecutor. It is in accordance with the development of penal law which includes three dimensions: the first dimension is material penal law namely capital punishment threat, the second dimension is criminal procedural law namely the implementation of capital punishment by the justice, and the third dimension is the criminal execution law which in the case of capital punishment invites harsh criticisms because the execution is time consuming;

- The expert bases his arguments on several theories on criminal punishment, namely:

    a) alternative theory of crime, and hence the teaching that capital punishment shall be the last resort, if there exists any other alternative, impose it instead of the capital punishment;

    b) the second concept is the UN statement which has been issued since the year 1956 under the theme of “The Prevention of Crime and the Treatment of Offender” which has replaced an outdated concept regarding Repression of Crime and The Punishment of Offender which has become obsolete and replaced with the treatment;

    c) the concept which states that criminal sanction is included in the category of sanctions which are *noodrecht* in nature, in the context of the notion of penal law as a judicial tool of *“ultimum remedium”* instead of *primum remedium*;

- Whereas Indonesia has been one of the countries which recognize capital punishment (pro capital punishment) since the year 1915 although the Netherlands abolished it in 1970, so that a pro-capital-punishment state is named a “retentive country” or a state which recognizes capital punishment *de jure* and *de facto*. Meanwhile, the international community tend to reject capital punishment (abolitionism) even to the extent of being “completely abolitionist”;

- The expert is not interested in the pros and cons on capital punishment because it has no content in law. Instead, the expert is more interested in the concept of “abolitionist de facto”, “abolitionist in practice” “abolitionist in peace time”, as the tendency of the international community that capital punishment is imposed only on the most serious crimes, as formulated in Article 6 of the ICCPR;

- Whereas in relation to the petition for judicial review of the Narcotics Law, the Petitioners argued that the provision of capital punishment in the Narcotics Law is contrary to the provision of the right to life contained in Article 28A and Article 28I Paragraph (1) of the 1945 Constitution, and there is the thought of possible reconsideration that the implementation of capital punishment in Indonesia is to be decided as abolished in the sense of “abolition *de facto*” or “abolition in practice” “in peace time”, according to the international developments;

- Whereas the use of narcotics, similar to gambling and sexual crimes, is included in the category of “crime without victim”, so it is not the criminal justice which imposes serious punishment or capital punishment, but rather the model of “anti-drug society”, which is the increasingly important issue to be intensively developed in the entire Indonesia and for the entire Indonesian people.

[3.20.5] Dr. Arif Gosita (Universitas Indonesia) presents the following statements:

- Whereas there are numerous provisions on capital punishment in Indonesian laws and regulations, which are approximately twelve in total, therefore the efforts to abolish capital punishment from laws and regulations must be holistic. The Netherlands has abolished capital punishment from its Criminal Code, but the Criminal Code in the Netherlands' East Indies still maintains capital punishment, because the objective was indeed to punish native people in the context of enacting order and security in the Netherlands' East Indies. Presently, 145 states have abolished capital punishment;

- Capital punishment needs to be abolished because capital punishment by law is a victimization of human beings by other human beings; it is disadvantageous and claims victims on both sides; it does not protect human beings;

- Indonesia still maintains capital punishment because although Indonesia has *Pancasila* and the 1945 Constitution, it does not respect and observe them well. Therefore, if the Indonesian law must be in accordance with *Pancasila* and the 1945 Constitution, capital punishment must be abolished, for the sake of 4K principles, namely truth *(kebenaran)*, justice *(keadilan)*, harmony *(kerukunan)*, and people's prosperity *(kesejahteraan rakyat)*;

- The implementation of capital punishment in the Narcotics Law is basically contrary to the 1945 Constitution, it does not have any binding legal effect and therefore must be abolished, because it is contrary to the right to life spelled out in Article 28A;

- To punish a human being by means of capital punishment is unjustifiable, it is neither fair nor developing the people's prosperity. Sentencing a human being to death is an action which will further lead to the victimization of other human beings;

[3.20.6] Prof. Mardjono Reksodiputro, S.H., M.A. (Universitas Indonesia) elucidates two issues, from the Concept of the Draft Law of the Indonesian Criminal Code and the experts' opinions on capital punishment as follows:

- Capital punishment in the Concept of the Draft Law of the Indonesian Criminal Code (version 2 year 1999-2000):
    a) In the discussion, there is an opinion to maintain capital punishment based on the argument that capital punishment is still necessary in Indonesia for deterrence purposes, particularly in handling crimes of murder (to take the life of a victim) and it is also acknowledged that often, the society and the victim's family (of the crime of murder) adopted the attitude of retribution or revenge ("an eye for an eye" philosophy). In addition, there are parties which reject capital punishment by arguing, among other things, that capital punishment is inhuman, contradictory to morality and posing the risk of a mistaken

yet non-correctable court decision after the convict dies. Another argument is that even in the Netherlands itself, capital punishment has been abolished since 1970 and in many other states, capital punishment has been abolished because “the deterrent effect” has never been proven, and it is also necessary to bear in mind that since 1961, Indonesia has been following the viewpoint that the objective of criminal punishment is reform, re-socialization and re-integration to the society through the concept of Correctional Institution for Convicts.

b) The team ultimately decides that capital punishment is **“a special punishment and shall always be imposed as an alternative”; as the last resort to protect the society; the execution of which upon pregnant women or mentally-ill person shall be postponed; may only be executed after the appeal for pardon has been rejected by the President; the execution of which may be postponed with a probation period of 10 years; if during probation the convict displays praiseworthy conducts and behaviors, it may be converted into a life imprisonment or a maximum imprisonment of 20 years by virtue of a Ministerial Decree; and if the appeal for pardon is rejected and capital punishment is not executed within 10 years, not because the convict escapes, it may be converted into a life imprisonment by virtue of a Ministerial Decree;**

c) The abovementioned idea of the Team is in line with the statement of The Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders (Milan, 1985) which in its resolution Number 15 has stipulated 9 provisions under the heading of "*Safeguards guaranteeing protection of the rights of those facing the death penalty"* which are, among others, as follows: (1) *"In countries which have not abolished the death penalty, capital punishment may be imposed only for the most serious crimes, … intentional crimes with lethal or other extremely grave consequences";*

- The expert's opinion on capital punishment offers three alternatives as follows:

a) To continue maintaining capital punishment, but by providing that its imposition in the Indonesian laws must be selective, the selection of which must be done by a justice and the execution of which must fulfill the principle of prudence, as a special crime which is not included in principal punishment. For instance by referring to the formulation in the Concept of the Draft Law of the Indonesian Criminal Code;

b) To provide that capital punishment is contrary to the 1945 Constitution and consequently, all laws in Indonesia must be adjusted in accordance with the aforementioned provision. Similarly, court cases which decide upon capital punishment but have not had any binding legal force must also be revised, while the court decisions which have

already had binding legal force shall be converted into life imprisonment by virtue of the Supreme Court Decision;

c) To provide that capital punishment is not contrary to the 1945 Constitution, and thus when it is imposed on criminal acts which threaten the safety of the Indonesian society, the justice must impose it by conscientiously considering for the possibility of alternatives to be utilized instead of capital punishment and the decision shall be approved in full by all justices of the relevant panel of judges (unanimous decision). With respect to court cases which are yet to have binding legal force, the court is allowed to utilize the abovementioned conditions and considerations and for court decisions which have already had binding legal force, the Supreme Court is allowed, with the approval of the Attorney General, to order the suspension of the execution of capital punishment for ten years and supplemented with the provision that if during the ten-year probation, if the convict displays praiseworthy conducts and behaviors, the capital punishment decision shall be converted into life imprisonment or a maximum imprisonment of twenty years by virtue of a Decree of the Minister of Law and Human Rights.

[3.20.7] Prof. Dr. Koento Wibisono (*Pancasila* Philosophy Expert from Universitas Gadjah Mada [UGM] Yogyakarta):

- Whereas in addressing the issue of pros and cons on the implementation of capital punishment in the crime of illegal drugs distribution, we must decide upon an option which may be as good or as important as sacrificing another option. On one hand, those opposing the implementation of capital punishment based their arguments on the judicial-moral-psychological aspects by referring to judicial provisions or precedents which are both internationally and nationally applied. The basis for the rejection or opposition in philosophical sense is that a person's life is a basic, inborn right which has been granted by the One Almighty God as The Creator, so that right cannot be eliminated by anyone for any reason. On the other hand, those who support or agree with the implementation of capital punishment based their argument on the consideration of empirical fact that there has been too many victims caused by the distribution of illegal drugs affecting both physically and psychologically -- not only for those who have been trapped in the "pleasure" of consuming illegal drugs, but also the society at large which carry an additional burden while they have had so many problems due to the current multi-dimensional crises;

- Whereas legal certainty does not automatically guarantee justice. Justice is a matter which is subject to various interpretations and subjective in nature in terms of its comprehension and implementation. The subjectivity is essentially caused by the difference in the ontological view of what and who human beings are, and in turn, causes an axiological difference in the imperative

value which must be applied to someone, both as a person and as a member of the society;

- Whereas therefore, in taking the stance either pro or con on the application of capital punishment, the Constitutional Court should also consider the aspects of ontological and axiological philosophy on the issue as an effort to partake in an extremely fundamental issue **in the framework of saving the citizens,** especially **young generation** from the rush of illegal drugs distribution committed by those who either purposively or accidentally desire to contribute in destroying the future of our nation and state;

- From the perspective of *Pancasila*, even though *Pancasila* has been able to be broadly interpreted depending on which we wish to utilize, the expert invites us to return to the principal notions in *Pancasila* and Preamble to the 1945 Constitution, in which the objective initiated by our founding fathers is to save this nation, to develop the intellectual life of this nation, where the current dismal situation has been brought about not only by other reasons, but also by the distribution of illegal drugs. Hence, *Pancasila* disagrees with the distribution of illegal drugs, which means that the implication or consequence will be that illegal drugs must be fought by means of an appropriate legal consequence;

- Thus, faced with the two options, the expert states that it is legal certainty and majority justice which must be more prioritized, for the sake and on behalf of

the greater society of the nation, than the interest of a very small number of syndicates to achieve financial benefits and other benefits.

[3.20.8] Prof. Dr. Ronald Z. Titahelu, S.H., M.S. (Universitas Pattimura, Ambon):

- Whereas the expert will review the issue of capital punishment in general, without any relationship with illegal drugs, from the values contained in the Constitution in its entirety, from the Preamble to the articles, and it is necessary to state that at the opening part of the Preamble to the 1945 Constitution there are meta norms, although they are vague in nature, they contain remarkably noble values within them which must be observed well. The expert views that the value of independence does not merely comprise political independence, but also the independence to determine one's own values and laws, including to set one free from the provision of capital punishment inherited from the colonial government the objective of which was indeed to preserve power;

- The current issue is whether the existence of humans' right to life which is either inborn or God-granted ,may be excepted through various provisions which allow the imposition of a sanction in the form of capital punishment? According to the expert, it is related with the principle which comprises two phrases, namely *protasis* and *apodosis*. *Protasis* is the phrase which requires "if clause" and *apodosis* is the one which requires "then clause". A "then clause" consists of will and not merely "the will of the empirical will of all", but

also containing moral values and dignity values which refer to the greatness of the dignity of the Indonesian nation and state. The greatness of the dignity of the Indonesian nation and state is to grant pardon, to abolish events and crimes subject to capital punishment, or even to abolish capital punishment itself;

- It is true indeed that no crime shall be left unpunished, but punishment does not necessarily take the form of mere capital punishment, or that there is no need for capital punishment to exist. When it is related to public prosperity, it will not only imply the sense of collective prosperity, but also that the collective prosperity and the individual prosperity should be balanced. The interest of the disadvantaged person and the interest of the person causing victimization must be considered equally, and that is social justice. This means that Preamble to the 1945 Constitution contains values which provide protection to the lives of human beings and which are further elucidated in Pancasila; values which are not only given to the citizens, but since the values are universal, they shall apply to all mankind accordingly;

- Capital punishment does not serve as a solution to preserve collective existence without the balance with individual existence. The values in Article 28A and Article 28I Paragraph (1) of the 1945 Constitution are present in the Preamble, but they are not “value norms” any longer; they have become “substantive norms” containing “general proposition”, which is a provision on every person’s right to life which cannot be derogated by any means,

including by Article 28J of the 1945 Constitution. Therefore, the revocation of articles on capital punishment in various laws and regulations in Indonesia is indeed very necessary;

[3.20.9] Prof. Dr. B. Arief Sidharta, S.H. (Universitas Parahyangan, Bandung);

- Whereas the wrong use of illegal drugs continues to increase daily and drug abuse is extremely harmful to human lives, destroying both the physique and the mentality of the user. Meanwhile, illegal drugs distribution has penetrated various levels of the society. Illegal drugs distribution has now become an extremely serious crime, so that in order to eradicate it, drug dealers need to be threatened and imposed with the most severe punishment possible, for example capital punishment as adopted in Singapore, Malaysia, and also in Indonesia through the Narcotics Law. Generally, it could be agreed that drug dealers need to be severely punished, yet it does not imply that it has to be capital punishment. The expert even argues that capital punishment should be abolished for any type of crimes and replaced instead with life imprisonment without the possibility to obtain remission, based on the following argument from the philosophical point of view.

- The analysis on capital punishment, either in favor or against it, has always been having the tendency to revolve around the level of positive sciences, especially positive penal law science criminology, sociology, and perhaps also psychology, which tend to display pragmatic consideration which may

further lead to the principle of justifying all means and treating humans as the means. Meanwhile, the contemplation or analysis from the philosophical point of view seems not very welcomed, while in fact philosophical view argues whether it is acceptable to treat human beings as a means/tool and whether capital punishment is philosophically justifiable. For Indonesia, the philosophical notion is highly relevant considering that Indonesia is in the middle of structuring its national law order, including penal law with its criminal punishment system;

- The philosophical idea which may result in a fundamental stance towards capital punishment should prevent us from being confused by influences from outside Indonesia. In this matter, regardless of the fact that the field of philosophy comprises diverse schools of philosophy, but it is not too difficult for us to decide an option because the founding fathers of the state of the Republic of Indonesia have given us a “standard”, namely by stipulating *Pancasila* as the foundation or principle in implementing the collective life in the framework of state organization, in brief, stipulating *Pancasila* as the principle of the state. Therefore, it will be natural for *Pancasila* to be stipulated as the philosophical foundation for the management and implementation of law in Indonesia;

- Specifically in penal law, criminal sanctions constitute a form of law sanctions, namely certain consequences which may be imposed on a person because his/her actions fulfill the conditions stipulated in the principles of penal law,

the actions which fundamentally are the ones which directly denigrate the dignity of human beings and/or threaten the existence of the human society. Therefore, the criminal sanctions or punishments in the form of infliction of misery on a person by the state call for justification. In order that a criminal sanction may be justifiable, it must:

a) be an actual statement regarding the society's evaluation towards the actions committed by the convict, whether the actions are bad, denigrating the dignity of others, and threatening the existence of a healthy society of human beings;

b) be a warning so that people will avoid the actions bringing about the consequence of being imposed with the punishment;

c) be directed to encourage the convict to actualize his/her humanity values so that he/she will be capable of controlling negative tendencies;

- Capital punishment as a criminal sanction does not fulfill the third aspect; it only fulfills the first and second aspects which imply that human beings are reduced into mere tools to achieve objectives. Thus, capital punishment essentially does not occupy a place in the notion of *Pancasila*-based law. Capital punishment is also considered as cruel and regarded as the most severe criminal sanction, creating fright and incredible torture within the convict because he/she realizes when and how his/her life will end, which is a

contrasting with the natural, unpredicted event of death, therefore creating an "additional horror";

- Whereas based on Article 28I Paragraph (1) of the 1945 Constitution, the right to life constitutes one of the Human Rights which cannot be reduced under any circumstances (non-derogable), thus based on the principle of *"Lex superior derogat legi inferiori"*, all laws and regulations containing provisions on capital punishment are unconstitutional and no longer have formal application.

[3.21] Considering whereas the Petitioners, the Government, and the related parties have all presented their final conclusions which indicates that in essence they remain firm on their respective standings;

THE STAND OF THE COURT TOWARDS THE PRINCIPAL CASE OF THE PETITION

[3.22] Considering whereas upon considering the arguments and concluding opinion of the Petitioners, the written evidence, statements from the experts, the written statement of the People's Legislative Assembly of the Republic of Indonesia, the statement and concluding opinion of the Government, the statement and concluding opinion of the Related Parties, thus the Court has now come to its stand upon the issue of the *a quo* petition's principal issue of the case, namely whether the provisions on death penalty or capital punishment contained in Article 80 Paragraph (1) Sub-Paragraph a, Paragraph (2) Sub-

Paragraph a, and Paragraph (3) Sub-Paragraph a, Article 81 Paragraph (3) Sub-Paragraph a, as well as Article 82 Paragraph (1) Sub-Paragraph a, Paragraph (2) Sub-Paragraph a, and Paragraph (3) Sub-Paragraph a of the Narcotics Law are contrary to the 1945 Constitution. The aforementioned provisions of the articles in the Narcotics Law respectively read as follows:

a. Article 80 Paragraph (1) Sub-Paragraph a:

"*Whosoever without any right or illegally: produces, processes, extracts, converts, prepares or provides Narcotics Category I the punishment shall be a capital punishment …".*

b. Article 80 Paragraph (2) Sub-Paragraph a:

"If the criminal acts as referred to in: Paragraph (1) Sub-Paragraph a preceded by conspiracy, subject to capital punishment..."

c. Article 80 Paragraph (3) Sub-Paragraph a:

"*If the criminal act referred to in: Paragraph (1) Sub-Paragraph a is preceded by conspiracy the punishment shall be a* ***capital*** *punishment*…".

d. Article 81 Paragraph (3) Sub-Paragraph a:

"*If the criminal act referred to in: Paragraph (1) Sub-Paragraph a is committed as an organized crime, the punishment shall be a capital punishment…".*

e. Article 82 Paragraph (1) Sub-Paragraph a:

"*Whosoever without any right or illegally: imports, imports, exports, offers for sale, distributes, sells, buys, delivers, acts as broker or exchanges narcotics Category I the punishment shall be a capital punishment*…".

f. Article 82 Paragraph (2) Sub-Paragraph a:

"*If the criminal act referred to in: Paragraph (1) is preceded by a conspiracy, the punishment shall be a capital punishment*…".

g. Article 82 Paragraph (3) Sub-Paragraph a:

"*If the criminal act referred to in: Paragraph (1) Sub-Paragraph is committed as an organized crime, the punishment shall be* ***capital punishment****…*"

According to the Petitioners the provisions in the aforementioned Articles of Narcotics Law are contradictory to:

1. Article 28A of 1945 Constitution read as follows, *"Every person shall have the right to live and to defend his/her life and living."*

2. Article 28I Paragraph (1) of 1945 Constitution read as follows, *"The right to life, the right not to be tortured, the right of freedom of thought and conscience, the right to have a religion, the right not to be enslaved, the right to be recognized as a person before the law, and the right not to be prosecuted under retroactive law shall constitute human rights which cannot be reduced under any circumstances whatsoever";*

[3.23] Considering whereas before stating its stand regarding the issue of constitutionality of capital punishment, *in casu* as set forth in the Narcotics Law, it is important for the Court to first consider the following matters:

(a) Whereas this Court, according to the provisions of Article 24 Paragraph (1) and (2) of 1945 Constitution, shall have a duty to implement judicature not only to uphold the law but also justice. In relation to the issue of capital punishment, justice upheld based on the law must always be made in view of considerations from many perspectives, such as the perspective of either penal or capital punishment itself, crimes subject to capital punishment, criminals subject to capital punishment, and victims and their family of the crime subject to capital punishment which is not less important. Therefore, regarding capital punishment, it is not fair if considerations are made by solely focusing on the view from the perspective of capital punishment and the person subject to it by ignoring considerations from the perspective of crimes subject to criminal sanctions or the capital punishment and the victims and the crime.

(b) In relation to the *a quo* petition, it looks real that almost all of Petitioners' arguments are built on the arguments solely taken from the perspective of the right to life of a person sentenced with capital punishment. The weaknesses which are not easily avoided by such view are:

    i) Such view will be understood as a view which makes the quality of the crime nature of the acts or crimes subject to capital punishment

relative and even nil. In fact, crimes subject to capital punishment shall be the crimes both directly and indirectly attacking the right to life and right of life, which is nothing but the right becoming the most authentic defense principle from the view in favor of the capital punishment abolition. The question then arising shall be what the real difference between right to life of the criminals subject to the capital punishment and right to life of those who have become the crime victims is, so that one of them must be made absolute (in this context the right to life of the criminals subject to capital punishment), while the other one can be made relative (in this context the right to life of the victims), at least this will be ignored by the supporters of capital punishment abolition. By using different formulation of words, the question is What kind of explanations which make sense and which have the sense of justice will be that the right to life of criminals of organized murder, criminals of genocide, criminals against humanity, terrorists – just to name some examples – must be made absolute by ignoring the right to life of the crime victims. The failure to give explanations which make sense and which have the sense of justice regarding such question has made all of the argument constructions built upon the defense principles of the right to life as an absolute right which cannot be reduced under any circumstances become very problematic.

ii) Such view also makes the sense of justice of the crime victims relative, as well as the sense of justice of people in general. By keeping the appreciation of the stands of those who are against capital punishment as Cesare Beccaria's opinion, as quoted by Petitioners in the *a quo* petition, "*Capital punishment was both inhumane and ineffective: an unacceptable weapon for a modern enlightened state to employ, and less effective than the certainty of imprisonment. Furthermore, that capital punishment was counter-productive if the purpose of law was to impart a moral conception of the duties of citizens to each other. For, if the state were to resort to killing in order to enforce its will, it would legitimize the very behaviour which the law sought to repress, namely the use of deadly force to settle disputes*", This opinion does not utterly answer the question of how to restore the heartache of a family losing one of their beloved members who has become the victim of planned murder, or genocide, or terrorism. The question is what law can and must do to for them. Because such situation can happen to any families in a society, the question can be formulated to become what law can and must do for the people.

By hiding behind the restorative justice arguments, which take the criminals (those who are subject to capital punishment) merely as "sick people who need to be healed", this view has ignored the

facts that every crime – whether it belongs to the category of *mala in se* or *mala prohibita* – is actually an attack to the social harmony of society, which also means that every crime must cause “wound” in the form of social disharmony in society. The higher the quality of crimes, the worse the social disharmony caused by the crimes against the society. As a result, the question then is whether there is a possibility that social harmony in a society can be restored only by restoring the criminals who have caused such disharmony, as believed by those who are against capital punishment.

The criminal punishment which is imposed on the criminals must also be seen as an effort to restore the disturbed social harmony as a result of the crimes. The presence of justice can be felt when the social harmony has been restored. This means that, those who need the restorative efforts are actually the society whose social harmony is disturbed by the crimes. Thus, criminal punishment is an effort to restore the social disharmony. Because of this reason, Immanuel Kant has ever said, “*even if a civil society resolved to dissolve itself ... the last murderer lying in the prison ought to be executed*”, vide Hugo Bedau and Paul Cassell, *Debating the Death Penalty*, 2004, page. 197).

iii) The view in favor of the abolition of capital punishment based on the reason of the imperfection of criminal judicature system so that

it can possibly lead to the mistakes, that is, the imposition of capital punishment against innocent people, is not fully acceptable, at least for two reasons. *First*, abolishing capital punishment because of the imperfection of the criminal judicature system, on one hand still cannot immediately make the criminal judicature system perfect. On the other hand, the abolition of the capital punishment injures the people's sense of justice because of the non-restorative social harmony caused by the occurring of the crimes subject to capital punishment. *Second*, by showing the possibility of the occurrence of mistakes in the imposition of capital punishment against innocent people or the occurrence of mistakes in some cases, without referring to the facts showing the percentage of mistakes occurred in the imposition of capital punishment during a certain span of time, this view is difficult to escape from the suspicion of the deliberateness to create *hyper-reality* atmosphere so that the message got by public becomes biased because people will focus on the mistakes and forget about the substance of the real debate, that is, why the defense of right to life of the criminals subject to capital punishment becomes more valuable than the defense of the right to life of crime victims.

iv) The view in favor of the abolition of capital punishment with the arguments that capital punishment has failed to have a deterrent effect by submitting statistical data showing that capital punishment

does not decrease the quantity of crimes, is doubted for its sufficiency of argumentative value in supporting the idea of the abolition of capital punishment, at least for two reasons. *First*, in the case of the countries which have abolished capital punishment, the data do not answer the question of what if at the same time, capital punishment is applied in the countries, whether the number of the crimes subject to the capital punishment decrease or increase. *Second*, the statistical data concerning narcotic drugs and drugs abuse in Indonesia during 2001-2005 from year to year show the increase in quantity (*vide* Petition page 62-63), the questions are:

- the statistical data are not the data specifically pertaining to criminal acts related to narcotic drugs and psychotropic substances subject to capital punishment. They also cover criminal acts of narcotics drugs and psychotropic drugs not subject to capital punishment. Therefore, although the quantity of the criminal acts of narcotics drugs and psychotropic substances apparently increase, the question is whether the quantity of the criminal act of narcotic drugs also increase or decrease instead.

- the statistical data do not answer the question, that if in the situation in which the capital punishment is applied, the quantity

will turn out to increase of that sort, what if the capital punishment is abolished.

v) The view in favor of the abolition of capital punishment for the reason that capital punishment is contradictory to the philosophy of punishment in Indonesia, according to Court of Justice, has treated equally all kinds of crimes and their quality at once. What becomes a matter in this case is whether the application of capital punishment immediately means changing the philosophy of punishment in Indonesia, namely rehabilitation and social reintegration of criminals. The Court is of the opinion that the philosophy is a generic principle. This means that it has an effect on certain crimes and in certain quality which enable rehabilitation and social integration of the criminals to be done. That is why the application of capital punishment to the kinds and quality of certain crimes does not immediately change the philosophy of punishment in Indonesia. Besides, in penal law, it is very hard to utterly omit the retributive image of the punishment because the retributive aspect adheres to the nature of the criminal sanction itself if it is solely seen from the perspective of people imposed with criminal sanction and the crime victims. Nevertheless, such image will be reduced or even be utterly gone if the imposition of a criminal sanction, including capital punishment, is seen from the perspective of an effort to restore the disturbed social harmony as an impact of

criminal acts including the criminal acts subject to capital punishment. Thus, Petitioners' opinion in the *a quo* petition to the effect that the "an eye for an eye" kind of revenge theory (*vergeldingstheorie, lex taliones*) with the criminal sanctions in Narcotics Law obtains legitimacy so that it is contradictory to the objective of punishment system in Indonesia, is not appropriate.

vi) The explanations in item v) above do not mean that Court ignores the facts depicting the tendency of the countries in the world to abolish capital punishment these days, namely 88 countries are abolitionist for all crimes, 11 countries for ordinary crimes only, and 30 countries are abolitionist in practice. However, the Court is of the opinion that the point at issue in capital punishment matters is not the statistical numbers describing the tendency, but whether the application of the capital punishment to certain crimes belongs to the qualification for the most serious crimes, is fair, and justifiable under the 1945 Constitution, as hereinafter explained in further considerations.

[3.24] Considering henceforth, more specifically with respect to the arguments of the Petitioners claiming that capital punishment is contradictory to 1945 Constitution, the Court is of the following opinion:

(a) Based on the arguments constructed by the Petitioners in their petition, it seems that although the Petitioners use the provisions in the Narcotics Law

as starting point for filing the petition for judicial review of a law against the 1945 Constitution, the final goal to be achieved is the abolition of capital punishment in all provisions of Indonesia's legislation. There are two fundamental reasons proposed by the Petitioners as their bases of justification, namely that, from the point of view of the Petitioners, (i) the inclusion of capital punishment in the Narcotics Law is contradictory to 1945 Constitution, especially Article 28A, Article 28**I** Paragraph (1), and Article 28**I** Paragraph (4) of 1945 Constitution; (ii) the inclusion of capital punishment in the Narcotics Law is contradictory to the existence of Indonesia as a part of the international communities in favor of the abolition of capital punishment.

With respect to the abovementioned two matters, the Court is of the opinion that only the considerations related to the justification of the Petitioners under item (i) are relevant to be considered by the Court, considering the fact that Indonesia is a part of the international community is true, and then it also becomes important for the Court to state its position pertaining to the reasons proposed by the Petitioners under item (ii) above.

(b) With respect to the issue of whether capital punishment is contradictory to the 1945 Constitution, the main argument proposed by the Petitioners is that capital punishment is contradictory to the right to life, meanwhile, because the right to life, according to Article 28I Paragraph (1) of 1945 Constitution, is stated as one of the rights which cannot be reduced under any

circumstances, in the point of view of the Petitioners, capital punishment is contradictory to 1945 Constitution.

With respect to the arguments of the Petitioners, the Court of Justice is of the following opinion:

1) Whereas according to the history of the drafting of Article 28I of 1945 Constitution, as explained in the hearing on May 23, 2007 by Lukman Hakim Saefuddin, the former member of Ad Hoc I Committee of People's Consultative Assembly Working Committee whose duty was preparing the drafting of the amendment to the 1945 Constitution, who basically explains that when formulating Chapter XA (Human Rights), the reference or the background was Stipulation of the People's Consultative Assembly Number XVII/MPR/1998. From the Stipulation of the People's Consultative Assembly then Law Number 39 Year 1999 concerning Human Rights was created. The spirit of both (Stipulation of the People's Consultative Assembly Number XVII/MPR/1998 and Law Number 39 Year 1999) is similar, namely that they adhere to the stand that human rights are not unlimited. He also said that the same spirit is included in the regulation concerning human rights in the 1945 Constitution, namely that human rights are not arbitrary, but it is possible to be limited as long as the limitations are stipulated by Law. It has been this spirit which created Article 28J 1945 of Constitution. The limitations as spelled out in Article 28J range from Article 28A to Article 28I of the 1945 Constitution. Patrialis

Akbar, another former member of Ad Hoc I Committee of the People's Consultative Assembly Working Committee on the same occasion, also conveyed the same statement.

From the answers of both of former members of Ad Hoc I Committee of the People's Consultative Assembly Working Committee to the questions from the Petitioners' Attorney, Government, the relevant parties of the National Narcotic Drugs Board, and the Constitutional Court Justices in the hearing, the important point reached is that none of the human rights regulated in 1945 is absolute, including the human rights regulated in Article28**I** Paragraph (1) of the 1945 Constitution.

"... I reaffirm that Article 28J is the article, the one and only Article, consisting two Paragraphs talking about obligations instead of rights since the chapter refers to human rights. And it was on purpose laid in the last Article as the key of Article 28A up to Article 28I", affirmed Lukman Hakim Saefuddin.

Based on all of the explanations under item 1) above, it seems that from the perspective of the original intent of the 1945 constitution makers, the application of all human rights set forth in Chapter XA of the 1945 Constitution can be limited. The original intent of the 1945 constitution makers that human rights can be limited is also affirmed by the placement of Article 28J as the closing Article of all provisions regulating human rights in Chapter XA of the 1945 Constitution. Thus, in a systematic

interpretation (*sistematische interpretatie*), human rights regulated in Article 28A up to Article 28**I** of 1945 Constitution shall comply with the limitations regulated in Article 28J of the 1945 Constitution. The systematic regulation concerning human rights in the 1945 Constitution is in accordance with the systematic regulation in the Universal Declaration of Human Rights which also put an Article concerning the limitations of human rights as a closing Article, that is, Article 29 Paragraph (2), which reads as follows: "*In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society."*

2) Seen from the history of the development of Indonesia's constitutionalism, as reflected in the constitutions which have been applied, namely the 1945 Constitution prior to the Amendment, the 1949 Constitution of the Republic of the United States of Indonesia, the 1950 Provisional Constitution, and the 1945 Constitution after the Amendment, apparently there has been a tendency not to make human rights become absolute in the sense that under certain circumstances, pursuant to the order of Constitution, human rights can be limited by a law, as follows:

(a) The 1945 Constitution prior to the Amendment even does not explicitly and completely contain a regulation of human rights,

including the right to life, although the fourth Paragraph contains what was then called *Pancasila,* one of the principles of which is the moral principle of "*Just and civilized humanity*";

(b) Article 32 Paragraph (1) of the 1949 Constitution of the Republic of the United States of Indonesia contains the provisions on the limitation of "*Human Rights and Freedoms*" as follows, "*Laws and regulations on the implementation of rights and freedoms explained in this part, if needed, shall stipulate the limitations of those rights and freedoms, however, for the sole purpose of guaranteeing the indispensable recognition and respect for other people's rights and freedoms, and to comply with fair conditions for peace, ethics, and public welfare in a democratic community*";

(c) Article 33 of the 1950 Provisional Constitution also limits Human Rights and Freedoms as follows, "*The implementation of rights and freedoms explained in this part can only be limited by laws and regulation for the sole purpose of guaranteeing the indispensable recognition and respect for other people's rights and freedoms, and to comply with fair conditions for peace, ethics, and general welfare in a democratic society*";

(d) The 1945 Constitution after the Amendment, through Article apparently continues with the Constitutionalism adhered to by the

previous Indonesian constitutions, namely implementing the limitations of human rights as explained above;

3) In line with the view of Indonesia's Constitutionalism concerning human rights as explained under item 2) above, when Stipulation of the People's Consultative Assembly Number XVII/MPR/1998 concerning Human Rights was issued as subsequently explained in the Human Rights Law, both legal products seem to be the continuation as well as affirmation that the view of Indonesia's Constitutionalism does not change because both of them cover the limitations of human rights, including the right to life, as follows:

(a) Stipulation of the People's Consultative Assembly Number XVII/MPR/1998 provides for the "Nation's View and Position Regarding Human Rights" derived from religious teachings, universal moral values, and supreme values of nation's culture, and based on *Pancasila* and the 1945 Constitution in Article 1 of the Human Right Charter, which provides for the right to life as follows, *"Every Person shall have the right to live and to defend his/her life and living*". Nevertheless, , the limitations of human rights including the right to life are also covered in its Article 36 which reads as follows: "*In implementing his/her rights and freedoms, every person must comply with the limitations stipulated by law for the sole purpose of guaranteeing the recognition and respect for other people's rights and*

freedoms, and to comply fair demands in accordance with the considerations of morality, security, and public order in a democratic society";

(b) Article 9 Paragraph (1) of the Human Rights Law provides for the right to life are and Article 4 provides that the right to life belongs to the human rights category which cannot be reduced under any circumstances and by anyone. Nevertheless, the Elucidation of Article 9 of Law of Human Rights states that the right to life can be limited under two circumstances, namely abortion for the sake of the mother's life and capital punishment based on the judicial decisions. Besides, Article 73 of the Human Rights Law also contains a provision concerning the limitation of human rights, as follows, "*The rights and freedoms regulated in this law can only be limited by and based on law, for the sole purpose of guaranteeing the recognition and respect for other people's human rights and freedoms, ethics, public order, and national interest*".

4) Indonesia as a country with the greatest Moslem population in the world and also as a member of the Islamic Conference Organization morally shall pay attention to the contents of the Cairo Declaration of Islamic Rights held by the Islamic Conference Organization whose Article 8 Sub-Article a states as follows "*Life is God's blessing and the right to life is guaranteed for every mankind. It is a duty of individual, society, and states*

to protect this right from any violation and not to take life except ***based on the Sharia law***". As a consequence, according to the view of the members of the Islamic Conference Organization, the deprivation of the right to life which is not based on the law derived from Islam law is prohibited;

5) The Court has once pronounced a decision in the petition of judicial review where it based its judicial review arguments on Article 28**I** Paragraph (1) of the 1945 Constitution, namely in the judicial review of the implementation of retroactive provisions of Law Number 26 Year 2000 concerning Human Rights Court of Justice filed by Abilio Jose Osorio Soares as the Petitioner. As understood, Article 28**I** Paragraph (1) of the 1945 Constitution provides for a number of rights which are literally formulated as "*rights which cannot be reduced under any circumstances*", including the right to life and the right not to be prosecuted under retroactive laws. In this case, the Court has stated its position, its complete information can be read in Decision Number 065/PUU-II/2004, which principally affirms that Article 28**I** Paragraph (1) and Article 28J Paragraph (2) must be read together so that the Court of Justice is of the opinion that the right not to be prosecuted under retroactive laws is not absolute. Because the right to life belongs to the category of rights regulated in Article 28**I** Paragraph (1) of the 1945 Constitution which belongs to the category of "*rights which cannot be reduced under any circumstances*", then the legal

considerations and the stand of the Court also apply to the Petitioners' arguments concerning the right to life in the *a quo* petition;

6) The other evidence showing that the right to life is not absolute, both provisions allowing the application of capital punishment with certain limitations and provisions concerning legal deprivation life, can be found in a number of international legal instruments regulating human rights, such as the International Covenant on Civil and Political Rights (ICCPR), Protocol Additional I to the 1949 Conventions and Relating to the Protection of Victims of International Armed Conflict, Protocol Additional II to the 1949 Conventions and Relating to the Protection of Victims of Non-International Armed Conflict, Rome Statute of International Criminal Court, Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights), American Convention on Human Rights, Protocol No. 6 to the Convention for the Protection of Human Rights and Fundamental Freedoms Concerning the Abolition of the Death Penalty.

- Article 6 Paragraph (2) of ICCPR states that "*In countries which have not abolished 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 Crime of Genocide. This penalty can only be carried out pursuant to a final judgment rendered by a competent court".

- Protocol Additional I to the 1949 Conventions and Relating to the Protection of Victims of International Armed Conflict, popularly known as Protocol I:

  Article 76 Paragraph (3) states, "*To the maximum extent feasible, the Parties to the conflict shall endeavour to avoid the pronouncement of the death penalty on pregnant women or mothers having dependent infants, for an offence related to the armed conflict. The death penalty for such offences shall not be executed on such women*";

  Meanwhile, Article 77 Paragraph (5) of the same instrument states, "*The death penalty of an offence related to the armed conflict shall not be executed on persons who had not attained the age of eighteen years at the time the offence was committed*";

- Article 6 Paragraph (4) of the Protocol Additional II to the 1949 Conventions and Relating to the Protection of Victims of Non-International Armed Conflict, popularly known as Protocol II states, "*The death penalty shall not be pronounced on persons who were under the age of eighteen years at the time of the offence and shall not carried out on pregnant women or mothers of young children*";

- Article 80 of the Rome Statute of International Criminal Court affirms, "*Nothing in this Part of the Statute affects the application by States of penalties prescribed by their national law, nor the law of States which do not provide for penalties prescribed in this Part*". With this provision, Rome Statute does not prohibit if the national laws of the States as members of the Statue apply capital punishment.

- Article 2 Paragraph (2) of the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights) states, "*Deprivation of life shall not be regarded as inflicted in contravention of this Article when it results from the use of force which is no more than absolutely necessary:*

  (a) in defense of any person from unlawful violence;

  (b) in order to effect a lawful arrest or to prevent the escape of person lawfully detained;

  (c) in action lawfully taken for the purpose of quelling a riot or insurrection".

  Even though it does not regulate capital punishment issues, the provision has made it clear that if the right to life is truly absolute, there shall not be a affirmation as mentioned in items (a), (b), (c) above, in particular items (b) and (c).

- Articled 4 of the American Convention on Human Rights reads as follows:

    1. *Every person has the right to have his life respected. This right shall be protected by law and, in general, from the moment of conception. No one shall be arbitrarily deprived of his life.*

    2. *In countries that have not abolished the death penalty, it may be imposed only for the most serious crimes and pursuant to a final judgment rendered by a competent court and in accordance with a law establishing such a punishment, enacted prior to the commission of the crime. The application of such punishment shall not be extended to crimes to which it does not presently apply.*

    3. *The death penalty shall not be reestablished in states that have abolished it.*

    4. *In no case shall capital punishment be inflicted for political offences or related common crimes.*

    5. *Capital punishment shall not be imposed upon persons who, at the time the crime was committed, were under 18 years of age or over 70 years of age; nor it shall be apply to pregnant women.*

6. *Every person condemned to death shall have the right to apply for amnesty, pardon, or commutation of sentence, which may be granted in all cases. Capital punishment shall not be imposed while such a petition is pending decision by the competent authority*.

The provision in Article 4 of the American Convention on Human Rights above, despite its clear orientation, still implies the possibility for the abolition of capital punishment application, with quite strict limitations. In other words, the convention does not position the right to life as an absolute right.

- Article 2 of the Protocol Number 6 to the Convention for the Protection of Human Rights and Fundamental Freedoms Concerning the Abolition of the Death Penalty states that "*A State may make provision in its law for death penalty in respect of acts committed in time of war or imminent threat of war; such penalty shall be applied only in the instances laid down in the law and in accordance with its provisions. The State shall communicate to Secretary General of the Council of Europe the relevant provisions of that law*". Based on this provision, it is clear that even the protocol which is affirmatively intended to abolish capital punishment still allows the application of capital punishment based on the national law of its participating states.

The provisions of various international legal instruments above show that the application of capital punishment or deprivation of life is justified as long as it meets the requirements or limitations as determined. This means that the abolition of capital punishment has not become a legal norm which is applicable in general and which is universally accepted by international communities. Referred to as legal norms shall be the limitations to the application of capital punishment. Based on the explanation under items 1) through 5) above, it is clear that the sense of "*cannot be reduced*" in Article 28**I** Paragraph (1) of 1945 Constitution is not absolute.

(c) With respect to the argument of the Petitioners that Indonesia is a part of the international community, while the international communities tend to abolish capital punishment, the Petitioners believe that Indonesia should have taken the same measure.

In response to the Petitioner's argument, Court is of the opinion that legally, considering the essential nature of the international law which constitutes coordinative law order, without denying the Petitioners' statement that international communities tend to abolish capital punishment, the relevance of the Petitioners' arguments shall have legal value if it can be proven that by maintaining the provisions on capital punishment in its national law, Indonesia has violated an international

obligation based on international covenants. Otherwise, the Petitioners' arguments must merely be treated and accepted as moral appeal.

Since the Petitioners stress the participation of Indonesia in such international covenants, *in casu* the International Covenant on Civil and Political Rights (ICCPR), which according to the Petitioners wishes for the abolition of capital punishment, in order to know whether there is a violation of the international obligations under such international covenants, the provisions which must be made as the first reference shall be the provisions of the Vienna Convention on the Law of Treaties 1969, hereinafter referred to as the Vienna Convention 1969), which especially applies for international covenants among countries.

Article 27 of the 1969 Vienna Convention, under the title of *Internal law and observance of treaties*, reads as follows: "*A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty. This rule is* ***without prejudice to article 46***". Meanwhile, Article 46 of the Vienna Convention shown by Article 27 Paragraph (1) reads as follows: "*A State may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of a provision of its internal law regarding competence to conclude treaties as invalidating its consent* ***unless that violation was manifest and concerned a rule of its internal law of fundamental importance***". This means that based on the two provisions of the Vienna Convention above, a country cannot cancel

its commitment to an international covenant by using its national law provisions as the reasons, unless the national law provisions have value of fundamental importance. Thus, if a country evidently fails to perform a treaty as long as such violation is tangible and is related to the national law provisions of the country which have fundamental importance, such case is excluded from the scope of international covenant violations.

ICCPR, which the Petitioners take as an important legal instrument in supporting their arguments, even though it is true that its spirit is the abolition of capital punishment, does not prohibit state parties from applying capital punishment in spite of its limitations, namely only for "*the most serious crimes in accordance with the law in force at the time of the commission of the crime...*", *vide* Article 6 Paragraph (2) of ICCPR. The Petitioners themselves admit this as well (*vide* Petitioners pages 27 and 44-45). This means that the possibility of a country to apply capital punishment, despite its limitations, is the evidence that the right to life is not absolute. Thus, considering that ICCPR still allows state parties to apply capital punishment in their national laws, Indonesia does not violate an international obligation under any covenant. However the issue is then what happen if it is seen from the perspective that the permission to apply capital punishment is limited to "*the most serious crimes in accordance with the law in force at the time of the commission of the crime..".* Whether Indonesia has violated an international obligation by applying capital punishment on certain criminal acts in Narcotics Law totally depends on

the answer to the question of whether the crimes petitioned for judicial review in the *a quo* petition belong to the category of "*the most serious crimes in accordance with the law in force at the time of the commission of the crime*" in Article 6 Paragraph (2) of ICCPR.

In other words, the issued is whether the criminal acts in Narcotics Law subject to capital punishment namely:

1) the criminal acts of any person who "*without any right and illegally produces, processes, extracts, converts, prepares or provides Narcotics Category I* …" [Article 80 Paragraph (1) Sub-Paragraph a];

2) the criminal acts of any person who "*without any right and illegally produces, processes, extracts, converts, prepares or provides Narcotics Category I preceded by conspiracy..*" [Article 80 Paragraph (2) Sub-Paragraph b];

3) the criminal acts of any person who "*without any right and illegally produces, processes, extracts, converts, prepares or provides Narcotics Category I as an organized crime..*" [Article 80 Paragraph (3) Sub-Paragraph a];

4) the criminal acts of any person who "*without right and illegally brings, sends, transports or transits narcotics drugs Type I …*" [Article 81 Paragraph (3) Sub-Paragraph a];

5) the criminal acts of a person who "*without any right or illegally: imports, exports, offers for sale, distributes, sells, buys, delivers, acts as broker or exchanges narcotics Category I*…" [Article 82 Paragraph (1) Sub-Paragraph a];

6) the criminal acts of a person who "*without any right or illegally: imports, imports, exports, offers for sale, distributes, sells, buys, delivers, acts as broker or exchanges narcotics Category I preceded by conspiracy*" [Article 82 Paragraph (2) Sub-Paragraph a];

7) the criminal acts of "*without any right or illegally: imports, imports, exports, offers for sale, distributes, sells, buys, delivers, acts as broker or exchanges narcotics Category I committed as an organized crime*" [Article 82 Paragraph (3) Sub-Paragraph a]

shall be crimes under the category of "*the most serious crimes in accordance with the law in force at the time of the commission of the crime*".

With respect to the issues, the Court is of the following opinion:

(a) The phrase "*the most serious crimes*" in Article 6 Paragraph (2) of ICCPR above and the phrase "*in accordance with the law in force at the time of the commission of the crime*" must not be read separately.

The *a quo* petition shall be the petition for judicial review of the Narcotics Law against the 1945 Constitution. Therefore, whether the crimes as mentioned under items 1) through 7) above belong to the category of "*the most serious crimes*" has to be associated with "*the law in force at the time of the commission of the crime, both national and international*".

(b) At the time the Petitioners committed the narcotics crimes which result in the imposition of capital punishment on the Petitioners, in the national level, the law applied shall be the Narcotics Law, meanwhile in the international level, the law applied shall be the United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances 1988 (hereinafter referred to as the Narcotic Drugs and Psychotropic Substances Convention), to which Indonesia has become a state party through its ratification by Law Number 7 Year 1997.

(c) The Narcotics Law shall be the implementation of international law obligations generated from international covenants, *in casu* the Narcotic Drugs and Psychotropic Substances Convention as affirmed in the "in view of" consideration section item 4 and General Elucidation of the fourth Paragraph of Narcotics Law.

One of the international law obligations created by Indonesia's participation in the Narcotic Drugs and Psychotropic Substances Convention as affirmed in Article 3 Paragraph (6) of the Convention

states, "*The Parties shall endeavour to ensure that any discretionary legal power under their domestic law relating to the prosecution of persons for offences in accordance with this article are exercised to* ***maximize the effectiveness of law enforcement measures in respect of those offences, and with due regard to the need to deter the commission of such offences***".

Crimes as referred to in Article 3 Paragraph (6) of the Narcotic Drugs and Psychotropic Substances Convention stated in Article 3 Paragraph (5) completely states, "*The parties shall ensure that their domestic courts and other competent authorities having jurisdiction can take into account factual circumstances which make the commission of* ***the offences established in accordance with Paragraph I*** *of this article* ***particularly serious****, such as:*

(a) the involvement in the offence of an organized criminal group to which the offender belongs;

(b) the involvement of the offender in other international organized activities;

(c) the involvement of the offender in other illegal activities facilitated by commission of the offence;

(d) the use of violence or arms by the offender;

(e) the fact that the offender holds a public office and that the offence is connected with the office in question;

(f) the victimization or use of minors;

(g) the fact that the offence is committed in a penal institution or in an educational institution or social service facility or in their immediate vicinity or in other places to which school children and students resort for educational, sports and social activities;

(h) *prior conviction, particularly for similar offences, whether foreign or domestic, to the extent permitted under domestic law of a Party*"

In the mean time, Paragraph 1 referred to by Article 3 Paragraph (5) above among others states that "*Each Party shall adopt such measures as may be necessary to establish as criminal offences under its domestic law, when committed intentionally:*

a)

i) the production, manufacture, extraction, offering, offering for sale, distribution, sale, delivery, on any terms whatsoever, brokerage, dispatch, dispatch in transit, transport, importation or exportation of any narcotic drug or any psychotropic substance contrary to the provisions of the 1961 Convention, the 1961 Convention as amended or the 1971 Convention;

ii) the cultivation of opium poppy, coca bush or cannabis plant for the purpose of the production of narcotic

drugs contrary to the provisions of the 1961 Convention and the 1961 Convention as amended;

iii) the possession or purchase of any narcotic drug or psychotropic substance for the purpose of any of the activities enumerated in i) above;

iv) the manufacture, transport or distribution of equipment, materials or of substances listed in Table I and Table II, knowing that they are to be used in or for the illicit cultivation, production or manufacture of narcotic drugs or psychotropic substances;

v) the organization, management or financing of any offences enumerated in i), ii), iii) or iv) above;

b).....

c)..... "

(d) Accordingly, by systematically interpreting the provisions included in Article 3 Paragraphs (1), (5), and (6) then associated with the provisions in the Narcotics Law which petitioned for judicial review in the *a quo* petition, it is clear that the provisions in the Narcotics Law petitioned for judicial review shall be the manifestation of the national implementation of Indonesia's international law obligations based on

international covenants, *in casu* the Narcotic Drugs and Psychotropic Substances Convention, based on which such crimes shall belong to the category of serious crimes.

(e) The interpretation as mentioned on item (d) above is in accordance with the general provisions of the interpretation of international covenants as regulated in Article 31 of 1969 of the Vienna Convention which in its Paragraph (1) provides that "*A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of a treaty in their context and in the light of its object and purpose*".

The context of the Narcotic Drugs and Psychotropic Substances Convention is clearly seen from the Preamble to the Convention in the first and second Paragraphs, which state,

"Deeply concerned by the magnitude of and rising trend in the illicit production of, demand for and traffic in narcotic drugs and psychotropic substances, which ***pose a serious threat to the health and welfare of human beings and adversarily affect the economic, cultural and political foundation of society****,*

Deeply concerned also by the steadily increasing inroads into various social groups made by illicit traffic in narcotic drugs and psychotropic substances, and particularly by the fact that ***children***

are used in many parts of the world as an illicit drug consumers market and for the purposes of illicit production, distribution and trade in narcotic drugs and psychotropic substances, which entails a danger of incalculable gravity*".*

(f) If the crimes referred to in Narcotic Drugs and Psychotropic Substances Convention as the particularly serious crimes compared with the crimes accepted as the most serious crimes so far, such as genocide crimes and crimes against humanity, substantively, there shall be no distinctions between the two groups of crimes. The reason is that the crimes belonging to both "*the most serious crimes*" and crimes referred to in the Narcotic Drugs and Psychotropic Substances Convention as "*particularly serious crimes*" ***adversarily affect the economic, cultural and political foundation of society and cause a danger of incalculable gravity***".

(g) Based on the explanation under items (a) through (f) above, the reasons are sufficient to state that crimes as regulated in Article 80 Paragraph (1) Sub-Paragraph a, Paragraph (2) Sub-Paragraph a, and Paragraph (3) Sub-Paragraph a; Article 81 Paragraph (3) Sub-Paragraph a; and Article 82 Paragraph (1) Sub-Paragraph a, Paragraph (2) Sub-Paragraph a, and Paragraph (3) Sub-Paragraph a of the Narcotics Law shall belong to the category of the most serious crimes based on both the Narcotics Law and the provisions of

international law in force at the time of commission of such crimes. Thus, the crime qualifications in the Articles of the Narcotics Law above can be equaled with the most serious crime under the provisions of Article 6 of ICCPR.

(h) Whereas, based on the explanation under items (a) through (g) above, there is no such international law obligations under the international covenant being violated by Indonesia by applying capital punishment to the crimes regulated in Article 80 Paragraph (1) Sub-Paragraph a, Paragraph (2) Sub-Paragraph a, Paragraph (3) Sub-Paragraph a; Article 81 Paragraph (3) Sub-Paragraph a; and Article 82 Paragraph (1) Sub-Paragraph a, Paragraph (2) Sub-Paragraph a, and Paragraph (3) Sub-Paragraph a of Narcotics Law. Otherwise, the application of capital punishment to the crimes referred to shall be one of the consequences of the participation of Indonesia in the Narcotic Drugs and Psychotropic Substances Convention as regulated in Article 3 Paragraph (6) of the Convention, with the substance the state parties can *maximize the effectiveness of law enforcement measures in respect of those offenses, and with due regard to the need to deter the commission of such offenses*, as explained under item (c) above.

(i) Whereas, the application of capital punishment to the crimes regulated in the Articles of the Narcotics Law petitioned for judicial review has been the consequence of Indonesia’s becoming a state party as

explained under item (h) and is also supported by the provisions of Article 24 of the Narcotic Drugs and Psychotropic Substances Convention which states that "*A party may adopt more strict of severe measures than those provided by this Convention if, in its opinion, such measures are desirable or necessary for the prevention or suppression of illicit traffic*". In other words, in relation to the *a quo* petition, if according to Indonesia, more severe measures are needed to prevent and eradicate such crimes, such measures are not contradictory to but rather are justified and suggested instead by the Convention. This means that Indonesia as a state party adopting the system of capital punishment against the certain Narcotics criminals has the right to determine capital punishment to the Narcotics criminals. Similarly, if someday Indonesia adopts an idea of life sentence without parole as argued by the Petitioners, it would not be contradictory to the Convention either.

(j) The consequences of Indonesia's participation in the Narcotic Drugs and Psychotropic Substances Convention in order to take more strict national measures in legally eradicating Narcotics crimes shall have a higher degree of binding force in the light of international law sources, as regulated in Article 38 Paragraph (1) of the Statute of International Court of Justice than the opinion of the Human Rights Commission of the United Nations to the effect that crimes related to the drugs abuse do not belong to the category of the most serious crimes.

[3.25] Considering whereas despite the entire foregoing consideration it is clear that the imposition of capital punishment to specific crimes covered in the Narcotics Law is not contradictory to the 1945 Constitution, the Court finds it necessary to give important notes as follows:

- In accordance with the provisions of Article 3 of the *Universal Declaration of Human Rights juncto* Article 6 of the ICCPR *juncto* the Human Rights Law and the 1945 Constitution as well as various International Conventions related to Narcotics, especially the 1960 UN Convention on Narcotics and the United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances in 1988 the sanction of capital punishment covered in the Narcotics Law has been formulated carefully and accurately and does not apply to all Narcotics-related criminal acts covered in the aforementioned Law, but is only imposed on:

  (a) producers and dealers (producers shall include planters) who commit such illicit acts, not to abusers or violators of Narcotics/ Psychotropic substances Law committed through licit channels such as medicine factories/pharmacy, pharmaceutical wholesalers, hospitals, community health centers, and drugstores;

  (b) perpetrators specified in the foregoing item (a) who commit their crimes which are related to Narcotics Category I (for example Cannabis and Heroin);

- The sanction of capital punishment set forth in criminal articles of the Narcotics Law also gives the sanction of special minimum criminal punishment. It means that, in imposing punishment to violators of the Narcotics Category 1 Articles, the judge, based on the available evidence and his/her belief, may punish the convict with the maximum sanction, namely capital punishment. On the contrary, if the judge believes that, according to the available evidence, voluntary and involuntary elements, the perpetrators are underage, pregnant women, and so on, so that there is no reason to impose maximum sanction, then the perpetrators (although related to Narcotics Category I) may not be sentenced with capital punishment. Accordingly, it is clear that imposing of capital punishment in Narcotics cases shall not be done as the judge wishes and this is in accordance with the provisions set forth in the ICCPR;

- In comparison, below is the juxtaposition of the imposition of capital punishment in three countries, namely Indonesia, Malaysia, and Singapore on perpetrators of Narcotics crimes.

No.	CRIMINAL ACT	INDONESIA	MALAYSIA	SINGAPORE
1.	Import, Export or illicit trafficking of opium	Quantity of narcotics is not specified, capital punishment or life sentence or max. 20 years and a max. fine of Rp.50 million.	1 kg or more, capital punishment. 250-1.000 gr, life sentence or min. 5 years and 6 pr.	6 kgs or more, max. 30 years and 15 pr. Min. 20 years and 15 pr.
2.	Import, Export; or illicit trafficking of morphine 20-30 gr.	-ditto-	15 gr or more, capital punishment.	a. max.30 years + 15 rattan beating min. 20 years + 15 pr.

No.	CRIMINAL ACT	INDONESIA	MALAYSIA	SINGAPORE
	More than 30 gr		5-15 gr life sentence or min. 5 years + 6 pr.	b. capital punishment.
3.	Import, Export; or illicit trafficking of heroin. 10-15 gr More than 15 gr.	- ditto -	- ditto-	- ditto-
4.	Import, Export; or illicit trafficking of: cannabis.	Quantity is not specified. Life sentence of max. 20 years and max. fine of Rp.30 million.	More than 200 gr, capital punishment.	10 gr or more max. 30 years + 15 pr Min. 20 years + 15 pr.
5.	Import, Export illicit trafficking of hashish or cannabis resin.	- ditto-	- ditto-	4 kg or more - ditto -
6.	Illicit production of morphine or its salt or its by-products.	Max. 20 years and a max. fine of Rp.30 million.	15 gr or more. Capital punishment.	Capital punishment.
7.	Illicit production of heroin (diamorphine) or its salt or its by-products.	- ditto -	- ditto -	- ditto -
8.	Illicit ownership of Narcotics substances.	Cannabis or coca: max.6 years and max. fine of Rp.10 million. Other narcotics: max. 10 years or a fine max of Rp.15 million.	Max. 5 years or a fine of M$ 10.000 or both.	Max. 10 years or a fine of S$20.000 or both. Minimum 2 years or a fine of S$4.000 or both.
9.	Abuse or illegal use of, narcotics substances	Cannabis or coca: 2 years. Other narcotics: 3 years.	Max. 2 years or a fine of S$5.000.	Max. 10 years or a fine of S$20.000 or both.
10.	Illicit ownership of equipments for narcotics abuse (pipe needle, etc)		Max. 2 years or a fine of M$5.000 or both.	Max. 3 years or a fine of S$10.000 or both.
11.	Illicit cultivation of hemp plant, coca and *papaver somniferum*	Cannabis or coca: max. 6 years and a max. fine of Rp.10 million.	Life sentence and 6 rattan beating. And land confiscation.	Max. 20 years or a fine of S$40.000 or both. Min. 3 years or a

No.	CRIMINAL ACT	INDONESIA	MALAYSIA	SINGAPORE
		Papaver Somniferum: max. 10 years and a max. fine of Rp.15 million.		fine of S$5.000 or both and land confiscation.
12.	Illicit trafficking of other narcotics (synthetic narcotics)	Capital punishment or life sentence or max. 20 years and a fine of Rp.50 million.	Max. 5 years or a fine of M$20.000 or both.	Class: A Max. 20 years + 15 rattan beating. Min. 5 years + 5 pr. Class: B Max. 20 years +10 pr. Min. 3 years + 3 pr. Class: C Max. 10 years + 5 rattan beating. Min. 2 years + 2 rattan beating.
13.	Illicit Import or Export of other narcotics (synthetic narcotics)	- ditto -	- ditto -	Class: A Max. 30 years + 15 pr. Min. 5 years + 5 pr. Class: B - ditto - Class: C Max. 20 years +15 pr. Min. 3 years + 5 pr.
14.	Obstructing the work of the investigators.	Max. 5 years and a fine of Rp.10 million.	Max. 1 year or a fine of M$. 2.000 or both.	Max.3 years or a fine of S$5.000 or both. Min. 6 months or a fine of S$ 1.000 or both.
15.	Not giving any information	Max. 1 year or a fine of Rp.1 million or both	- ditto -	- ditto -
16.	Giving false information	Max. 5 years or and Rp.10.000	Max. 1 year or a fine of M$2.000 or both.	Max. 1 year or a fine of M$5.000 or both.

(Notes: Pr. = rattan beating; M$ = Malaysian dollar; S$= Singaporean dollar. Source: Romli Atmasasmita, 1987)

[3.26] Also considering whereas by taking into account the irrevocable nature of capital punishment, regardless of the Court's opinion on the non-

contradiction of capital punishment to the 1945 Constitution for specific crimes in the Narcotics Law petitioned for review in the *a quo* petition, the Court is of the opinion that in the future, in the context of the reform of the national criminal law and harmonization of laws related to capital punishment, the formulation, application and implementation of capital punishment in Indonesian judicial system should carefully consider the following matters:

a. capital punishment shall no longer be a principal punishment, but rather a special and alternative punishment;

b. capital punishment shall be imposed with a probation period of ten years that if the convicts indicate good behaviors may be changed into a life imprisonment or 20 years;

c. capital punishment shall not be imposed on underage children;

d. the execution of capital punishment on pregnant women and mentally-ill persons shall be postponed until the pregnant women deliver their babies and the mentally-ill convicts recover their sanity;

[3.27] Considering whereas regardless of the aforementioned idea of legal reform, for fair legal certainty, the Court recommends that all decisions on capital punishment that have obtained permanent legal force (*inkracht van gewijsde*) shall be carried out in a proper manner;

[3.28] Based on the aforementioned consideration it is clear that Article 80 Paragraph (1) Sub-Paragraph a, Paragraph (2) Sub-Paragraph a, Paragraph (3) Sub-Paragraph a; Article 81 Paragraph (3) Sub-Paragraph a; and Article 82 Paragraph (1) Sub-Paragraph a, Paragraph (2) Sub-Paragraph a, Paragraph (3) Sub-Paragraph a of the Narcotics Law are not contradictory to the 1945 Constitution and also do not violate Indonesian obligations of international laws resulting from international agreements. Consequently, it is also clear that the Petitioners' petition is groundless;

4. CONCLUSION

Considering whereas based on the foregoing description, the Court is of the opinion that:

[4.1] The Indonesian Petitioners have legal standing, while the foreign Petitioners do not have legal standing;

[4.2] Petitioner III and Petitioner IV in Case Number 2/PUU-V/2007 who are foreign citizens (namely Myuran Sukumaran and Andrew Chan) and Petitioner in Case Number 3/PUU-V/2007 (namely Scott Anthony Rush) do not have the legal standing, so that the *a quo* Petitioners' petition cannot be accepted (*niet ontvankelijk verklaard*);

[4.3] The provisions of Article 80 Paragraph (1) Sub-Paragraph a, Paragraph (2) Sub-Paragraph a, Paragraph (3) Sub-Paragraph a; Article 81 Paragraph (3) Sub-Paragraph a; Article 82 Paragraph (1) Sub-Paragraph a,

Paragraph (2) Sub-Paragraph a, and Paragraph (3) Sub-Paragraph a of the Narcotics Law, insofar as they are related to capital punishment, are not contradictory to Article 28A and Article 28**I** Paragraph (1) of the 1945 Constitution, so that the petition for judicial review of the *a quo* articles is groundless and therefore the Petitioners' petition shall be rejected;

5. COURT RULINGS

In view of Article 56 Paragraph (1) and Paragraph (5) of Law Number 24 Year 2003 regarding the Constitutional Court (State Gazette of the Republic of Indonesia Year 2003 Number 98, Supplement to State Gazette of the Republic of Indonesia Number 4316);

PASSING THE DECISION:

[5.1] To declare that the petition of Petitioner I and Petitioner II in Case Number 2/PUU-V/2007 is rejected in its entirety;

[5.2] To declare that the petition of Petitioner III and Petitioner IV in Case Number 2/PUU-V/2007 cannot be accepted (*niet ontvankelijk verklaard*);

[5.3] To declare that the petition in Case Number 3/PUU-V/2007 cannot be accepted (*niet ontvankelijk verklaard*);

Hence this decision was passed in the Consultative Meeting of Justices on October 23, 2007 attended by nine Constitutional Court Justices, and was

pronounced in the Plenary Meeting of the Constitutional Court open for public held today, Tuesday, October 30, 2007, by us, Jimly Asshiddiqie as the Chairperson and concurrent 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, respectively as Members, assisted by Cholidin Nasir as the Substitute Registrar, as well as in the presence of the Petitioners/their Attorneys-in-Fact, the Government or its representative, and the People's Legislative Assembly or its representative, as well as the Directly Related Party, the National Narcotics Agency;

CHIEF JUSTICE,

SGD.

Jimly Asshiddiqie
JUSTICES

SGD.	**SGD.**
Abdul Mukthie Fadjar	**H.A.S. Natabaya**
SGD.	**SGD.**
I Dewa Gede Palguna	**Soedarsono**
SGD.	**SGD.**
H. Harjono	**H. Achmad Roestandi**

SGD.	**SGD.**
H. M. Laica Marzuki	**Maruarar Siahaan**

5. DISSENTING OPINIONS

Four Constitutional Justices conveyed dissenting opinions regarding the aforementioned decision of the Court. The dissenting opinion conveyed by Constitutional Court Justice H. Harjono specifically highlighted the legal standing of the foreign petitioners. Constitutional Court Justice H. Achmad Roestandi conveyed a dissenting opinion as to the Principal Issue of the petition. Whereas dissenting opinions conveyed by Constitutional Justice H.M. Laica Marzuki and Constitutional Justice Maruarar Siahaan were related to the legal standing and the Principal Issue of the petition, as completely set out as follows:

[5.1] Constitutional Court Justice H. Harjono:

Whereas there are foreign citizens among the Petitioners of the *a quo* petition, namely: Myuran Sukumaran, and Andrew Chan in Case Number 2/PUU-V/2007, as well as Scott Anthony Rush in Case Number 3/PUU-V/2007. In petition Number 2/PUU-V/2007. The Petitioners of foreign citizenship (*WNA*) request the Court to declare that Article 51 Paragraph (1) Sub-Paragraph a of the Constitutional Court Law (*UUMK*) is contradictory to Article 28D Paragraph (1) of the 1945 Constitution because the *a quo* article states that only individual, citizen of the state of Indonesia, has the qualification as a petitioner in judicial review of laws against the 1945 Constitution. The provisions of Article 51 Paragraph (1)

Sub-Paragraph a of the Constitutional Court Law will result that Petitioners whose status are *WNA* do not have the legal standing to file a petition for judicial review on the 1945 Constitution to the Court. The Petitioners argue that the provisions set forth in the 1945 Constitution which regulate Human Rights grant rights to *WNA*, because *WNA* is included in the definition of “every person“ whose rights are guaranteed in the 1945 Constitution in the provisions on Human Rights (Chapter XA of the 1945 Constitution).

Chapter XA of the 1945 Constitution on Human Rights makes use of the term “every person“ to refer to the rights recognized constitutionally, namely the rights covered in Article 28A through 28J. It is clear that, by referring to every person, the Constitution grants the rights to every person, meaning every human being including persons with the status of foreign citizens. However, it does not mean that in Indonesian judicial system every person is automatically treated and granted the same rights without considering his/her nationality status. The practices of the formulation of international agreements among countries of bilateral nature in which such agreements cover the protection of citizens from other countries prove that there is still a differentiation between the rights of citizens of one country and the rights of foreign citizens. In relation to the enactment of a law, laws that are specially formulated for foreign citizens can be differentiated from laws that are specially formulated for citizens of a country, and laws that are formulated for both citizens of a country and foreign citizens. In relation to the judicial review against the 1945 Constitution, the three kinds of laws have specific characteristics. It is unreasonable if a foreign citizen questions

the legality of a law that is purely intended to apply for citizens of a country before the Constitutional Court, because it is clear that the intended *WNA* has no interest. A law that is purely intended to apply for foreign citizens, if a foreign citizen questions the legality of such law, will relate to two issues: *first*, it relates to the existence of the rights of foreign citizen, and second, it relates to the state sovereignty to formulate rules to be implemented in its territory. The legality of rules in relation to immigration which cover legal policy that is purely intended to apply to immigrants cannot be questioned by *WNA* even though the *WNA* is impaired by such rules, because the rules are indeed addressed to him/her and a state authority is a reflection of the state sovereignty shown to outside world. The rights of foreign citizens to question the rules especially addressed for foreigners may arise from other provisions, namely the existence of international agreements, be it bilaterally or multilaterally entered into between the *WNA'*s country of origin and the government of the State of Indonesia. A law the substance of which applies to both citizens of Indonesia and foreign citizens, and then if the substance of the law impairs foreign citizens, it means that such law has also impaired Indonesian citizens as well. In a judicial review, a decision by the Court is *erga omnes* in nature if a law is declared as not having any binding legal effect and therefore it will not only apply to the Petitioner but will also apply to all persons impaired by the law being reviewed, including citizens of Indonesia. The substance of the law petitioned for review by *WNA* Petitioner in the *a quo* case applies to both foreigners and citizens of Indonesia. In the case that a petition filed by a *WNA* while the substance being petitioned also includes the

interests of citizens of Indonesia, but the Court rejected it purely because the petitioners are *WNA*, such decision will result in a delayed legal certainty because now everyone has to wait until a citizen of Indonesia files a petition and that to qualify for examination by the Court the intended petitioner must fulfill the requirements both with respect to qualification as well as legal standing. Based on such consideration, the Court should have granted the status of having the legal standing to *WNA* Petitioners in the *a quo* case. The granting of legal standing can be conducted by the Court without having to grant the Petitioners' petition to declare Article 51 Paragraph (1) of the Constitutional Court Law contradictory to the 1945 Constitution but will suffice by broadly interpreting Article 51 Paragraph (1) of the Constitutional Court Law.

[5.3] Constitutional Court Justice H. Achmad Roestandi:

The pros and cons debate on the imposition of capital punishment has been progressing for centuries and still develops until now. Therefore, in this Dissenting Opinion, I will focus on the analysis of the constitutionality issue, with the following explanation:

Whereas the Petitioners argue that the substance of articles, Paragraph and/or part in Law Number 22 Year 1997 regarding Narcotics related to capital punishment, as provided for in Article 80 Paragraph (1) Sub-Paragraph a, Article 80 Paragraph (2) Sub-Paragraph a, Article 80 Paragraph (3) Sub-Paragraph a, Article 81 Paragraph (3) Sub-Paragraph a, Article 82 Paragraph (1) Sub-

Paragraph a, Article 82 Paragraph (2) Sub-Paragraph a, Article 82 Paragraph (3) Sub-Paragraph a are contradictory to the 1945 Constitution.

With respect to the arguments of the Petitioners, I am of the following opinion:

Article 28A of the 1945 Constitution reads:

"Every person shall have the right to life as well as the right to defend his life and livelihood."

Article 28**I** Paragraph (1) of the 1945 Constitution confirms that the right to life is one of the rights **that cannot be reduced under any circumstances whatsoever.** The phrase "that cannot be limited under any circumstances whatsoever" means that such right is absolute, cannot be limited, cannot be reduced, and cannot be postponed. Accordingly, the limitation allowed by Article 28J Paragraph (2) cannot be incurred on the right to life. The main goal of capital punishment is to take away a person's right to life intentionally. Therefore, it is crystal clear that capital punishment is contradictory to Article 28A *juncto* Article 28**I** Paragraph (1).

The imposition of capital punishment is different from the condition when a person gets killed during a war, or when a person gets killed in an operation to arrest criminals.

The main goal of the activities conducted by the army in a war or the murder conducted by police officers in arresting criminals, is not with an intention to kill,

but to **paralyze** the enemies or the criminals. If, in order to reach the main goal (that is, to paralyze the enemies or criminals) a murder happens, then the murder is not the main goal, but an **excessive** incident.

We can use international instruments, such as the International Covenant on Civil and Political Rights (ICCPR), as one of comparison tools in order to find the most appropriate interpretation on Article 28**I** Paragraph (1).

From the beginning, however, it is better to be cautious about several differences between Article 28**I** Paragraph (1) of the 1945 Constitution and Article 4 of the ICCPR, namely:

a. **Terms used:**
    1) Article 28**I** Paragraph (1) uses the term: **right that cannot be limited under any circumstances whatsoever.**
    2) Article 4 of the ICCPR uses the term: non-derogable rights.
b. **Number of rights stated:**
    1) Article 28**I** only states 7 kinds of rights.
    2) Article 4 of the ICCPR states 8 kinds of rights. The eighth right is the right not to be imprisoned merely based on contractual obligations.
c. **Systematization of Regulation:**
    1) Out of the 7 rights that cannot be reduced under any circumstances whatsoever as referred to in Article 28A Paragraph (1), there are several rights which are not **specifically** mentioned in other articles

of the 1945 Constitution and which **all of a sudden** show up in Article 28A Paragraph (1), namely, the right not to be enslaved and the right not to be prosecuted under retroactive laws.

2) The entire (eight) human rights (non-derogable rights) specified in Article 4 of the ICCPR are specifically mentioned in other articles of the ICCPR.

d. **Limit Gradation (level):**

1) In article 28A Paragraph (2), prohibition to limit the seven rights is **absolute**, which means that there can be no limit under any circumstances whatsoever. Consequently, the limit allowed by Article 28J Paragraph (2) cannot be imposed to the rights mentioned in Article 28A Paragraph (2).

2) Article 4 states that limitation to the rights can generally be conducted **"under the conditions of general state of emergency that threatens state life"** . However, the conditions of general state of emergency are can not be applied to non-derogable rights referred to in Article 4.

Limitation to Articles 6, 8 Paragraphs (1) and (2), 11, 15 and 18 may still be imposed with other reasons explicitly specified in the articles. Meanwhile, limitation cannot be imposed on the right not to be tortured (*vide* Article 7), the right not to be enslaved and to be put under involuntary servitude (*vide* Article 8), the right to be recognized as an individual before the law (*vide* Article 16) and the right not to be imprisoned because of being unable to fulfill a contract (Article 18).

Based on the aforementioned explanation, I am of the opinion that prohibition to limit the seven kinds of human rights stated in Article 28A Paragraph (1) is absolute. The prohibition as regulated in Article 28 J Paragraph (2) shall not be enabled to the seven kinds of rights. The reason is that, if the limitation mentioned in Article 28 J Paragraph (2) shall also apply to the rights mentioned in Article 28 A Paragraph (1), then the drafters of the 1945 Constitution should, *quad non*, have formulated vain or useless Articles.

I am of the opinion that international instruments can be used as one of a reference, and can be used as a comparison to enrich our reasoning horizon in interpreting the constitution. However, whenever there exists any explicit difference between international instruments with the 1945 Constitution, as a Constitutional Court Justice, I have to prioritize the 1945 Constitution place. The reason is that, as a Constitutional Court Justice, I am granted the constitutional mandate and authority to review laws against the 1945 Constitution. It is not my duty to review laws against international instruments. Furthermore, it is not my duty to review the 1945 Constitution against international instruments.

As a follower of Islam, not only do I understand but I also believe in the absolute truth written in the entire content of the holy book Al-Qur'an, including that certain highly limited types of crimes (namely robbery and murder) can be sentenced with capital punishment. For murder case, capital punishment shall be the last resort, after the victim family states that they do not want to receive compensation (*diyat*). For me, the provisions of Islamic criminal law constitute a

divine law (*lex divina*) and also serve as the law used to guide us in accomplishing our goals (*ius constituendum*) that will lead to the implementation of positive law.

However, there is a difference in paradigm between the implementation of positive law and the implementation of religious law (norms), as a result of the different nature between them. Positive laws (legal norms) are *external*, while religious norms are *internal.* Law norms will be considered to have been implemented perfectly when they have been implemented **physically**. Meanwhile, religious norms will only be considered to have been implemented perfectly if, apart from the physical implementation, they are also based on sincere **motivation** (**intention**) from the conscience of the person behind the **physical** implementation.

Seen from the aspect of positive law, the implementation of capital punishment is indeed worrisome, because after the capital punishment is conducted there will be no more remedy available to fix it. This is understandable because positive law does not consider the re-calculation (*penghisaban*) in the afterlife. Positive law only regulates mundane life. Meanwhile religious law, aside from regulating mundane life, is also related to transcendental life (*ukhrowi)* .

Accordingly, any violation to religious norms is not only felt as a crime that disturbs just social order, but also felt as a sin that will still be calculated at the Pay-back Day (*yaumiddin*) or at Judgment Day (*yaumul hisab*) later. Court decisions in life do not constitute a thorough solution that guarantees complete

justice to those who believe in the afterlife. The mistake of imposing capital punishment is believed to be re-calculated in the afterlife. Because of the different paradigm, I can understand that religious norms allow the imposition of capital punishment for persons involved in certain crimes.

However, Indonesian society is a pluralistic society, that consists of various races, languages, cultures and religions. This pluralistic nation has reached a national consensus, set forth in *Pancasila* and the 1945 Constitution, which serve as the fundamental law in social, national and state life. The fundamental law constitutes the **highest positive law** that has to become the highest reference for all citizens, including me, as a Constitutional Court Justice, to make a decision in judicial review cases.

Article 28I Paragraph (1) of the 1945 Constitution states that the right to life is a right that cannot be reduced under any circumstances whatsoever, therefore, capital punishment whose main goal is to intentionally deprive a person's of his right to life is contradictory to the 1945 Constitution.

Conclusion

Based on the aforementioned reasons, I am of the opinion that the *a quo* Petitioners' petition should have been granted.

[5.2] Constitutional Court Justice HM. Laica Marzuki:

Petitioners I, 1. Edith Yunita Sianturi (*WNI*). 2.Rani Andriani (Melisa Aprilia) (*WNI*). 3. Myuran Sukumaran (*WNA*). 4. Andrew Chan (*WNA*) and Petitioner II, Scott Anthony Rush (*WNA*), filed a judicial review on Article 80 Paragraph (1) Sub-Paragraph a, Article 80 Paragraph (2) Sub-Paragraph a, Article 80 Paragraph (3) Sub-Paragraph a, Article 81 Paragraph (3) Sub-Paragraph a, Article 82 Paragraph (1) Sub-Paragraph a, Article 82 Paragraph (2) Sub-Paragraph a, Article 82 Paragraph (3) Sub-Paragraph a of Law Number 22 Year 1997 regarding Narcotics (hereinafter referred to as the Narcotics Law) – to the extent that they contain the phrase *'capital punishment or'* – against the Constitution of the State of the Republic of Indonesia Year 1945 (hereinafter referred to as the 1945 Constitution);

The articles of the Narcotics Law petitioned for judicial review by the intended Petitioners I and II, read as follows:

- Article 80 Paragraph (1) Sub-Paragraph a of the Narcotics Law,

  (1) Whosoever, without any right and illegally:

  a. produces, processes, extracts, converts, prepares or provides Narcotics Category I shall be punished with a *capital punishment or* life imprisonment, or maximum imprisonment of 20 (twenty) years and a maximum fine of Rp.1,000,000,000.00 (one billion rupiah);

- Article 80 Paragraph (2) Sub-Paragraph a of the Narcotics Law,

(2) In the event that the crimes as intended in:

a. Paragraph (1) Sub-Paragraph a are preceded by a conspiracy, shall be sentenced with *capital punishment or* life imprisonment or minimum imprisonment of 4 (four) years and maximum imprisonment of 20 (twenty) years and a minimum fine of Rp.200,000,000.00 (two hundred million rupiah) and maximum fine of Rp.2,000,000,000.00 (two billion rupiah);

- Article 80 Paragraph (3) Sub-Paragraph a of the Narcotics Law,

(3) In the event that the crimes as intended in:

a. Paragraph (1) Sub-Paragraph a are conducted as an organized crime, shall be sentenced with *capital punishment or* life imprisonment or minimum imprisonment of 5 (five) years and maximum imprisonment of 20 (twenty) years and a minimum fine of Rp.500,000,000.00 (five hundred million rupiah) and maximum fine of Rp.5,000,000,000.00 (five billion rupiah);

- Article 81 Paragraph (3) Sub-Paragraph a of the Narcotics Law,

(3) In the event that the crimes as intended in:

a. Paragraph (1) Sub-Paragraph a, was conducted in an organized manner, shall be sentenced with *capital punishment or* life imprisonment, or imprisonment minimum 4 (four) years and maximum 20 (twenty) years and a fine of minimum Rp.500.000.000,00 (five hundred million rupiah) and maximum Rp.4.000.000.000,00 (four billion rupiah);

- Article 82 Paragraph (1) Sub-Paragraph a of the Narcotics Law,

(1) Whosoever, without right and illegally:

a. *imports*, exports, offers for sale, distributes, sells, buys, delivers, acts as broker or exchanges narcotics Category I, shall be sentenced with *capital punishment or* life imprisonment, or maximum imprisonment of 20 (twenty) years and a maximum fine of Rp.1,000,000,000.00 (one billion rupiah);

- Article 82 Paragraph (2) Sub-Paragraph a of the Narcotics Law,

(2) In the event that the crimes as intended in Paragraph (1) is preceded by a conspiracy, to the criminal acts as intended in:

a. Paragraph (1) Sub-Paragraph a, shall be sentenced with *capital punishment or* life imprisonment or minimum imprisonment of 4 (four) years and maximum imprisonment

of 20 (twenty) years and a minimum fine of Rp.200,000,000.00 (two hundred million rupiah) and maximum fine of Rp.2,000,000,000.00 (two billion rupiah);

- Article 82 Paragraph (3) Sub-Paragraph a of the Narcotics Law,

(3) In the event that the criminal acts as intended in:

a. Paragraph (1) Sub-Paragraph a is committed as an organized manner, the punishment shall be *capital punishment or* life imprisonment or minimum imprisonment of 5 (five) years and maximum imprisonment of 20 (twenty) years and a minimum fine of Rp.500,000,000.00 (five hundred million rupiah) and maximum fine of Rp.3,000,000,000.00 (three billion rupiah);

Petitioners I and II consider that the intended articles of the Narcotics Law are contradictory to:

- Article 28A of the 1945 Constitution:

Every person shall have the right to life as well as has the right to defend his life and livelihood.

- Article 28I Paragraph (1) of the 1945 Constitution:

(1) The right to life, the right not to be tortured, the right of freedom of thought and conscience, the right to have a religion, the right not to be enslaved, the right to be recognized as a person before the law, and the right not to be prosecuted under retroactive law shall constitute human rights which cannot be reduced under any circumstances whatsoever

Firstly, it is deemed necessary to consider, whether the Petitioners have the legal standing to file a petition for judicial review in this case. Petitioners I, Myuran Sukumaran and Andrew Chan, and Petitioner II, Scott Anthony Rush, are Australian citizens, not Indonesian citizens.

Article 51 Paragraph (1) Sub-Paragraph a of Law Number 24 Year 2003 regarding the Constitutional Court, requires that Petitioner shall be an individual of Indonesian citizen who believes that his/her constitutional right and/or authority has been impaired by the coming into effect of the law petitioned for review.

Pursuant to Article 51 Paragraph (1) Sub-Paragraph a of the intended Constitutional Court Law, it is believed that the petitioners who are *notabene* of foreign citizen status (*WNA*) shall not be able to file a petition for judicial review.

However, when the articles of the Narcotics Law petitioned for review are related to right to life for every person, as guaranteed by the Constitution, *vide* Article 28A of the 1945 Constitution and Article 28I Paragraph (1) the 1945

Constitution, it is believed that the provisions of a law, *wet, Gesetz,* as *in casu* Article 51 Paragraph (1) Sub-Paragraph a of the Constitutional Court Law, shall not limit the efforts to file a petition for judicial review of the article of the law related to *the matter of life and death*, including for persons with the status of foreign citizens in this country. The *right to life* is a *basic right*. *Basic right* is an *inherent dignity* attached to every human because he/she is human. A *basic right* cannot be breached by a law, *wet, Gesetz.*

With respect thereto, constitution guarantees equal treatment for all persons before the law. Article 28D Paragraph (1) of the 1945 Constitution, reads, *'Every person shall have the right to the recognition, guarantee, protection and legal certainty as well as equal treatment before the law'*. The word 'every person' in Article 28D Paragraph (1) of the 1945 Constitution covers not only *citizens' right* but also *equal right* for every person while he/she is in the territory of the Republic of Indonesia.

The decision of German *Bundesverfassungsgericht*, dated May 22, 2006, granted the petition of **constitutional complaint** *('Verfassungsbeschwerde')* from a foreign university student, of *Moroccan* citizenship, who believed that the efforts to prohibit data screening *('Rasterfahnundung'),* conducted by *The Federal Policy Agency ('Bundeskriminanilamt')* to anticipate the danger of terrorism after the incident of September 11, 2001, are contradictory to *the right for informational self-determination* guaranteed by the *Grundgesetz* of Federal Republic of Germany.

With respect thereto, the Mongolian Constitutional Court, commonly referred to as the *Constitutional Tsets* (or *Tsets*) recognizes the rights of foreign citizens and the persons who do not have citizenship, who do not lawfully live in the territory of the state of Mongolia to file a petition for judicial review to the intended *Constitutional Tsets* or *Tsets* (*Konstitusi* Magazine, No. 17, November-December 2006, page 13).

The coming into effect of Article 51 Paragraph (1) Sub-Paragraph a of the Constitutional Law in this case means obstructing the efforts of every person to petition for a judicial review of a law in relation to a *basic right* guaranteed by the constitution. The coming into effect of Article 51 Paragraph (1) Sub-Paragraph a of the Constitutional Law means denying the constitution, *in casu* Article 28D Paragraph (1) of the 1945 Constitution.

Accordingly, it is reasonable that Article 51 Paragraph (1) Sub-Paragraph a of the Constitutional Court Law shall be put aside *(opzij leggen, to put aside, exception d'illegalite)*, in this case particularly. The Constitutional Court once put aside Article 50 of the Constitutional Court Law in the Decision of Case Number 004/PUU-I/2003, dated December 23, 2003 in the name of Petitioner Machri Hendra, SH, before the Court declared that Article 50 of the Constitutional Court Law shall no longer have binding legal effect, based on the Decision of Case Number 066/PUU-II/2004, dated April 12, 2005, in the name of Petitioner Dr. Elias L. Tobing and Dr. RD. H. Naba Bunawan, MM, MBA.

The Republic of Indonesia is currently one of the 68 countries that are still imposing capital punishment, or death penalty *(doodstraf, death penalty, capital punishment)*, as *in casu* expressed in the Narcotics articles petitioned for review. There are 129 abolitionist countries that have abolished capital punishment.

The Second Amendment to the 1945 Constitution, precisely dated August 18, 2000, put into effect Article 28A of the 1945 Constitution, that reads, *'Every person shall have the right to life as well as has the right to defend his/her life and livelihood',* in addition to Article 28I Paragraph (1) of the 1945 Constitution, read, *'The right to life, etc, etc, are human rights that cannot be limited under any circumstances whatsoever'.*

Both articles of the intended constitution regulate the *right to life* for every person*.* The phrase of Article 28I Paragraph (1) of the 1945 Constitution which reads, ' The right to life ... are human rights that cannot be limited under any circumstances whatsoever' states that the *right to life* constitutes *non-derogable rights*, or *non-derogable human rights*. The *right to life* shall not be breached, ignored, or let alone negated, and also shall not be limited by lower legal norms.

The *right to life* is a *basic right*, cannot be limited by law, *wet, Gesetz* whose levels are lower. Article 28J Paragraph (1) of the 1945 Constitution and Article 29 (2) of the *UDHR* shall not be applied. *Basic Rights* directly bind the three branches of state powers to comply and respect them. Article 1 (3) of the *Grundgezet* of the Federal Republic of Germany, reads, *' .... basic rights are binding on legislature, executive and judiciary as directly valid law'.* Retaining

capital punishment or death penalty would mean that there is a contradiction in itself (*contradictio in se, tegenspraak in zich zelf)* to the *basic rights*.

It is reasonable that Article 80 Paragraph (1) Sub-Paragraph a, Article 80 Paragraph (2) Sub-Paragraph a, Article 80 Paragraph (3) Sub-Paragraph a, Article 81 Paragraph (3) Sub-Paragraph a, Article 82 Paragraph (1) Sub-Paragraph a, Article 82 Paragraph (2) Sub-Paragraph a, Article 82 Paragraph (3) Sub-Paragraph a of the Narcotics Law – to the extent that they contain the phrase *'capital punishment or'* – shall be declared as having no binding legal effect, because they are contradictory to Article 28A of the 1945 and Article 28I Paragraph (1) of the 1945.

In the future, death penalty or capital punishment *(doodstraf)* should not be applied for all crimes (abolitionist for all crimes).

Besides, death penalty or capital punishment (*doodstraf*) cannot be restored (*herstel met de vorige toestand)* once the convict is found innocent. A classic example is from the 18 century, when *Jean Calas* was sentenced to death by the Toulouse Court, France, for indictment of murdering his own son. There was no evidence of the indictment but he was executed anyhow. *Marchese de Cesare Bonesana Beccaria* (1738 – 1794), an Italian law expert and thinker wrote the tragedy of *Jean Calas* in his book titled *Dei delitti e delle pene* (1764). *Beccaria* condemned capital punishment and torture. For him, prevention of crimes should be conducted through educational activities. He considered capital punishment contradictory to social contract (*du contract*

social). A state does not have the right to sentence a person to death. *Cesare Beccaria* questioned, *'What is the right whereby men presume to slaughter their fellow?* ' (C. of E. Doc. 4509)

Life is an ALLAH's gift, that cannot be taken away by any persons. *Article 2 of The Cairo Declaration on Human Rights in Islam (1990), reads, 'Life is a God-given gift and the right to life is guaranteed to every human being. It is the duty of individuals, societies and states to protect this right from any violation, and it is prohibited to take away life except for a Shari'ah – prescribed reason'.* Only ALLAH can take away a person's life and livelihood, through His orders. Article 2 (c), The Cairo Declaration reads, '*The preservation of human life throughout the term willed by God prescribed by Shari'ah*'. Shari'ah literally means a path to the spring. The spring in the context of shari'ah means having Allah as its source (further, *Al Munjid*, Dar el-Machreq sarl, Beirut, Lebanon, 2000:383).

'Wer hat dir, Henker, diese Macht über mich gegeben', said Gretchen in Kerker's drama *(Gustav Radbruch*, 1950 : 270). Who on earth do you think, o slaughter, has given you the right to end my life?

Based on the aforementioned consideration, it would be better if the Court grants Petitioners I and II's petition in its entirety in this case.

[5.4] Constitutional Court Justice Maruarar Siahaan:

LEGAL STANDING

The presence of foreign citizens as Petitioners, namely Myuran Sukumaran and Andrew Chan in Case number 2/PUU-V/2007 as well as Scott Anthony Rush, in case number 3/PUU-V/2007, needs to be considered before entering the petition substance, which relates to the legal standing for the Petitioners required by Article 51 Paragraph (1) of the Constitutional Court Law, that is, Petitioner to a judicial review to the 1945 Constitution in individual qualification must be an individual of Indonesian citizen. The requirement as mentioned in the intended Article 51 Paragraph (1), if seen from present context, needs the following interpretation:

Whereas by adopting of Human Rights in the 1945 Constitution as the *basic norm*, has its own consequence, that is, the intended Human Rights shall become the benchmark to judge the constitutionality of law that affects and relates to the dignity and status of persons while they are in the territory of state law, *in casu* the Republic of Indonesia. Therefore, constitutional right interpreted in Article 51 Paragraph (1) of the Constitutional Court Law also constitutes fundamental right or human right that has not only national legal effect, but also universal legal effect.

The ratification of the *International Covenant on Civil and Political Rights*, and other International Human Rights instruments, results in Indonesia's international obligation to be bound to provide protection to every person while they are within Indonesian territory legally and to recognize them as individuals before the law. Article 16 of the ICCPR states that, "*Everyone shall have the*

rights to recognition everywhere as person before the law". The statement of the words *everyone* and *everywhere* makes it clear that a person must be recognized as a lawful individual, so that he/she has legal rights in his/her country as well in other countries.

Article 2(1) of the *Covenant* requires that every party state of the *covenant* must respect and guarantee the rights recognized in the covenant for every person, while they are in the state territory and they comply to their jurisdiction, without any differentiation based on race, skin color, gender, language, religion, political view or other view, citizenship or social origin, birth and other status. The obligation to grant *national treatment* as *minimum standard* binds the State of the Republic of Indonesia in the International society, in relation to its position as a party in the intended covenant.

The approach of equal treatment in Article 28 I Paragraph (2) of the 1945 Constitution, that regulates equal treatment, also obligates the same legal position, that can be inferred to the statement ”every person shall have the right to be free from discriminatory treatment…”.

The Protection of Human Rights in Chapter XA of the 1945 Constitution, which is granted to “every person” and ratification of the ICCPR by Law number 12 year 2005 dated October 28, 2005, have given way to the constitutional obligation of the State of the Republic of Indonesia to uphold its international obligation as required in the ICCPR, which therefore judicially implies changes to Article 51 Paragraph (1) Law Number 24 Year 2003, whose changes legally

affect the implementation such that it is necessary to extend *legal standing* in filing for a petition of judicial review, insofar as it is stated in relation to **human rights as evaluation benchmark**, so that the article reads, in certain context, to have been extended to cover foreigners who are not citizens.

However, such statement does not always mean that foreigners' rights are equal with citizens' rights, in a way that foreigners may question state policies related to citizen. Indeed, complete coverage of human rights in Chapter XA, with the formulation of "**every person has the right..."** without differentiating between citizen rights with foreigner rights, may result in misunderstanding and concern, although unreasonable. The Indian Constitution explicitly divides *fundamental rights* in Chapter III*,* into two parts, namely (a) those that apply only for citizens, and (b) those existing for every "*person*" including foreigners, which consist of (i) the right to equal protection before the law, (ii) the right not to be prosecuted by a retroactive law, *double jeopardy* rule, (iii) the right to life and the right to personal freedom, and so on (Durga Das Basu, 2003: 69). However, even without explicit differentiation like this, seen from the nature of the essence and the relation of citizen with their country, although the 1945 Constitution formulates "every person", it is clearly understandable that all rights mentioned in Chapter XA do not automatically apply to foreigners. Political rights which are closely related to citizens' obligations to their country, result in the understanding that civil and political rights of citizen that can only be obtained by becoming a citizen, is not equal with human rights of foreigners, who are also granted with equal protection before the Indonesian law. Citizens obtain guaranteed rights to involve in the

government, to elect and be elected, to hold public position and certain jobs, as well as other rights closely related with their position as citizens of Indonesia, that are not obtained by foreigners naturally. Practices-especially judicial practices through its decision, shall make it clear of the differentiation of human rights possessed by citizens and human rights that are also possessed by foreign citizens, that are guaranteed and protected by Indonesian legal and judicial system.

Particularly the foreign citizen Petitioner in the *a quo* petition for judicial review of Law Number 22 Year 1997 on Narcotics, to conduct judicial review of capital punishment which has been imposed on them in the criminal case by judges of the court of general jurisdiction against the provisions in the 1945 Constitution regarding the right to life, we think it is human right within the scope of "**every person**", which is not limited to citizen only, but also foreigner non-citizen. It is not only because Indonesia has ratified ICCPR that imposed such international obligation, but also because of Indonesian commitment *to partake in implementing world order* through universally recognized Human Rights protection. Indonesian participation in International Convention on Human Rights, also provides reciprocal judicial rights and moral to Indonesia to demand international obligation implementation by other country, be it a Covenant participant or not, to protect and ensure Indonesian citizen's human rights abroad equal with the minimum standard of national treatment, which cases are quite a lot.

Other countries' practices, which accept legal standing/standing to sue (*locus standi*) of foreigners to have access to justice through judicial mechanism, in order to obtain protection to foreigner's human rights which are violated by the country receiving the foreigner, be it for temporary stay or not, are quite resourceful. Regardless of the data in the written statement submitted by the Petitioners' Experts concerning access by non-citizens to court procedure involving constitutional review of legislation in some countries, which might be seen as more of a constitutional complain rather than judicial review based on the authority perspective of the Constitutional Court of the Republic of Indonesia, we can also find some decisions or regulations which provide such access in other countries' judicial practice.

- *Asakura v. City of Seattle, 265 US 332 (1924)* concerning a complaint of a Japanese citizen pawnshop entrepreneur Petitioner who lived in Seattle, who filed a petition for judicial review of city regulation which prohibited foreigner to conduct pawnshop business, and granted such permit to its citizen. That regulation revoked the previous regulation, which granted the same kind of business permit to Japanese citizen, which was based on international convention between Japan and the United States of America.

- *Cabell v .Chavez-Salido, 454 U.S. 432(1982)* involving a review filed by a non-citizen petitioner of article 1031(a) 0f Cal.Govt Ann, which requires public officers or employees declared by law to peace officers, to be citizen of the United States of America. Although the Supreme Court revoked the decision

of the First Level Court which declared the regulation as unconstitutional, the petitioner's legal standing was not rejected.

- *Salim Ahmed Hamdan v.Donald H. Rumsfeld, Secretary of Defense, 126 S.Ct.2749,* involving the validity of Military Court established based on Presidential Order to hear the case of Guantanamo prisoner which was filed by Hamdan, a prisoner who was captured when the United States of America invaded Afghanistan to fight Taliban regime which was deemed as helping Al Qaeda and other detainees who were later imprisonment in the Guantanamo prison.

- Pursuant to the Constitution of Dominica year 1978, a foreigner shall mean "a person", within the purview of s.100(a), and is entitled to judicial review under s.103(1), even though has been debarred from entering territory of the country[Application by Kareem, (1985) LRC (Const)425(428)(Dom)] (Durga Das Basu, foot note no. 62,page 69).

There are still many other cases, which are no longer necessary to be quoted, but referring to international practice that constitution and judicial practices of other countries do not close access to judicial review of laws involving human rights which are universally protected and recognized, although limited to the rights which, by their nature, do not involve relationship between citizen and his/her country, and which demand loyalty arising from the obligation of a citizen. Therefore, the judicial review of Law Number 22 Year 1997 concerning Narcotics, which contains capital punishment which has been

imposed on the Petitioners, which has been deemed as impairment to the right to life as regulated and protected in international instruments and as universally recognized, to which International Convention Indonesia is also a party, has caused the meaning of Article 51 paragraph (1) of Law Number 24 Year 2003 on petitioner's legal standing before the Constitutional Court of the Republic of Indonesia to be understood within the context of constitutional obligation and international obligation of Indonesia, has already changed based on Law Number 12 Year 2005 which came into effect on October 28, 2006. Law Number 24 Year 2003 cannot be understood separately, regardless of its relationship with other laws which are closely related, but must be read as part of a broader system, which finally culminated on the 1945 Constitution. If situation arises where the law does not create order, it must be acknowledged that disharmony between one law and another may occur, because laws, through enacted laws of different period, can also causes unsystematic law (disorder). However, it is just the duty of the judges to interpret it through the spirit of the constitution and legislation principles, so to enable it to be logically and systematically implemented; based on such description, I am of the opinion that the Petitioners, Kyuran Sukmaran, Andrew Chan and Scott Anthony Rush have legal standing to file the *a quo* petition.

PRINCIPAL ISSUE OF THE PETITION

Prior to arriving at the petitioned judicial review process of law against the 1945 Constitution, some instruments which are relevant and important to note

must be determined first, especially in trying to understand its meaning in the 1945 Constitution, which are made as basic laws in reviewing the consistency of the laws and regulations below the 1945 Constitution, namely:

1. Aspiration of laws in the Preamble to the 1945 Constitution as a philosophy of life or basic philosophy of a nation and state.

2. The influence of relevant International Human Rights Instrument and interpretation by the United Nations through the United Nations Human Rights Committee as well as United Nations Council For Human Rights, to be used as supporting instrument in comparative study interpretation on article 28 I and article 28J paragraph (2), and

3. Research results and criminological and sociological scientific study on the objective and philosophy of punishment and the effectiveness of deterrence or prevention doctrines applied domestically as well as in other countries.

It is a principal matter for the Court to study the structure of the 1945 Constitution as basic laws or highest laws, with four amendments, to be able to see the **aspiration of laws** which would serve as the basis and spirit of the law making process in the Republic of Indonesia, and also to study basic ideas which describe the philosophy of life of such nation. The Aspiration of laws and the nation’s philosophy of life which would become a guidance in the organization of the state, which is said to be a rule of law state, must also have critical function in evaluating legal policy, or be used as **a paradigm which would become the**

basis of policy making in the field of laws and regulations, as well as in the social, economic and political fields.

The preamble to the 1945 Constitution brings into reality such aspiration of laws (*rechtsidee)*, which is *Pancasila*. Aspiration of laws exists in the aspiration of the nation of Indonesia, in the forms of ideas, taste, creation, intention and thought in connection with adopted values in carrying out the nation's life, and simultaneously becomes the objective of the nation and state. Aspiration of laws can be understood as a construction of thoughts which is mandatory to direct the law to the intended and targeted aspirations. Such aspiration of laws shall serve as a regulatory and constructive benchmark, so that without such aspiration of laws the produced laws will lose their meaning. The decision makers in the law making process will nail down awareness and instillation of such values, without which a gap will occur between aspiration of laws and the established norm.

The aspiration of laws of *Pancasila* as contained in the Preamble to the 1945 Constitution, at the same time serves as fundamental norm of the state, must color the legal norm which is established by such authority source and legal norm established by the abovementioned fundamental norm must also accept flows of values contained in such aspiration of laws. Law as a system shall be understood as an instrument full of values which is in harmony with its source. Therefore, unlike the debate around the world during the century regarding capital punishment, which mostly were based on punishment theory and punishment objective, the constitutionality review of the norm containing capital

punishment in Law Number 22 Year 1997, must be reviewed against the relevant provisions in the principal part of the 1945 Constitution, which shall be understood and studied philosophically from *Pancasila* in the Preamble to the 1945 Constitution as a nation's philosophy of life. The problem is whether or not capital punishment is constitutional pursuant to the 1945 Constitution. To determine the constitutionality of the norm petitioned for review, I can agree with the opinion of the Expert, Prof Dr. Arif B. Sidharta SH, in his written statement which states that:

"...*philosophical and metaphysical thoughts concerning capital punishment is necessary to obtain fundamental answer regarding the issue of whether or not capital punishment can be justified. Philosophical thinking is very relevant for Indonesia, considering Indonesia is in the process of developing its national legal system, namely to put the basis and to establish national legal system including Criminal Law with its Criminal system. Philosophical thinking that can result in fundamental attitude towards capital punishment will bring us farther from uncertainty due to influence of outside Indonesia....the reason is that the founders of the state of the Republic of Indonesia has given a "benchmark" or "guideline", namely by stipulating Pancasila as the foundation or principle in the organization of common lives within the framework of organization, in short to stipulate Pancasila as the principle of state life. Therefore, it is reasonable if Pancasila is stipulated as the philosophical basis for the development and organization of laws in Indonesia. It means that Pancasila is a critical norm to develop and organize laws in Indonesia".*

Although the value and concept of human rights adopted by the 1945 Constitution have their history preceding the Universal Declaration of Human Rights, they still possess relevant universality, even though later on the value and concept of human rights in their development, have, through International Human Rights instrument, affected their institution creating process more comprehensively in the Indonesian legal system and constitution, where there is harmony between one another. Therefore, in interpreting the provisions in the principal part of the 1945 Constitution, the development of and interpretation on relevant concepts need to be observed. Moreover, after the ratification of Human Rights instrument, such as ICCPR and ICESCR and the entry of the Republic of Indonesia in the United Nations Human Rights Council, which have created Indonesia's commitment on international obligation which has arisen from the international convention and participation to international organization, will also give color on how the Constitutional Court as a State Institution authorized for such, must understand the constitutional norms in the 1945 Constitution.

After four times of amendment to the 1945 Constitution, the agreed/reached consensus deleted the Elucidation of the 1945 Constitution, but the values and understanding contained therein are still useful for historical interpretation, especially because in fact provisions of a normative nature in the elucidation are adopted and formulated as articles in the principal part of the 1945 Constitution. As a historical document, the elucidation can describe the spirit of the nation which was formed by the 1945 Constitution, which has been

said as the spirit of the administrators, who certainly were expected to be fully aware of the noble values contained in the 1945 Constitution, both in the **Preamble as well as in the Principal Part**.

Pancasila which has become the philosophy of life and spirit of the State and Nation established through the proclamation which was announced all over the world, shall bind all the citizens, the state's administrators and every person within the territory of the Republic of Indonesia and at the same time if necessary shall be regarded as the **special right** or **privilege** to obtain respectable treatment in the form of **independence which is the right of all nations**, which takes the form of independence limited by laws spelled out based on the philosophy of life of that nation. The principal value of this review is what has been inherited by the **founding fathers** as a high value of justice and humanity in a sentence in the Preamble to the 1945 Constitution as follows: *"... Indonesia's National Independence shall be enshrined in the Constitution of the State of the Republic of Indonesia, established within the structure of the State of the Republic of Indonesia with the sovereignty of the people based upon Belief in The One and Only God, just and civilized Humanity*,*..."*.

The value containing in the principle (*sila*) of Belief in The One and Only God and Just and Civilized Humanity as contained in the Preamble to the 1945 Constitution is a moral principle which becomes the spirit, basic motivation, guideline and aspirations of all laws and regulations to be formulated as operating norms derived from the 1945 Constitution which regard human beings

as very valuable creatures created by God and who possess high status because of his/her being given mind and moral by God. Such aspiration of laws which regarded human beings as creatures created by God who are very valuable with their high status and dignity, is the principal of fundamental state norm or ***staatsfundamentalnorm*** which must become the basis and must be reflected in the legal norms and provisions which shall bind all citizens, which operationally are spelled out in the principal part of the 1945 Constitution as the basic norm as contained in Article 28A, on the right to life and the right to defend his/her livelihood, and Article 28I paragraph (1) on the right to life which cannot be reduced under any circumstances, based on which, the protection and fulfillment of such right to life must be regarded as state's responsibility, in particular, the Government. A country that bases its treatment to every person – citizen or non-citizen – on a high civilized nation which highly respect human dignity and status as part of the nobility character of *Pancasilais* people, means that human beings as fellow man in social, nation and state's life is placed in a noble position. As a highly valued subject, both in the position of the governed people as well as the authorized state's governing party, in such a whole quality must reflect the value of **just and civilized humanity based upon Belief in the One and Only God**. The Preamble to the 1945 Constitution contains the substance which obliges the Government and other state administrators to maintain the noble character of humanity that respect human's status and dignity as a firmly-held national civilization and as moral aspirations of noble people. This aspiration of laws (*rechtsidee)* shall control the state's basic laws, as the spirit of the Constitution

which will become the parameter of constitutionality for implementing the provisions of the laws derived from the 1945 Constitution.

Based on such spiritual situation, Preamble and the Principal Part of the 1945 Constitution which are full of constitution morality principles, constitute guiding values in reading our constitution as a test case (*moral reading of the constitution*) which, thereafter, must be reflected in the Indonesian laws and regulation. Based on a consistent attitude in upholding the principle of noble human character, we can see the essence and meaning of ”*the right to life*” as regulated in Articles 28A and 28**I** paragraph (1) of the 1945 Constitution. The right to life which is a translation of *“the right to life”* in international practice has two interpretations:

a. Restricted interpretation/approach, which limits the intended protection to capital punishment, abortion and extrajudicial execution.

b. Broader interpretation/approach, which is the latest development that tries to introduce substance having economic and social nature, namely the right to life consisting of the right to food, employment, health care, healthy living environment (William Schabas, 2006). ”*The Right to life”* is interpreted as the right to a quality that distinguishes human being as creatures with dignity, which is very vital and functional compared to a dead body or thing, while ”*The right to live”* is interpreted as the right to continue life or have a living. It seems that such broad interpretation has

also been adopted by article 9 of Law Number 39 Year 1999 concerning Human Rights.

The right to life, be it to continue the existence of his/her life or the right to food and care to defend her/his life, is regarded as the right given to human beings who have high position, because the life of human beings is very valuable with all its status and dignity, which is an opinion based on noble character mandated by the 1945 Constitution. Therefore, as the most precious and highest right that must be highly upheld in the life of human being as a gift from God, it would be advisable that applicable laws and regulations also place human being's lives in a respectable position, both in role and position and also social responsibility and legal responsibility, and also related to their rights and obligations. The humanity values which highly uphold human's status and dignity as a reflection of the noble character of the nation of Indonesia, which places the right to life as the highest human rights, has produced logical consequence and by itself that applying capital punishment is something which shows internal contradiction and disharmony with basic value and recognition of such right to life. Such view and opinion, as value and aspiration of laws, do not by themselves, free Indonesian people from legal responsibility, because as a rule of law state and based on constitution which protects human rights of all its citizens, contains reciprocal constitutional obligations to respect other people's human rights, with all the legal consequences which arise from aspiration of justice laws for all of Indonesian society.

Constitutional protection guaranty of right to life regulated in article 28A, which by Article 28I paragraph (1) of the 1945 Constitution is declared as one of the non-derogable rights, but on the contrary based on article 28J paragraph (2) is restricted, which by some parties is interpreted that the right to life is not absolute, so that it is also interpreted that capital punishment is not contrary to the constitution. I can understand that such interpretation stems from the unclear formulation of relationship between the right to life in articles 28A and 28I paragraph (1) and whether or not capital punishment is allowed in Indonesian legal system. The understanding of the right to life as one of non-derogable rights in the context of international Human Rights instrument, as stated by the Government and its expert and the related Party that Article 6 Paragraph (2) of ICCPR still allows the imposition of capital punishment to the most serious crimes. So does the Preamble to the UN Convention Against Illicit Traffic in Narcotics, Drugs and Psychotropic Substances 1988, which states that narcotics crimes become a threat to human health and welfare, and also undermines the economy foundation and political foundation of the society, especially because it involves children, so that a participating state is allowed to adopt action which is more severe than imprisonment, fine, seizure of goods obtained from criminal acts and others, has been interpreted as a justification to capital punishment. However, both need further test.

Regardless of our agreed opinion that narcotics crime has caused agony and threat that impair the future of the nation, which in reality can happen to any family in Indonesia, and regardless of our expected definition that such crime is

the most serious crime, although it is not in accordance with the internationally determined standard to justify imposition of capital punishment, it would be advisable to submit an accurate analysis without involving anger, disappointment and hate and also distrust, which is able to see the issue objectively and clearly. The fight against narcotics crime as an internationally organized crime, clear integrated comprehensive state policy is needed, with the involvement of all state's institution and state's administrator from the highest level to the lowest together with all elements of the society as a whole. Narcotics trading which is currently extends beyond state's boundaries, has become a threat to non-military security, with the territory of Indonesia that is stretched open and difficult to watch, becomes a vast open door for drug-trafficking to be handled with rationally independent crime control policy. Therefore, partial argumentation to justify capital punishment because it is deemed to have a strong deterrent effect, which in fact is not supported by criminology and sociology studies, can be regarded as one of such rational policies, which for the territory of Indonesia does not provide satisfactory answer. The cause of the increase of narcotics crimes is not solely depend on whether or not capital punishment is exist in our legal system. As has already been mentioned, the open territorial condition, global mobilization of people bringing all ideas – including idea and influence, including the bad ones, our failure to respond to the fast changes which were happening in all sectors, social, cult rural, economy along with structural poverty which must be coped, must be seen as part of the implemented management. If we leave the problem solution solely on capital punishment, would mean simplifying the issue too

much. If that is the case, then the focus should be policy and action, and not whether to adopt capital punishment or not. It is undeniable that capital punishment guarantees that the punished criminal will not repeat his/her criminal act, and will give effect to other prospective perpetrators. However, it cannot be denied that it is not the only method. Other type of punishment can achieve the same objective without sacrifice our humanity. Therefore, the action effectiveness is based on integrated policy, by making use of all power of the law enforcers, state's organ in charge of security, and all elements of the society, by making use of relevant scientific discipline is a logical choice. The expert's statement with regard to experience in the United States of America, states that it is not the heavy punishment that will reduce or prevent narcotics crime, but what is the best method to reduce the serious problem of narcotics through medical care and rehabilitation of the perpetrator that will reduce the market and the demand for narcotics which will terminate narcotics distribution business.

Consideration of Justice Chaskalson from Constitutional Court of South Africa in the case of ***Makwanyane*** can support such opinion, by his words, which are relevant to be quoted, as follows:

The need for a strong deterrent to violent crime is an end the validity of which is not opens to question…In all societies there are laws which regulate the behavior of people and which authorize the imposition of civil or criminal sanctions on those who act unlawfully. This is necessary for the preservation and protection of society. Without law, society can not exist. Without law individuals

in society have no rights. The level of violent crime has reached an alarming proportions. It poses a threat to the transition to democracy, and the creation of development opportunities for all, which are primary goals of the Constitutions. The high level of violent crime is a matter of common knowledge and is amply borne out by the statistics provided by the Commissioner of Police…The Power of the State to impose sanctions on those who break the law can not be doubted. It is of fundamental importance to the future of our country that respects for the law should be restored, and that dangerous criminals should be apprehended and dealt with firmly. Nothing in this judgment should be understood as detracting in any way from that proposition. But the question is not whether criminals should go free and be allowed to escape the consequences of their anti-social behavior. Clearly they should not; and equally clearly those who engaged in violent crime should be met with the full rigour of the law. The question is whether the capital punishment…can legitimately be made part of that law.

The greatest deterrent to crime is the likelihood that offenders will be apprehended, convicted and punished. It is that which is presently lacking in our criminal justice system; and it is at this level and through addressing the causes of crime that the State must seek to combat lawlessness.

In the debate as to the deterrent effect of the capital punishment, the issue is sometimes dealt with as if the choice to be made is between the capital punishment and the murder going unpunished. That is of course not so. The

choice to be made is between putting the criminal to death and subjecting the criminal to the severe punishment of a long term of imprisonment which, in an apropriate case, could be a sentence of life imprisonment…Both are deterrents, and the question is whether the possibility of being sentenced to death, rather than being sentenced to life imprisonment, has a marginally greater deterrent effect, and whether the Constitutions sanctions the limitation of rights affected thereby.

In the history of punishment, deterrent effect of capital punishment has not succeeded either to fully reduce the intended criminal act to be fought. Classic and modern scientific evidence as has been explained by experts is in fact something which is undeniable. However, the facts set forth by the Government's expert and related party that because most countries in Asian still adopt capital punishment, then if Indonesia abolish capital punishment, then Indonesia will become market for narcotics. It is accompanied by a statement that, even with capital punishment sanction, the level of narcotics distribution is already so high, not to mentioned if it is abolished. Therefore, we must refer back to scientific research and the consideration of the Constitutional Court of South Africa which is quoted above, that it is not the heavy of the punishment, but the effectiveness and the appropriateness of the law enforcement. Concrete evidence of state which has abolished capital punishment can be used as reference, whether the concern of the nation and country destruction will materialized after capital punishment is abolished, by taking European countries as example and

comparing them with states in the United States of America which has abolished capital punishment and those which have not.

Therefore, the starting point of the review conducted by the Constitutional Court shall advisably come back to the philosophical judgment in accordance with the spirit and morality of the constitution contained in the Preamble of the 1945 Constitution, and thereafter to conduct interpretation on article 28J paragraph (2) which says that in exercising the rights and freedom – including the right to life in Articles 28A and 28I paragraph (1) of the 1945 Constitution which has non-derogable nature- is bound by the restrictions stipulated by the laws, which must be read in accordance with the principles, spirit and morality of the principles of Pancasila as contained in the Preamble of the 1945 Constitution, and related articles in its principal part.

The principles of Pancasila form a unity of Pancasila philosophy of life, which was based on the view that the nature and everything inside it which is related in harmony is a creation of the One and Only God. Every reality is unique, but only has a meaning in connection with another reality which is also unique. Therefore, its existence forms a principle that ”unity in differences” and ”differences in unity”. Every reality and the whole nature depend on God. (Arif Sidharta, Written Statement Text, Reflection on Capital punishment, p.8) The principles which are one unity, each of which is restricting one another and enriching one another, where human being are created by the God with the final objective to come back into their origin, namely the God. Human being are

completed with common sense and inner self which give the ability to distinguish the good and the one, humanity and inhuman. The common sense and inner self become the foundation of human's status, because common sense and inner self make someone responsible for his/her action and has the ability to control his/her self. Man who is created in nature of togetherness with other human being and reality in this universe, each his/her own unique personality, to form humanity. Every human to be able to remain human, must recognize and accept the existence of such unique personality as a consequence of the nature of togetherness. The recognition and acceptance of man self has an implication of the emergence of recognition and respect to human status, which also includes recognition and respect to "the sanctity of (human) life. (Arif Sidharta h. 11). The structure of human life in togetherness with their fellow man is based on family relation view. The legal order which is needed by man is able to create and develop a condition that enable man to properly realized him/her self completely and fully, and such condition only materialized if the starting point and the objective of establishing order is the recognition and respect to human status and dignity in togetherness which imply recognition on the sanctity of life. Therefore, the objective of the laws based on Pancasila is protection towards human being in togetherness with their fellow man, consisting of maintenance and development of human morals and aspirations of noble moral based upon the One and Only God.

If religious laws also justify the imposition of capital punishment because of the existence of the principle of an eye for an eye, then such matter must be

seen hermeneutically, namely that the text derived is in the context of the level of competence and development of human society at that time in organizing orderly common life in accordance with the laws which can be understood and level of institutional complexity at that time. However, God simultaneously gives people, common sense and knowledge concerning what is good and what is bad to develop themselves and their humanity. Since man eats fruit of knowledge through Adam and Eve, man must live by his/her knowledge to know which is good and which is bad. Man is continuously forced to make choices. In making this choice, man turns to knowledge (Jujun S. Suriasumantri, 2007:39). Such common sense and knowledge are privilege given by the God to man and not to other creature. This awareness and belief (*tauhid*) to God will determine the quality of the science progress. (Raharjo, 2006:6). In my opinion, the common sense and knowledge that produce science shall guide man to a better situation in the context of situation and his/her society development. The choice that is based on common sense and knowledge have enable claim of legal responsibility of the perpetrator by way of increasing further the dignity and status of man created by God, without reducing fairness, order and security, comfort in the society. Common sense and empirical experience of man in facing social challenges which flow historically in the process of confirmation and creation of theory, which submit to the mechanism of testing and denying (*falsification),* have disciplined man to be able to develop his/her civilization progressively through science with all the methodology to get higher and more complex every time. In the process of influencing each other amongst the human society, high level of

civilization and respect and assessment to humanity value which uphold human rights, as a reflection of such high dignity and status, is something which has never been rejected by human's common sense. Although sometimes, due to reason, which is often emotional and irrational, and social political and economic reasons, the respect and positive view towards more advance world civilization are just adopted without objectivity. History of human being as obvious from all the empirical evidence available before the Court, be it in international Human Rights instruments, empirical evidence of social studies, criminal philosophy and the objective of the punishment which see the deterrence factor as a justification of capital punishment, and also the study on the development of capital punishment all over the world clearly shows us that the human civilization is in the process of abolishing the capital punishment.

Therefore, it is reasonable to quote the statement of **Expert**, **Abdul Hakim Garuda Nusantara SH**.**LL**.**M,** Chairman of the National Commission for Human Rights at that time, who refers to the occurred process of change, in his brief statement as follows:

- An observation made by a Muslim Scholar in the field of Human Rights, Mashud Baderin in his book, *International Human Rights and Islamic Law,* finds out that most of Islamic countries which are still carrying out Islamic criminal laws are trying to avoid capital punishment through procedural and commutative provisions which are available in *syariat* (Islamic law) rather than

through direct prohibition. The prophet Muhammad SAW was also said to suggest the avoidance of capital punishment as much as possible.

- There are only 68 countries as of July 2006 which are still applying capital punishment, and more than half of countries in the world have abolished it for all categories of felonies. Eleven countries have abolished capital punishment for general felonies category, thirty countries have taken *de facto* moratorium not to implement capital punishment and a total of one hundred and twenty countries have given abolition to capital punishment. Currently, Indonesia has not yet ratified the second protocol of ICCPR although the National Commission for Human Rights has several times recommended ratifying such protocol.

- In the discussion in the National Commission for Human Rights, there is no longer a constitutional basis for capital punishment, and such product no longer has spirit, laws without spirit. Law without spirit in fact can be brought to life by authority, because of public emotion pressure which often is irrational and not enlightened. In fact its is admitted that there are some people in the National Commission of Human Rights who are still approving capital punishment, especially for brutal criminal acts.

By firmly upholding the 1945 Constitution, with spirit and values containing therein which form the nation’s constitution morality, we can understand that the right to life which we called one of non-derogable rights which cannot reduced in whatever case, creates a conclusion that the 1945 Constitution does not give the

right to the state to end someone's life – even someone who has done serious violation of laws – with capital punishment sanctioned by the laws established by the State. The interpretation that human being are recognized as creature created by God who possess status and dignity and sanctity of life, which are far better than other creatures, does not allow them to be treated harshly by imposing inhuman punishment. Such interpretation has also been manifested in the participation of the Republic of Indonesia in International Convention Against Cruel and Inhuman Punishment on September 28, 1998 based on Law Number 5 Year 1998 concerning Ratification to Convention Against Torture And Other Cruel, Inhuman or Degrading Treatment Or Punishment *(Konvensi Menentang Penyiksaan Dan Perlakuan Atau Penghukuman Yang Kejam, Tidak Manusiawi, atau Merendahkan Martabat Manusia*). Capital punishment as a form of cruelty done by the state on behalf of the laws cannot be interpreted other than cruel and inhuman and also inhumane. By quoting once again the statement of Justice Chaskalson, I also see death as a form of the most extreme punishment, which is final in nature and cannot be revoked, which will terminate, not only the right to life itself, but also all of other rights. In such meaning, it is not in doubt that capital punishment is a cruel punishment. Once sentenced to death, the convicted will wait for his/her death while the process of appeal, cassation and reconsideration or pardon is being submitted. During that time, the convicted who was sentenced to death will feel uncertain about his/her fate, whether he/she will finally receive commutation of sentence or even be freed absolutely.

Capital punishment is also inhumane, because of the nature of its punishment, capital punishment is a denial of humanity, and has the nature of degrading humanity because it takes off all the dignity of the convicted by treating him/her as an object that must be eliminated. Such thing is not in line with the value and morality contained in Pancasila as aspiration of the laws of the 1945 Constitution which respect and protect the life and status and also human dignity of the convicted, which can also be interpreted as respect to humanity as a whole, including the humanity of the legislators, law enforcers imposing the punishment and the executor, who at the process of deciding and executing capital punishment, have loss their humanity as well. Intentional human extinction by a state does not make human being human and seriously degrading the humanity value itself, which is respected by the state's constitution.

The limitation set forth in Article 28J paragraph (2) of the 1945 Constitution, cannot be interpreted as something that justify capital punishment which limits the right to life in Article 28I paragraph (1); the position of Articles 28J paragraph (1) and (2) is a general provision – which confirms that human rights as mentioned in Articles 28A to 28I, are not absolute because they cannot be taken off from the **obligation** to respect others, and can also specially limited based on the reason to guarantee recognition and respect to the right and freedom of others and to fulfill fair demand in accordance with consideration of morals, religious values, security and public order in a democratic society. Therefore, it is not meant to specifically limits Article 28I, especially which is used as the basis for justifying capital punishment, because the right to life that is

broadly interpreted as described above, caused **the limitation on the right to life cannot be interpreted as taking off the life itself**.

In order to determine whether the limitation in Article 28J paragraph (2) was, in fact, explicitly intended to contain justification of capital punishment, the Original Intent of the drafter of the 1945 Constitution regarding this issue cannot be clearly seen from the existing minutes. The fact whether the discussion of 28J paragraph (2) was related to the issue of whether or not capital punishment was allowed in the Indonesian criminal law system can neither be found from this minutes. Although the history of the 1945 Constitution's amendments involves the adoption of Human Rights in Chapter XA of the 1945 Constitution, which was done through the second amendment, by adopting and raising the content of Law Number 39 year 1999 concerning Human Rights. Elucidation of article 9 of the *a quo* Law explains that in a very extraordinary cases or situations, namely for the sake of his/her mother's life in an abortion case or based on a court's decision in criminal cases, abortion and capital punishment are still allowed. ***Capital punishment and abortion which are mentioned as exceptions*** in the a quo Law, do not use the norm in the 1945 Constitution itself, and if such was the intention of the drafter of the Amendment to the 1945 Constitution, the elucidation which has become a norm should be adopted to become part of the constitution's provisions.

Therefore, Article 28J of the 1945 Constitution is a limitation which applies to all human rights regulated in Chapter XA, it is also evident to us that the

weight of the stipulated rights is not the same, so that it is only logic if the method to put limit shall not be the same. There is limitation which is interpreted as temporary postponement such as the right to express opinion and to communicate and obtain information, the right to choose a place to live, can be limited by temporary postponement because of war or natural disaster. However, with regard to the right to life, there is no clue which stipulate that the limitation on right can be done through eliminating the right to life itself, although it is recognize and has become part of other people's human rights which must also be respected, the right to life can be limited because the laws has decided justice to bring back balance which has been impaired by the committed offense in the form of limitation on the scope of activities by placing him/her in a special place and undergo certain obliged development. Therefore, even though it is understood that the right to life is not to be interpreted as absolute in nature and hence can be limited, then such limitation cannot be interpreted as right of the state to eliminate the life itself, and consequently cannot be interpreted as granting authority to the Government and the legislators to regulate and to impose capital punishment to a criminal who has been declared guilty for committing certain serious criminal acts.

Once again Capital punishment: Deterrence/Prevention?

This argument has been broadly used by experts, both presented by the Government and some experts invited by the Court, and also has been intensively brought forward by the **Government** and ***BNN*****,** that capital

punishment has deterrent effect towards perpetrators, and is badly needed to prevent the ever increasing narcotics crimes, which have caused many victims, and have endanger the future of the nation. It has also been said that even when the capital punishment is still implemented, the level of narcotics crime is still so high, and Indonesia will become heaven for narcotics distributor if capital punishment is abolished. It is not denied that the level of narcotics crime and its effect on young generation are very apprehensive, in fact, has reached the limit of patience of many families, which have caused anger and high emotion, so that it might be possible that we are trapped in a desire for a concept of deterrence with a cruel element. It is also undeniable, that capital punishment, like any other types of punishment, certainly has certain deterrence towards potential perpetrator individually as well as towards the society as a whole. However, the issue of deterrence is not merely a result that can solely be achieved by capital punishment. The settlement and the method which tend to justify cruelty to be done to (narcotics) criminals as an effective method, in fact will makes us face the history test in achieving high civilization of the nation. Although the argument of degree of error in imposition of capital punishment has been very famous in the history of criminal laws, and with regard to narcotics crimes, such things can be prevented through a leveled judicial process in criminal justice system which enables check and recheck, it is not such thing that becomes the principal issue to us. The principal issue now is there empirical scientific evidence to support the argument that capital punishment is the only deterrence factor which is extraordinarily effective which cannot be achieved by other method, so that it can

subjected the philosophical argument in the constitution as the highest laws to such utilitarian-speculative argument, although temporarily.

Scientific argument brought up by experts before in the hearing before the Court concerning the **non-absolutism** of capital punishment effectiveness as deterrence*,* which can be referred to experts presented before the Positional Court, in fact revealed the contrary. The starting point of such argument which actually has occurred for centuries, and reoccurred in this constitutionality review, although scientifically still be regarded as important, nevertheless it no longer becomes the focus or basic thought. Philosophical perspective with a test case of the 1945 Constitution which is full of moral and ethical values in its preamble which gives color to the relevant principal part of the 1945 Constitution, must become common guideline in the review of constitutionality of the *a quo* norm.

The statement of expert **Jeffrey Fagan** conforms to our opinion, which basically has explained the following:

- There is no scientific evidence that severe punishment prevents narcotics distribution, and the distribution level is still high although more than one million people have been imprisonment because of it. In countries which applied capital punishment more often, the relationship between capital punishment and deterrence of narcotics distribution is not obvious, impact which reduces the distribution and price change of narcotics does not occur. Price is the most sensitive thing; with such high risk to take, the price gets

higher. On the contrary, facts show that in countries where capital punishment is not implemented, the price in fact is higher.

- In the study of the United Nations (UN Officer on Drugs and Crime*)*, it was reported that three neighboring countries which have very different policy in execution in and level of narcotics consumption. Between the year of 1999-2005, Indonesia has executed capital punishments of 7 (seven) people, Singapore 106, and Malaysia 10 people. Based on this report, it is evident that the price of *cocaine and heroine are far more expensive in Indonesia than in Singapore and Malaysia.* Actually if the deterrence has very strong influence, the contrary will happens.

Economic Analysis of Law

The approach taken in the study of *economic analysis of law,* as well as comparative study on laws and economics, brings doctrine of laws in submission to cost and benefit analysis and also the concept of economic efficiency, which gives the possibility to make a certain conclusion concerning social consequences and values of certain legal provisions. The concept of man as a logical maximizer of his/her own interest, means that a person has response towards incentive, namely that, if the surrounding situations of someone changes in such a way that he/she can increase his/her satisfaction by changing attitude, hen he/she will take that attitude (Richard A Posner, *Economic Analysis of Law*, 1986, p.4).

We can elaborate such theory which is based on the assumption that the perpetrator takes decision to commit or not to commit based on cost and benefit consideration. He/she will not commit the crime if the expected benefit is less than the cost which may arise. In this case, there are two cost of crime which must be considered, namely:

a. The ability of the authority to catch and to adjudicate the perpetrator. [(P)robability to adjudicate].

b. Expected maximum punishment [(S)anction].

The multiplication of these factors will be the calculated as potential cost of a perpetrator. Suppose the cost is C, then C is P (the ability of the authority to catch and adjudicate) multiplied by S (expected maximum punishment). So that based on such argumentation, crime control policy can be directed by increasing the probability of detected crime (P) or by increasing sanction, so that cost which is higher than the benefit can prevent the perpetrator rationally not to commit crime. Attention must be focused on cost or budget of the criminal justice system, including operating cost budget to detect or to capture the perpetrator and the cost of sanction. Cost is an important variable if increase probability of detected crime is to be exchanged with increase of maximum punishment. As an example, suppose S is equal to 100,000 and P is equal to 0.01, then the cost to be borne by the perpetrator is 1,000. By increasing maximum punishment or by increasing the probability of detected crime, for example two times, then the cost

of crime that must be borne by the perpetrator will doubled, (C=C2). However, the two methods to achieve this result are not equally easy.

It is possible that through the policy of increasing the maximum punishment will reduce efforts to increase the capture of the perpetrator. Therefore, an argument emerges that increasing crime cost by S(*anction)* variable compared to increasing the probability of capturing the perpetrator (P), will require less cost budget to the state, and consequently, increasing maximum punishment which is regarded as a way towards high deterrence but low level detection – because of low operating budget – is regarded as beneficial from the point of view of cost budget required for crime control which is deemed quite sufficient. Therefore, the policy that determine capital punishment as maximum punishment which is argued as deterrence*,* gives high hope for the effectiveness of law enforcement which is thought to be sufficient with minimum budget is actually reducing the probability of capture and adjudication of the narcotics criminal, which according to expert, has already been proven in scientific research, in fact, just becomes a more principal instrument in preventing and reducing narcotics crimes.

Therefore, there is no justification from the side of expected deterrent effect of capital punishment, logically, proportionally and reasonably, which can serve as a basis to deviate from constitution’s morals basic philosophy contained in the 1945 Constitution which does not grant authority to the state to impose capital punishment.

Based on such considerations, I am of the opinion that capital punishment, not only as contained in Law Number 22 Year 1997 on Narcotics, but concerning all laws outside or inside the Indonesian Criminal Code stipulating capital punishment, are contrary to the 1945 Constitution which advisably shall be declared as having no legal binding effect. However, it must be understood that such statement has broad implication, so that if this is become the opining of the Constitutional Court, then sufficient times are required by the Legislators to harmonize many things in Indonesian legal system. If capital punishment is to be abolished, then Amendment to Indonesian Criminal Code, must be made, which involves criminal system that does not use absorption system in punishment imposition, but instead use **cumulative system**, maximum additional punishment of **more than 20 years imprisonment** for serious offenses, to allow imposition of **imprisonment for life without the possibility of obtaining remission**, addition to types of principal punishment with social work, additional punishment in the form of seizure of all of the assets of the perpetrator which are deemed as assets resulting from narcotics crime, and also some other relevant adjustment, All of it to show that severe attitude in preventing narcotics crimes through a series of appropriate and integrated crime control policy, without obliging the state to do cruelty through imposition of capital punishment. Therefore, Indonesia will proof itself as a state that respect the status and dignity of human being and also highly uphold the sanctity of life, which can be followed by young generation of the nation towards ideal society. We must also show to the whole world that we are consistent in bringing into reality the values and philosophy of life of

Pancasila, as a basis to build human being civilization which highly uphold the humanity value and status towards the future. Building a high civilization through elimination of narcotics distribution, or at least, drastically reducing it, requires strong attitude and discipline, however strong attitude is not identical with violence. By that, we expect that Indonesia will have high moral basis to demand protection to its citizens all over the world, most of whom have experienced violation of human rights, including in the form of capital punishment sanction, which, in fact, is the obligation of the state to respect, to protect, and to fulfill.

We have laid the commitment to build the future through recognition of human dignity and status as part or essence of the right to life, therefore the doctrine of respect to the life and human status is a guideline for the state to make man human in the Indonesian society. Capital punishment which is not in accordance with the parameter of just civilized humanity must be abolished. It is possible that previously such punishment was regarded as not violating humanity, but currently, it must be seen from the sensitivity that grows along the history of our civilization in the middle of world civilization, which should be based on the nation's morality and philosophy of life in the Preamble of the 1945 Constitution. The diminishing of the right to life of a victim has occurred because of awareness or individual values of the perpetrator, which actually is not a basis and value to be used in harmony recovery in the society because of the committed crime. It is just the nation's awareness collectively that must form applicable values as contained in the Preamble and Principal Part of the 1945 Constitution.

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