INDONESIA'S USE OF CAPITAL PUNISHMENT FOR DRUG-TRAFFICKING CRIMES: LEGAL OBLIGATIONS, EXTRALEGAL FACTORS, AND THE BALI NINE CASE

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> *[I]n 1989 I remarked that 'no one can embark upon a study of the death penalty without making the commonplace observation that from a philosophical and policy standpoint there appears to be nothing new to be said.' This is still true: the arguments remain essentially the same. Yet the balance has changed, and the nature of the debate has moved on. There can be no doubt that the greater emphasis on the 'human rights' perspective on the subject has added greatly to the moral force propelling the abolitionist movement. It has further 'internationalized' what was formerly considered an issue solely for national policy. And those who still favour capital punishment 'in principle' have been faced with yet more convincing evidence of the abuses, discrimination, mistakes, and inhumanity that appear inevitably to accompany it in practice.*[1]

INTRODUCTION

As reflected in Professor Hood's quote above, worldwide debate over the role and legality of capital punishment is increasing.

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1. Roger Hood, The Death Penalty: A Worldwide Perspective 7 (3d ed. 2002).

In December 2007, the U.N. General Assembly passed a resolution calling for a moratorium on the death penalty, by a vote of 104 to 54, with 29 abstentions.[2] Within the United States, New Jersey recently abolished the death penalty,[3] and the Supreme Court reconsidered whether lethal injection is "cruel and unusual punishment," in contravention of the Eighth Amendment.[4]

Besides an executive or legislative decision to abolish capital punishment, challenges through the judicial system are a common way to restrict capital punishment. There are two sources of legal obligations, each with their own means of execution: the sovereign state's constitution, and the state's international obligations through treaties and other agreements. The problem with using international obligations—i.e., human rights treaties—to abolish the death penalty is that they are often written ambiguously, in order to encourage more states to participate. Ambiguous language places fewer concrete and enforceable burdens on each signatory. When a state's activity is challenged under such a provision, the legality of the actions turns on the relevant judiciary's interpretation of the ambiguous language.

Partly as a result, capital punishment is an atypical human rights violation: states which retain it openly acknowledge that fact, and it is explicitly provided for in their criminal statutes. It is not (to them) illegal and, unlike most human rights violations, exposure of a state's use of capital punishment does not result in promises to end the practice and explanations for why it has continued. For this reason, challenges to the death penalty may require a change of opinion in that state's legislature or relevant judicial body. Such a change of opinion requires open debate and will be affected by many extralegal factors.[5] One such challenge took place in the Indonesian judicial system in 2007.

2. Warren Hoge, *Assembly Calls For Freeze On Death Penalty*, N.Y. Times, Dec. 19, 2007, at A14.

3. 2007 N.J. Sess. Law Serv. 777 (West); Jeremy W. Peters, *Corzine Signs Bill Ending Executions, Then Commutes Sentences of 8*, N.Y. Times, Dec. 18, 2007, at B3.

4. Baze v. Rees, 128 S. Ct. 1520, 1523 (2008) (finding that lethal injection does not cause unnecessary pain).

5. The possibility of Indonesia abolishing capital punishment through nonjudicial means—i.e., through legislation or a presidential decree—is largely informed by the same factors discussed here, but is beyond the scope of this Note due to the political and other issues it raises.

This Note argues that, though Indonesia had a legal obligation to abolish capital punishment as a punishment for drug-trafficking crimes under its constitution and applicable international law, as interpreted by relevant international bodies, its judiciary was able to find sufficient ambiguity in the wording of each obligation to buck the international trend of abolishing capital punishment. Furthermore, it argues that this result was partly due to factors which inhibit free and open debate on capital punishment in Indonesia. Part I of this Note will explain the Bali Nine case, applicable law, and the events leading to their appeal to the Indonesian Constitutional Court (the *Mahkamah Konstitusi Republik Indonesia*, or MKRI). Part II will describe the MKRI and the arguments made by each side. Part III will examine various extralegal factors which may have affected the MKRI decision and which generally restrict Indonesia's debate on capital punishment. Part IV will explain and analyze the majority opinion and dissents from the MKRI's decision. Finally, Part V will conclude that the MKRI was able to find sufficient ambiguity in the wording of the 1945 Constitution and the ICCPR to allow capital punishment for drug-smuggling offenses, that this took place in part because the ICCPR lacked binding power, and that for capital punishment to be abolished in Indonesia, more debate—and more open debate—on the subject will be necessary.

I. THE BALI NINE, LAW NO. 22 OF 1997 ON NARCOTICS, AND THE APPEALS PROCESS

The Bali Nine are a group of Australian citizens who traveled to Bali[6] in April 2005.[7] The Australian Federal Police (AFP) had

6. Bali is an island off the East coast of Java that is one of the most popular tourist destinations in the world and which has a majority-Hindu population of over three million. Bali Tourism Board, About Bali, http://www.balitourismboard.org/index.html (last visited Jan. 9, 2009).

7. Rush v. Comm'r of Police (2006) 150 F.C.R. 165, 170 (Austl.). The main issue in *Rush* involved the actions of the Australian Federal Police with respect to the Bali Nine. The court denied a discovery request intended to help determine whether the Australian Federal Police had violated various Australian laws (the Death Penalty Abolition Act 1973 and the Australian Federal Police Act 1979) or committed the torts of negligence or misfeasance in public office, in supplying the Indonesian National Police with information which could lead to Australian nationals receiving death sentences. Although *Rush* is used here for general factual background, some of the facts are disputed. The evidence "was given by

alerted Indonesian National Police (INP) officials in Denpasar, the capital of Bali, that the nine Australians were involved in a plan to smuggle heroin out of Bali.[8] The AFP requested that the INP monitor the suspects and help them gather evidence, but also advised the INP to "take whatever action they deem appropriate" if they suspected that any of the Bali Nine were in possession of heroin during the observations.[9] The nine Australians were detained by the INP during their stay in Bali, and were found to have "what was alleged to be significant quantities of heroin."[10] They were charged in October 2005 with violations of Articles 82(1)(a) and 78(1)(b) of Indonesia's Law No. 22 of 1997 (the "Narcotics Law").[11]

Article 82(1)(a) punishes anyone who "imports, exports, offers for sale, traffics, sells, purchases, offers up, accepts, or acts as an intermediary in the sale, purchase or exchange of a Category I narcotic" with death, life in prison, or up to twenty years in jail and a fine of up to one billion rupiah.[12] Article 78(1)(b) punishes the possession or control of a Category I narcotic not in plant form with up to ten years in jail and a fine of up to five hundred million rupiah.[13]

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way of affidavit and without cross-examination," and there are "significant conflicts of evidence between witnesses." *Id.* at 170. The court in *Rush* did not set out to resolve issues of fact. *Id.*

8. *Id.* at 172.

9. *Id.* at 173.

10. *Id.* at 175.

11. *Id.* at 175, 179.

12. The first citation to all Indonesian statutes cited in this Note will include a hyperlink to an English translation of the cited statute that is available on the internet. Unless otherwise indicated, the author has used the cited English translation in writing this Note. Law of the Republic of Indonesia, No. 22 of 1997 on Narcotics, art. 82(1)(a), http://www.aseansec.org/Law%20of%20the%20Republic%20of%20Indonesia%20Number%2022,%20Year%201997%20on%20Narcotics.doc [hereinafter Law 22 of 1997] (English translation by Indonesian National Narcotic Board). One billion rupiah, at current exchange rates, is approximately US $91,324. International Monetary Fund Representative Exchange Rates for Selected Currencies, http://www.imf.org/external/np/fin/data/rms_rep.aspx (last visited Jan. 5, 2009) (displaying 1:10,950 as the representative exchange rate issued by the central bank for the Indonesian rupiah on January 5, 2009).

13. Law 22 of 1997, *supra* note 12, art. 78(1)(b). The Appendix to Law 22 includes heroin among the twenty-five listed Category I narcotics. *See* Law 22 of 1997, *supra* note 12, app. A(19) (placing heroin in Narcotics Category I). Five hundred million rupiah, at current exchange rates, is approximately US $45,662 .

Australia tried diplomatic means to avoid capital punishment for the Bali Nine before sentencing occurred. Specifically, in December 2005 Australia's Foreign Minister requested that Indonesia's Attorney General not seek the death penalty in the Bali Nine case.[14] Similar appeals were made by the Australian Embassy in Jakarta to the Indonesian Foreign Minister and by the Australian Attorney General and Minister for Justice and Customs to the Indonesian Attorney General.[15]

Despite these diplomatic efforts, in February 2006, the Denpasar District Court sentenced two of the nine, Andrew Chan and Myuran Sukumaran, to death for "exporting heroin in an organized ring and possessing a prohibited class-one narcotic," and sentenced the other seven to life imprisonment.[16] The Bali High Court upheld the two death sentences in April 2006 and reduced the prison sentences for five of the seven others to twenty years.[17] In September 2006, the Supreme Court (*Mahkamah Agung*) rejected the appeals of Chan and Sukumaran, and increased the penalty of four of the other Bali Nine members from twenty-year jail terms to death.[18] In March 2008, the Supreme Court reduced three of these death

International Monetary Fund Representative Exchange Rates for Selected Currencies, *supra* note 12.

14. Dale Bampton, Indonesia, Australia, and the Death Penalty: Options for Australians Facing Execution in Indonesia 17 (2006) (unpublished L.L.B. thesis, Sydney University) (on file with author) (citing Commonwealth of Australia, *Parliamentary Debates*, House of Representatives, Feb. 14, 2006, at 3 (statement of Alexander Downer, Minister for Foreign Affairs)).

15. *Id.*

16. Sian Powell, *Nine Lives in the Balance*, The Australian, Feb. 16, 2006, at 11, *available at* http://www.theaustralian.news.com.au/story/0,25197,18159587-28737,00.html.

17. Mark Forbes, *Court Upholds Death Verdicts*, Sydney Morning Herald, Apr. 27, 2006, at 3; Geoff Thompson, *Reduced Sentences for Five of Bali Nine* (Australian Broadcasting Corporation (ABC) radio broadcast Apr. 27, 2006), *available* at http://www.abc.net.au/pm/content/2006/s1625542.htm (explaining that the reduced sentences were based on the fact that those defendants' roles were limited to transportation, and that they were exporting the drugs, which poses a lesser threat to Indonesia than does importing them). The details of each appeal that was not to the MKRI go beyond the scope of this Note and will not be discussed further.

18. Mark Forbes, *Execution Shock for Bali Nine; Another Four Australians Sentenced to Death*, The Age (Austl.), Sept. 6, 2006, at 1, *available at* http://www.theage.com.au/news/national/execution-shock-for-four-of-the-bali-nine/2006/09/05/1157222131815.html?page=fullpage#contentSwap1.

sentences to life in prison,[19] leaving three members of the Bali Nine on death row, five with life imprisonment, and one with a twenty-year jail sentence.[20]

In February 2007, Chan and Sukumaran submitted an appeal to the MKRI.[21] They claimed that certain provisions in the Narcotics Law,[22] which allow capital punishment as an optional penalty for various drug-related crimes, violate Articles 28A[23] and 28I(1)[24] of the Indonesian Constitution of 1945 as amended (the "1945 Constitution"),[25] as well as the International Covenant on Civil and Political Rights (the "ICCPR"),[26] all of which protect the right to life. The MKRI rejected the appeal.[27]

19. Mark Forbes, *Bali Three Spared Death*, The Age (Austl.), Mar. 6, 2008, at 1, *available at* http://www.theage.com.au/news/national/bali-three-spared-death-penalty/2008/03/06/1204402565563.html.

20. *See infra* Appendix Table 1 (listing members of the Bali Nine, their initial sentences, and their sentences following final appeals).

21. Chan and Sukumaran filed their petition jointly with two female inmates in a special correctional institution for women in Tangerang. Due to similar subject matter, their case (No. 2/PUU-V/2007) was combined with that of another Bali Nine member, Scott Anthony Rush (No. 3/PUU-V-2007). *The Government Refuses to Abolish Capital Punishment*, Mahkamah Konstitusi Republik Indonesia [MKRI] [Constitutional Court of the Republic of Indonesia], Mar. 21, 2007, http://www.mahkamahkonstitusi.go.id/eng/berita.php?newscode=309 (last visited Jan. 7, 2009). The rest of this Note will discuss the two petitions together, because the MKRI considered them together.

22. *See* Law 22 of 1997, *supra* note 12, arts. 80–82 (dealing with the production, transit, import and possession of psychotropic drugs and narcotics).

23. Article 28A of the 1945 Constitution as amended provides "[e]very person shall have the right to live and to defend his/her life and existence." Undang-Undang Dasar Republik Indonesia [UUD'45] [Constitution] art. 28A, http://www.embassyofindonesia.org/about/pdf/IndonesianConstitution.pdf [hereinafter Indon. Const.] (English translation by the Embassy of the Republic of Indonesia in the United States).

24. Article 28I(1) of the 1945 Constitution as amended provides that "[t]he right[] to life . . . [is a] human right[] that cannot be limited under any circumstances." *Id.* art. 28I(1).

25. For an explanation of the necessity of designating the Indonesian Constitution by year, see *infra* note 150 (explaining Indonesia's multiple constitutions).

26. International Covenant on Civil and Political Rights, *opened for signature* Dec. 16, 1966, art. 6, S. Exec. Doc. E, 95-2, at 25 (1978), 999 U.N.T.S. 171, 174 (entered into force Mar. 23, 1976) [hereinafter ICCPR] (protecting the right to life); *see infra* Part II.B.2 (discussing Article 6 and its protections of the right to life). For a more complete discussion of the international legality of capital punishment for drug crimes, see Rick Lines, Int'l Harm Reduction Ass'n,

Following the MKRI's rejection of the petitioners' appeal, the only remaining domestic appeal is an appeal to the Supreme Court for a *peninjauan kembali* (PK), in which the Court reopens and reviews the case.[28] The PK is usually limited to whether the petitioner should be released, but it sometimes allows a sentence reduction.[29]

Outside the Indonesian judicial system, Australia could appeal to the International Court of Justice (ICJ), arguing that the capital punishment of its citizens is an imposition on its sovereignty.

The Death Penalty for Drug Offenses: A Violation of International Human Rights Law (2007), *available at* http://www.ihra.net/DeathPenalty.

27. *See infra* Part II.B (describing the petitioners' arguments to the MKRI); *infra* Part IV (describing the MKRI's decision). The petitioners also challenged provisions restricting MKRI access to Indonesian citizens as violating the International Convention on the Elimination of All Forms of Racial Discrimination, which requires states to ensure that non-nationals have equal access to courts and tribunals, but discussion of that challenge is outside the scope of this Note. Andrew Byrnes, *Drug Offences, the Death Penalty and Indonesia's Human Rights Obligations in the Case of the Bali 9: Opinion Submitted to the Constitutional Court of the Republic of Indonesia* ¶ 3(a) (U. New S. Wales L. Res. Series, Paper No. 44, 2007), *available at* http://www.austlii.edu.au/au/journals/UNSWLRS/2007/44.html (discussing the issue of standing for non-citizens); *see also* Sianturi/Indonesia, MKRI, 30 Oktober 2007, Decision No. 2-3/PUU-V/2007 138 (Indon.), *available at* http://www.mahkamahkonstitusi.go.id/download/putusan_sidang_eng_PUTUSAN%202_PUU_V_07%20-%20Hukuman%20Mati%20(Eng).pdf [hereinafter MKRI Decision No. 2-3/PUU-V/2007] (English translation by MKRI) (discussing Article 51 of Law Number 24 of 2003 which limits access to the MKRI to Indonesian citizens). The MKRI rejected this appeal, but ruled on the death penalty issue because the Australians were joined by Indonesian citizens in their appeal.

28. Bampton, *supra* note 14, at 20–21 (citing Tim Lindsey et al., *Early Plea for Clemency May Be a Mistake*, The Australian, May 30, 2005, at 9, *available at* http://www.cils.unimelb.edu.au/documents/lindsey_30-05-05.pdf (examining appellate procedure for a defendant when litigation is also ongoing in Australia)). This is in contrast to the first Supreme Court appeal, which asserts that there was a mistake in the sentencing or finding of the lower court, and usually has no formal hearing and does not involve more witnesses or further evidence. *Id.*

29. *Id.* at 24. The Indonesian President can also grant clemency. Indon. Const., *supra* note 23, art.14. There is also the slim possibility that the Bali Nine prisoners could be included in a prisoner exchange deal between Indonesia and Australia, but Kolier Haryanto, a spokesman for the Indonesian Justice and Human Rights Ministry, has said that drug traffickers will not be included in such a deal, though he added that Indonesia's position on the issue is not "fixed." Australian Associated Press (AAP), *Transfer Blow for Bali Nine, Corby*, The Age (Austl.), Mar. 11, 2008, http://www.theage.com.au/news/world/transfer-blow-for-bali-nine-corby/2008/03/11/1205125907124.html (last visited Jan. 9, 2009).

However, this was suggested in the case of Van Nguyen, an Australian citizen executed in Singapore in 2005 for drug trafficking, and the Australian government did not support the idea.[30] An ICJ challenge would also face many hurdles. It would be difficult to challenge an Indonesian court's jurisdiction in a case concerning conduct that took place in Indonesia. Moreover, the ICJ has no power to issue binding rulings unless both parties submit to it—it is extremely unlikely that Indonesia would submit to such an arrangement and allow the possibility of an injunction by the ICJ. Following an execution, Australia could claim that the execution was an international wrongful act and seek remedies such as an apology or restitution.[31] Such a claim would be seen as an extreme measure, and is one Australia is unlikely to make.[32]

II. MKRI ARGUMENTS

Section A of this Part will briefly describe the creation of the MKRI. Section B will discuss the petitioners' arguments and other factors supporting the petitioners' arguments. Section C will briefly explain the Indonesian government's justifications for using capital punishment for drug-trafficking offenses. Section D will discuss testimony of the Indonesian Narcotics Agency, and finally, Section E will discuss third-party testimony.

A. Background on the MKRI

The MKRI's creation was authorized in 2001 by the Third Constitutional Amendment[33] to the 1945 Constitution.[34] Under the

30. Bampton, *supra* note 14, at 18.

31. *See generally* International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts with Commentaries, arts. 1–3, 34–37 (2001), *available at* http://untreaty.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf (describing state responsibility and remedies for international wrongful acts).

32. S*ee* Michael Hor, *The Death Penalty in Singapore and International Law*, 8 Sing. Y.B. Int'l. L. 105, 116–17 (noting that Singapore, which is not a party to the ICCPR or any other relevant treaty, is "unlikely" to face an international legal claim related to the death penalty, and "if it happens success is not at all clear given the present state of customary international law"). Hor does note, however, that given current trends, "there might well come a time when custom crystallizes" and does restrict capital punishment. *Id.* at 117.

33. *See infra* Part III.A.5.c (discussing amendments to the 1945 Constitution). There are two models of courts in which legislation or other

new Article 24C(3) of the 1945 Constitution, the Court comprises nine constitutional justices, with three each appointed by the President, the Supreme Court, and the People's Representative Council (DPR).[35] Law No. 24 of 2003 on the Constitutional Court created the Court,[36] and it was invested by the president in August 2003.[37] The justices serve coinciding five-year terms.[38]

The new Article 24C(1) of the Constitution allowed the MKRI to "make final decisions in the review of legislation against the Constitution."[39] This was limited by Law No. 24 of 2003 to laws passed after the First Constitutional Amendment—that is, after October 19, 1999.[40] However, among the first cases heard by the MKRI was a successful challenge to the limiting provision.[41] As a

political action can be challenged on its constitutionality: the American model (in which any federal court can adjudicate constitutional questions) and the European model (in which a special, designated court handles all constitutional challenges). Luke Allnut, *CIS: How Are Constitutional Courts Meant to Work?*, Radio Free Europe, Apr. 10, 2007, http://www.rferl.org/featuresarticle/2007/04/4ef9f008-45db-43f1-a0c4-393eab416fc2.html (last visited Jan. 9, 2009). The MKRI follows the European model. For more on European-model constitutional courts, see *generally* Donald L. Horowitz, *Constitutional Courts: A Primer for Decision Makers*, 17 J. Democracy 125, 125–28 (2006) (describing constitutional courts in general and discussing a stronger trend toward European-style constitutional adjudication in new democracies; American-style review is not common outside of the United States and Latin America).

34. Petra Stockmann, The New Indonesian MKRI: A Study into Its Beginnings and First Years of Work 15 (2007), *available at* http://home.snafu.de/watchin/ConstitutionalCourt.pdf; *see infra* Part III.B.3 (further discussing the MKRI).

35. Indon. Const., *supra* note 23, art. 24C(3); *see also infra* text accompanying notes 154–163 (discussing the DPR, which is basically a parliament with legislative power, and Indonesia's political structure).

36. Stockmann, *supra* note 34, at 16.

37. CIA, The World Factbook 2007 272 (2007).

38. Stephen Fitzpatrick, *Top Judge Favoured Bali Nine Appeal*, The Australian, Jan. 24, 2008, at 7, *available at* http://www.news.com.au/story/0,23599,23238653-31317,00.html (stating that all nine justices' terms will end "within months").

39. Petra Stockmann, Indonesian Reforms As Reflected in Law: Change and Continuity in Post-Suharto Era Legislation on the Political System and Human Rights 342 (2004). The Supreme Court continues to review legislation ranking below statutes against statutes. *Id.*

40. Stockmann, *supra* note 34, at 15.

41. Stockmann, *supra* note 34, at 30–33; *see also* MKRI Decision No. 2-3/PUU-V/2007, *supra* note 27 (discussing MKRI Decision No. 066/PUU-II/2004, in

result, it seems that the MKRI can now review any Indonesian legislation.

B. The Petitioners' Arguments

Because it is generally acknowledged that there is currently no customary international law restricting capital punishment,[42] the petitioners had two main legal bases for arguing that capital punishment should not be used in the context of drug crimes: the Indonesian Constitution of 1945 and Article 6 of the ICCPR.[43]

In addition to these legal arguments, petitioners argued that the philosophy of criminal punishment in Indonesia is "more focused on the efforts of rehabilitation and social reintegration for perpetrators of criminal acts," so punishment based on retribution or deterrence—such as capital punishment—should not be used.[44]

1. The 1945 Constitution

The Second Amendment to the 1945 Constitution added Chapter XA, dealing with human rights. Article 28A declares that "[e]ach person has the right to live and has the right to defend their life and their living."[45] Article 28I(1) includes this right to life in its list of "basic human rights that are not to be interfered with under any circumstances at all."[46] Article 28J(2) cautions that "each person is obliged to submit to the limits determined by law" in order to

which the Court held that Article 50 of the Constitutional Court Law has no binding legal force).

42. Hor, *supra* note 32, at 105–06.

43. It should be noted that because two cases were combined, *see supra* note 21, there were two sets of petitioners submitting arguments and experts to the MKRI. Particularly, Professor Byrnes, *supra* note 27, was called by petitioners in Case No. 3/PUU-V/2007, MKRI Decision No. 2-3/PUU-V/2007, *supra* note 27, at 20, while Professor Alston, *infra* note 53–54, was called by petitioners in Case No. 2/PUU-V/2007, MKRI Decision No. 2-3/PUU-V/2007, *supra* note 27, at 18. Both experts' legal arguments have different bases and styles. This Note will not differentiate between the two groups of petitioners because they faced the same legal issues. All experts mentioned in this Note were heard by the MKRI.

44. MKRI Decision No. 2-3/PUU-V/2007, *supra* note 41, at 16. Support for this description of Indonesian criminal punishment philosophy was found in MKRI Decision No. 013/PUU-I/2003, *id.* at 16, and in expert testimony, *id.* at 17.

45. Indon. Const., *supra* note 23, art. 28A.

46. *Id.* at 28I(1).

"guarantee[] justice" and "tak[e] into consideration morality, religious values, security, and public order in a democratic community."[47]

As the aforementioned articles show, the 1945 Constitution is among those which recognize a right to life, subject to unspecified limitations (as opposed to recognizing a right to life with explicit recognition of the death penalty as an exception).[48] Thus, two important characteristics of the 1945 Constitution are that it does not explicitly recognize the death penalty, and that it does not permit derogation of the right to life. Among states with similar constitutions, Hungary, South Africa, and Albania have declared the death penalty unconstitutional.[49] In contrast, the constitutions of Malaysia and Singapore have provisions qualifying the right to life, saying that it can be deprived in accordance with law[50]—this can be

47. *Id.* at 28J(2). Much of the language in Chapter XA parallels that of the ICCPR, but they will be discussed separately because state constitutions and international treaties differ in both persuasive power and rules of interpretation in domestic courts.

48. Expert Opinion from William A. Schabas, Director, Irish Centre on Human Rights, submitted to the MKRI 5 (May 2, 2007) (on file with author).

49. *Id.*; s*ee, e.g.*, A Mayagar Köztársaság Alkotmánya [Constitution] art. 54 (Hung.), *available at* http://www2.ohchr.org/english/bodies/cescr/docs/E.C.12.HUN.3-Annex2.pdf (English translation provided by the Office of the U.N. High Comm'r for Human Rights) ("everyone has the inherent right to life and to human dignity. No one shall be arbitrarily denied of these rights."), art 8(4) (allowing suspension of fundamental rights "with the exception of the fundamental rights specified in Articles 54" and others); S. Afr. Const. 1996 s. 11 ("Everyone has the right to life."), s. 37(5) (stating that the right to life is protected "entirely"); Constitution of the Republic of Albania art. 21 ("The life of a person is protected by law."); Stephen I. Pogany, *Human Rights in Hungary*, 41 Int'l. & Comp. L.Q. 676, 680–81 (1992) (discussing Hungary's Constitutional Court and its determination in 1990 that capital punishment was unconstitutional); Howard W. French, *South Africa's Supreme Court Abolishes Death Penalty*, N.Y. Times, Jun. 7, 1995, at A3 (discussing the South African Constitutional Court's finding that capital punishment violates the South African Constitution); BBC World Service, *Albania Abolishes Death Penalty*, Dec. 10, 1999, http://news.bbc.co.uk/2/hi/europe/558690.stm (last visited Jan. 9, 2009) (stating that Albania's Constitutional Court had found the death penalty unconstitutional).

50. *See* Sing. Const. art. 9(1) ("No person shall be deprived of his life . . . save in accordance with law."); Malay. Const. art. 5(1) ("No person shall be deprived of his life . . . save in accordance with law."); s*ee also infra* text accompanying notes 317–321 (discussing Southeast Asian regional capital punishment practices). Neither Singapore nor Malaysia is a party to the ICCPR. Office of the U.N. High Comm'r for Human Rights, Status of the Ratifications of

read as explicit allowance of capital punishment. Based on the right to life protected in Article 28A and Article 28I(1)'s declaration that that right is not to be interfered with "under any circumstances at all," petitioners argued that the 1945 Constitution does not support capital punishment.[51]

2. ICCPR Article 6

Indonesia acceded to the ICCPR on February 23, 2006, and issued no reservations or understandings.[52] The protection of the right to life in ICCPR Article 6 has two relevant aspects. First, ICCPR Article 6(1) states that "[e]very human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life." Second, ICCPR Article 6(2) states that any country using the death penalty may only impose it "for the most serious crimes in accordance with the law." Professor Philip Alston,[53] an expert witness for the petitioners, argued that for ICCPR Article 6 to have any meaning, it must be interpreted internationally and not by each state, as only an "objective and universal" standard can have meaning.[54] Therefore, the predominant interpretations of ICCPR Article 6 would be binding in Indonesian courts. As described

International Human Rights Treaties, July 14, 2006, http://www2.ohchr.org/english/bodies/docs/status.pdf (last visited Jan. 9, 2009).

51. Similarly, petitioners argued that because there is always a possibility that innocent people will be punished, and capital punishment is irreversible, capital punishment violates Article 28I(4), which requires the government to generally protect human rights. MKRI Decision No. 2-3/PUU-V/2007, *supra* note 41, at 14. 1945 Constitution Article 28I(4) reads: "The protection, advancement, upholding and fulfillment of basic human rights is the responsibility of the State, especially the Government." Indon. Const., *supra* note 23. The MKRI majority's decision did not discuss this argument.

52. Indonesia implemented the ICCPR domestically through Law No. 12 of 2005. Byrnes, *supra* note 27, ¶ 16.

53. John Norton Pomeroy Professor of Law, New York University School of Law, and Director of the Center for Human Rights and Global Justice.

54. Philip Alston, Opinion on Selected International Legal Issues Arising Out of Proceedings Before the MKRI to Challenge the Constitutionality of Provisions of the Narcotics Law Authorising Imposition of the Death Penalty ¶¶ 11–12 (May 1, 2007) [hereinafter Alston Report] (unpublished expert opinion submitted to the MKRI) (on file with author) (arguing that capital punishment is arbitrary if it is for an offense other than the most serious offenses).

below, petitioners argued that under the prevailing interpretations of ICCPR Article 6, Indonesia's drug laws satisfy neither aspect.[55]

a. The "No Arbitrary Deprivation" Standard

ICCPR Article 6(1) states that "[n]o one shall be arbitrarily deprived of his life." Petitioners argued that even if drug trafficking is considered one of the "most serious" crimes, allowing the death penalty in such cases would be arbitrary if the main goal of the death penalty is shown not to be met.[56] Additionally, capital punishment for a crime that is not among the most serious,[57] or imposed by a court which is not infallible,[58] constitutes arbitrary deprivation of the right to life.

Professor Jeffrey Fagan,[59] an expert witness for the petitioners, described extensive studies showing that criminals are deterred more by an increase in their likelihood of apprehension than by an increase in the magnitude of their punishment, meaning that likely capture is a more effective deterrent than potential death.[60]

55. Petitioners also argued that because international human rights instruments such as the ICCPR were referred to in the drafting of the constitutional provisions at issue here, those constitutional provisions should be interpreted in light of such international human rights instruments. MKRI Decision No. 2-3/PUU-V/2007, *supra* note 41, at 15.

56. Byrnes, *supra* note 27, ¶ 87.

57. Alston Report, *supra* note 54, ¶ 12.

58. *See infra* text accompanying notes 71–72.

59. Professor of Law, Columbia Law School, Professor of Sociomedical Science, Mailman School of Public Health, and Co-Director of the Center for Crime, Community, and Law.

60. Jeffrey Fagan, Deterrence and the Death Penalty: Expert Opinion and Testimony to the MKRI 19 (May 2, 2007) [hereinafter Fagan Opinion and Testimony] (unpublished expert opinion submitted to the MKRI) (on file with author); *see also* Naci Mocan & Kai Gittings, *Getting off Death Row: Commuted Sentences and the Deterrent Effect of Capital Punishment*, 46 J.L. & Econ. 453, 465 (2003) (finding that increased homicide arrest rates have a statistically significant and negative correlation with homicide rates). Indeed, in *State v. Makwanyane*, the case in which the Constitutional Court of South Africa found capital punishment unconstitutional, court president Arthur Chaskalson noted that "[t]he greatest deterrent to crime is the likelihood that offenders will be apprehended, convicted and punished" and that it is not true that "the choice is to be made . . . between the death sentence and the [crime] going unpunished."*State v Makwanyane & Mchunu* 1995 (3) SA 391 (CC) at 122–23 (S. Afr.), *reprinted in* The International Sourcebook on Capital Punishment 127, 164 (William A.

Thus, it can be argued, since Indonesia is using deterrence as a primary justification for its use of capital punishment in drug trafficking cases,[61] such deprivation of life is arbitrary.

Though petitioners did not make this argument, on an individual level it appears that drug traffickers both underestimate the risks they face[62] and overestimate their chance of success[63]—both tendencies act to decrease capital punishment's power to deter them from such crimes.

Professor Fagan discussed the apparent deterrent effect of capital punishment in Southeast Asia by comparing the experiences of Indonesia and Singapore.[64] Despite Indonesia's much larger population, Singapore executed almost fifteen times as many convicts as did Indonesia between 1999 and 2005.[65] If capital punishment had a deterrent effect on drug trafficking, this would lead to less drug trafficking, and therefore higher wholesale drug prices, in Singapore. However, wholesale drug prices for both cocaine and heroin were significantly higher in Indonesia than in Singapore from 2003 to 2006,[66] and drugs generally were more prevalent in Singapore than

Schabas ed., 1997), *available at* http://www.alrc.net/doc/mainfile.php/cl_safrica/218/.

61. *See infra* text accompanying note 89 (Indonesian President Susilo Bambang Yudhoyono describes deterrence and justice as the two justifications for capital punishment in drug crimes); *see also infra* text accompanying notes 384–387 (discussing the U.N. Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances and the MKRI's recommendation that states give "due regard to the need to deter the commission" of drug crimes).

62. Fagan Opinion and Testimony, *supra* note 60, at 41; *see also* Scott H. Decker & Margaret Townsend Chapman, Drug Smugglers on Drug Smuggling: Lessons From the Inside 133–36 (2008) (discussing drug smugglers' inability to balance risk and reward and their underestimation of the likelihood of apprehension; 63% said they would continue to smuggle drugs if they faced a fifty-in-one-hundred chance of capture). In fact, some drug smugglers are unaware of the potential penalties they face, completely nullifying any deterrent effect such penalties may have. *Id.* at 132. "Indeed, as far as some crimes threatened by capital punishment in several countries are concerned, such as importing or trading in illegal drugs, there simply is no reliable evidence relating to the deterrent effects of executions." Hood, *supra* note 1, at 209.

63. Fagan Opinion and Testimony, *supra* note 60, at 41; *see also* Decker & Chapman, *supra* note 62, at 133–36 (discussing the overwhelming effect of drug smugglers' potential financial gains, including one smuggler's comment that "the money overrode any—any rational judgment").

64. Fagan Opinion and Testimony, *supra* note 60, at 43.

65. *Id.* at Table 2.

66. *Id.*

Indonesia in that period,[67] indicating that drug trafficking was not deterred as a result of Singapore's high levels of capital punishment.

Given Indonesia's low execution rate,[68] Professor Fagan argued, it is unlikely that there will be a very strong deterrent effect among drug traffickers in Indonesia.[69] If very few people are executed, drug traffickers are less likely to know about such executions, and are less likely to take them into consideration when deciding whether or not to engage in drug trafficking activities.[70]

In addition, petitioners argued, arbitrariness can be thought of as the acceptable margin of error for a given punishment. Because of the extreme nature of capital punishment and its finality, the injustice of any verdict that is later shown to have been wrong is magnified. This could undermine the Court's credibility[71] and is further support for the argument that capital punishment for drug trafficking crimes constitutes an arbitrary deprivation of life.[72]

b. The "Most Serious Crimes" Standard

The petitioners also argued that drug trafficking was not among "the most serious crimes" discussed in ICCPR Article 6(2),[73] and that as a result Indonesia may not use capital punishment for such crimes. The U.N. Economic and Social Council (ECOSOC) and

67. *Id.* at 43.

68. *See id.* at Table 2 (showing executions in Indonesia from 1999 to 2005, with a high of three and a total of seven). The MKRI hearings took place during a fourteen-month hiatus of executions in Indonesia, which ended with the executions of two Nigerian drug traffickers in June of 2008. Peter Gelling, *Indonesia Expanding Use of Death Penalty*, Int'l Herald Trib., Jul. 12, 2008, at 3, *available at* http://www.iht.com/articles/2008/07/11/asia/indo.php.

69. Fagan Opinion and Testimony, *supra* note 60, at 48.

70. *Id.*

71. *Id.* at 33–36. Professor Fagan also discusses the tradeoff involved in a court's willingness to use capital punishment: if it is too rare, it will have no deterrent effect, but if it is used frequently, the danger of executing the innocent increases. *Id.*

72. For example, even the United States judicial system—which has a much better reputation than that of Indonesia—has been found to have very high error rates in cases resulting in a sentence of capital punishment. *See, e.g.*, James S. Liebman et al., *Capital Attrition: Error Rates in Capital Cases, 1973-1995*, 78 Tex. L. Rev. 1839, 1850 (2000) (finding that 68% of capital cases undergoing full judicial review were overturned due to serious error).

73. Alston Report, *supra* note 54, ¶¶ 20–26; s*ee also* MKRI Decision No. 2-3/PUU-V/2007, *supra* note 41, at 19.

the U.N. General Assembly have described the "most serious" offenses as those that do not "go beyond intentional crimes with lethal or other extremely grave consequences."[74] In practice, according to the U.N. Secretary General, this "is intended to imply that the offenses should be life-threatening, in the sense that [death] is a very likely consequence of their action."[75]

The Human Rights Committee (HRC) interprets the ICCPR and, "although it is not a court with the power to issue binding judgments, its views on the interpretation and application of the ICCPR are particularly authoritative and should be given considerable weight in determining what the treaty's provisions mean." [76] The MKRI has referred to the HRC's General Comments in several cases.[77] The HRC has "consistently rejected the imposition of a death sentence for offences that do not result in a loss of life"[78] and "suggests that a most serious offense must involve, at a minimum, intentional acts of violence resulting in the death of a person."[79]

The "most serious crimes" language—rather than anything more specific—was used in the drafting of the ICCPR in 1966 because at the time many states still used capital punishment for a

74. Alston Report, *supra* note 54, ¶ 22 (citing U.N. Econ. & Soc. Council [ECOSOC] Res. 1990/51, at 6, U.N. Doc. E/1990/90/Add.1 (Jul. 24, 1990)). Identical language is found in resolutions by the U.N. Commission on Human Rights. Byrnes, *supra* note 27, ¶ 93.

75. Alston Report, *supra* note 54, ¶ 23 (citing The Secretary-General, *Report of the Secretary-General on Capital Punishment and Implementation of the Safeguards Guaranteeing Protection of the Rights of those Facing the Death Penalty*, ¶ 79, *delivered to the Econ. and Soc. Council and the Comm'n on Crime Prevention and Criminal Justice*, U.N. Doc. E/2000/3 (Mar. 31, 2000)).

76. Byrnes, *supra* note 27, ¶ 22.

77. *Id.* ¶ 31.

78. Alston Report, *supra* note 54, ¶ 25 (citing U.N. Human Rights Comm., *Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant*, ¶ 8, U.N. Doc. CCPR/C79/Add.25 (Aug. 3, 1993) (considering a report submitted by the Islamic Republic of Iran)); *see also* Byrnes, *supra* note 27, ¶¶ 116–19 (discussing HRC decisions and comments finding that drug offenses are not among the "most serious" crimes supporting capital punishment).

79. Alston Report, *supra* note 54, ¶ 25 (citing U.N. Human Rights Comm., *Thompson v. Saint Vincent and the Grenadines*, *Views Concerning Communication No. 806/1998*, ¶ 8.2, U.N. Doc. CCPR/C/70/D/806/1998 (Dec. 5, 2000) (holding that a mandatory death penalty breaches ICCPR Article 6(1)'s right to life).

wide range of crimes.[80] The range of crimes supporting capital punishment in different jurisdictions conflicted with the drafters' goal of a *universal* standard, so "the term was a 'marker' for the policy of moving towards abolition through restriction, nothing more specific than that."[81] Since the drafting of the ICCPR, norms have developed exempting juveniles from capital punishment,[82] and multiple U.N. General Assembly resolutions have called for the gradual abolition of capital punishment, including most recently a resolution calling for a complete moratorium.[83]

Two related ideas in the context of human rights treaties support giving substantial weight to the HRC's interpretation of ICCPR Article 6: (1) "autonomous interpretation," the idea that identical terms should have identical meanings in domestic law and international law when based on the same international law provision; and (2) the idea that, while individual states have some discretion in meeting their international obligations, an "objective and independent assessment in the light of the text and context of the relevant treaty provision" should be made by a "relevant international body" to determine whether those obligations have actually been met.[84] Indeed, allowing state-by-state interpretation would allow each state to interpret any crime they wish as among the "most serious" crimes, and would "render the relevant international law standard meaningless."[85] As a result, the MKRI should base its

80. Byrnes, *supra* note 27, ¶ 96 (citing Roger Hood, *The Enigma of the 'Most Serious' Offences* 6–7 (N.Y.U. Sch. of Law, Ctr. for Human Rights & Global Justice, Working Paper No. 9, 2006), *available at* http://www.chrgj.org/publications/docs/wp/WPS_NYU_CHRGJ_Hood.pdf).

81. *Id.*

82. *Id.*; *see, e.g.*, *Roper v. Simmons*, 543 U.S. 551, 576–78 (2005) (finding unconstitutional the execution of individuals who were under eighteen at the time of their crimes and including a discussion of developing international norms barring juvenile capital punishment).

83. *See* U.N. Gen. Assembly, Third Comm., *Report of the Third Committee on Promotion and Protection of Human Rights: Human Rights Questions, Including Alternative Approaches for Improving the Effective Enjoyment of Human Rights and Fundamental Freedoms*, ¶¶ 19–83, U.N. Doc. A/62/439/Add.2 (Dec. 5, 2007); *supra* text accompanying note 2.

84. Byrnes, *supra* note 27, ¶ 97.

85. *Id.* ¶ 99 (quoting U.N. Human Rights Council, *Report of the Special Rapporteur on Civil and Political Rights, Including the Question of Disappearances and Summary Executions*, ¶ 40, U.N. Doc. A/HRC/4/20 (Jan. 29, 2007) (*prepared by* Philip Alston)).

interpretations of ICCPR Article 6 on those of the HRC, which do not support the use of capital punishment for drug trafficking crimes.

C. The Indonesian Government's Arguments in Favor of Using the Death Penalty for Drug Offenses

Though the Indonesian government's briefs in this case are not available, the government[86] has given several justifications for its use of capital punishment in drug trafficking crimes, and government experts' arguments are described in the MKRI decision.[87] The experts make some formal legal arguments, but most of their arguments focus on the effects of drug use in Indonesia and the practical and logistical effects of abolishing the death penalty.[88]

President Susilo Bambang Yudhoyono has said (outside the context of the Bali Nine case) that deterrence and the interests of justice justify the use of the death penalty for drug charges.[89] In testimony to the MKRI, the DPR gave a statement arguing that "narcotics crimes in Indonesia have been categorized as serious crimes, so that it is appropriate" to punish such crimes with capital punishment, and that 1945 Constitution Article 28J(2) prevents the right to life from being absolute.[90] Similarly, some commentators argue that because of the impact of drugs on all users and on society, drugs can be considered among the "most serious" crimes under the ICCPR.[91] Others also may assert that, while the HRC and other states' interpretations are persuasive in interpreting the ICCPR and other human rights treaties, the treaties have little binding power and HRC interpretations are not legally binding in domestic courts.

Separately from the DPR, the government argued that drug crimes are "crimes against humanity . . . aimed at killing and

86. Here, "the government" includes all the branches of the Indonesian government, including government agencies.

87. MKRI Decision No. 2-3/PUU-V/2007, *supra* note 41, at 25–30. Several different groups and individuals testified to the Court, sometimes making multiple arguments, and they will be presented in the order they were made.

88. MKRI Decision No. 2-3/PUU-V/2007, *supra* note 27, at 25–30.

89. Bampton, *supra* note 14, at 6 (citing Susilo Bambang Yudhoyono, President of Indonesia, Address at International Day Against Drug Abuse and Illicit Trafficking (Jun. 28, 2005)).

90. MKRI Decision No. 2-3/PUU-V/2007, *supra* note 41, at 21–22; *see supra* text accompanying note 47 (quoting Indon. Const., *supra* note 23, art. 28J(2)).

91. Bampton, *supra* note 14, at 9 (citing Hor, *supra* note 32, at 108–09).

destroying human being[s] slowly but sure[ly]."[92] Therefore, the government argues, drug crimes should be categorized as among the most serious crimes.[93] The government also pointed out that despite the global abolitionist tendency, "many countries . . . still maintain capital punishment, including those that [have] reinstate[d] capital punishment after previously having abolished it."[94]

The government went on to argue that "granting the petition would create legal uncertainty and injustice" regarding other laws, not petitioned for review, that allow for capital punishment.[95] It also argued that 1945 Constitution Article 28J(2) can limit or abolish the right to life if the limitation is "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."[96]

D. Arguments of Indonesia's National Narcotics Agency

The National Narcotics Agency (*Badan Narkotika Nasional*, or BNN) addressed the MKRI as "the directly related party," stating that capital punishment for drug trafficking crimes was justified because they "are categorized as extraordinary crimes," and that the international nature of drug trafficking causes a large amount of money to leave Indonesia "in such a . . . way that it can cause the state to be financially bankrupt."[97] The BNN also offered further justification based on claims that drug traffickers "abolished 'the right to life' of other people" through the deaths attributed to drug use, and that drugs also "disturb[ed] the society, destroying [the] young generation/children of the nation."[98]

Henry Yosodiningrat, the Chairman of the Indonesian National Anti-Narcotics Movement (*Granat*) and a BNN expert, explained that in the context of Indonesian drug laws, capital punishment is "applied and aimed only at organized perpetrators or for crimes preceded by a conspiracy, . . . to prevent the occurrence of

92. MKRI Decision No. 2-3/PUU-V/2007, *supra* note 41, at 23.
93. *Id.*
94. *Id.*
95. *Id.* This argument seems to ignore those parts of petitioners' arguments that focus solely on drug trafficking crimes, rather than all crimes for which capital punishment is allowed in Indonesia.
96. MKRI Decision No. 2-3/PUU-V/2007, *supra* note 41, at 23–24.
97. *Id.* at 24–25.
98. *Id.* at 24.

illicit narcotics trafficking."[99] With a narrow focus, it could be argued that the deprivation of the right to life is less severe than it would be if capital punishment were more widely applied.[100]

The BNN presented several more experts who argued that making the right to life "incontestable under any circumstances" would require dissolving the army and police and asking "the United Nations to dissolve all armed forces (army/police) all over the world."[101] These BNN experts also pointed to data showing an increase in murder following the abolition of capital punishment, which is evidence of a deterrent effect.[102] Furthermore, BNN experts argued that two principles of *Pancasila*[103] justify capital punishment: the One and Only God principle, because "all religions recognize capital punishment;"[104] and the Just and Civilized Humanity principle, which allows "balancing justice" and thus would allow the government to consider the victims of drug crimes.[105]

Regarding the petitioners' point that capital punishment does not fit with the Indonesian philosophy of criminal penalties, another

99. *Id.* at 28; *see infra* text accompanying notes 259–267 (discussing Indonesian drug enforcement efforts and the perceived use of capital punishment for particular types of crimes and criminals).

100. *Compare infra* text accompanying note 113 (discussing a Komnas HAM official's statements about Muslim countries' practice of including capital punishment in their criminal justice systems but using other means to limit their use of capital punishment).

101. MKRI Decision No. 2-3/PUU-V/2007, *supra* note 41, at 25–26. It is not clear that petitioners tried to make the right to life "incontestable under any circumstances," and it seems very unlikely that they would argue for the dissolution of the army and police forces.

102. *Id.* at 26–27.

103. *See infra* Part III.A.2 (discussing *Pancasila*).

104. *Id.* at 26. It is certainly not clear that "all religions" or even the five religions recognized by *Pancasila* (*see infra* text accompanying note 278) support capital punishment. *See, e.g.*, Leanne Fiftal Alarid & Hsiao-Ming Wang, *Mercy and Punishment: Buddhism and the Death Penalty*, 28 Soc. Just. 231, 242 (2001) ("The death penalty is inconsistent with Buddhist teachings."); John Nichols, *The Pope's 'Seismic Shift'*, The Nation, Apr. 3, 2005, http://www.thenation.com/blogs/thebeat?bid=1&pid=2301 (last visited Jan. 9, 2009) (describing Pope John Paul II's decision to remove capital punishment from the Catechism, which summarizes Catholic doctrine).

105. MKRI Decision No. 2-3/PUU-V/2007, *supra* note 41, at 26. "Balancing justice" also reflects the traditional Indonesian principle of *adat*. *See infra* text accompanying notes 140–143 (discussing *adat* and its focus on "adjustment" and social harmony); *see also infra* text accompanying notes 396–398 (MKRI majority's discussion of social harmony).

BNN expert made a distinction between Indonesia's imprisonment system and its larger criminal punishment system, arguing that rehabilitation and social reintegration are the goals only of Indonesian imprisonment.[106]

Another BNN expert discussed international law, arguing that the U.N. Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances,[107] which has been acceded to by "the majority of United Nations members," recognizes drug trafficking as a serious international problem and leaves the severity of punishment to each party.[108] As such, Indonesia has the discretion to use capital punishment for such crimes.[109]

E. Third-Party Testimony

Indonesia's National Commission on Human Rights, or Komnas HAM (*Komisi Nasional Hak Asasi Manusia*),[110] testified as a "directly related party" through its chairman, Abdul Hakim Garuda Nusantara.[111] Komnas HAM stated that the constitutionality of capital punishment "can be disputed" and discussed the ICCPR's limitations on capital punishment.[112]

Komnas HAM briefly discussed Islamic law, and pointed out that "most . . . Moslem countries which apply the Islamic Penal Law have [made] more efforts to avoid capital punishment through procedural and commutative provisions which are available in the Islamic law instead of implementing a direct prohibition" on capital punishment.[113]

106. MKRI Decision No. 2-3/PUU-V/2007, *supra* note 41, at 27–28.

107. Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, Dec. 20, 1988, 1582 U.N.T.S. 165, *available at* http://www.incb.org/pdf/e/conv/convention_1988_en.pdf. The Convention was ratified by Indonesia through Law No. 7 of 1997. MKRI Decision No. 2-3/PUU-V/2007, *supra* note 41, at 29–30.

108. MKRI Decision No. 2-3/PUU-V/2007, *supra* note 41, at 29–30.

109. *Id.* at 30.

110. *See infra* text accompanying notes 223–228 (discussing Komnas HAM).

111. MKRI Decision No. 2-3/PUU-V/2007, *supra* note 41, at 30.

112. *Id.* at 31. The ICCPR discussion was similar to that of Professor Alston and petitioners in *supra* Part II.B.2.

113. MKRI Decision No. 2-3/PUU-V/2007, *supra* note 41, at 33 (citing Mashood Baderin, International Human Rights and Islamic Law (2005)). Similarly, it could be argued that, by only using capital punishment on

Regarding the personal opinions of members of Komnas HAM, the majority found capital punishment to be unconstitutional, but there were some members "arguing that a cruel criminal act does deserve capital punishment."[114]

Dr. Mudzakir, as a member of the Indonesian Criminal Code Revision Team, testified regarding its conclusions.[115] He explained that the Draft Law of the Indonesian Criminal Code reflects a belief that capital punishment should be allowed, but only under special and restricted circumstances.[116] It is to be used "as the last resort to protect . . . society," as an alternative rather than the principal type of punishment.[117] He went on to argue that capital punishment should only be utilized for "criminal acts which have resulted in death or threatened the life of human beings and humanity, or state security."[118] According to the Team's interpretation, the Draft Law suggests a ten-year probation period during which the sentenced individual would be incarcerated. At the end of this period, capital punishment would not occur if "the reaction from . . . society towards the committed crime is mild, the convict shows regret, and there is hope for his/her actions to be corrected."[119] In such cases capital punishment would be converted into a life sentence or a specified period of imprisonment.[120]

Another member of the Indonesian Criminal Code Revision Team, Dr. Nyoman Serikat Putrajaya, testified that it was unclear whether the Draft Law would include capital punishment at all. This

"organized perpetrators" engaged in "illicit narcotics *trafficking,*" *supra* text accompanying note 99 (emphasis added), Indonesia is limiting capital punishment by focusing on a narrow subset of drug possessors. However, Indonesia's apparent determination to increase its use of capital punishment and carry out executions more quickly (*see infra* text accompanying notes 263–265) may disprove this notion. *See also infra* text accompanying note 401 (MKRI recommendation that all death sentences that have reached permanent legal force be carried out immediately).

114. MKRI Decision No. 2-3/PUU-V/2007, *supra* note 41, at 33. Komnas HAM has, in fact, "several times recommended ratifying" the Second Optional Protocol to the ICCPR, which completely abolishes capital punishment. *Id.* at 156.

115. *Id.* at 39.

116. *Id.*

117. *Id.* at 40.

118. *Id.* at 40–41.

119. *Id.* at 40.

120. *Id.* at 41.

confusion arises in part because of research indicating that only fifty percent of survey respondents[121] "agree[d] that capital punishment should be maintained in the context of protecting individuals and . . . society."[122] There was, however, a "concern that society will take the law into their own hands" to "take revenge" if "there is no channel through the laws" allowing for capital punishment.[123]

The Court heard from several other third-party experts,[124] who testified on penal theory, the drug trade, human rights and the 1945 Constitution, human rights in international treaties, *Pancasila* and capital punishment, the history of capital punishment in Indonesia, the concept of capital punishment in the Draft Law of the Indonesian Criminal Code and how it reflects international opinion, and drug use in Indonesia. These experts made arguments similar to those discussed above.[125]

III. EXTRALEGAL FACTORS RESTRICTING AND AFFECTING THE DEATH PENALTY DEBATE IN INDONESIA

To fully understand the capital punishment debate in Indonesia, it is necessary to understand many historical and contemporary issues in Indonesia. Section A of this Part will present historical factors, including conceptions of Indonesian unity and the Indonesian legal system. Section B will discuss contemporary factors, including drug abuse and trafficking, the role of Islam, and the formation of the MKRI. Finally, Section C will discuss Indonesia's foreign relations, particularly with Southeast Asia and Australia.

The MKRI has taken extralegal factors into account while interpreting Constitutional provisions regarding human rights on previous occasions. For example, although "the right not to be prosecuted under retrospective laws" is included among those rights which "may not be interfered with under any circumstances at all,"[126] the MKRI used Article 28J of the 1945 Constitution to allow

121. No data was given on the sample population for this survey; it is unclear whether it is meant to reflect the Indonesian population in general.

122. MKRI Decision No. 2-3/PUU-V/2007, *supra* note 41, at 42.

123. *Id.*

124. "Third-party experts" here refers to experts who were called by the MKRI, rather than by the petitioners, the government, or the BNN as a directly related party.

125. MKRI Decision No. 2-3/PUU-V/2007, *supra* note 41, at 42–67.

126. Indon. Const., *supra* note 23, art. 28I(1).

retroactive application of a law "in the framework of fulfilling just requirements in accordance with moral considerations, religious values, security and public order within a democratic society" in a case involving human rights violations in East Timor by former Governor Abilio Soares.[127]

In addition to the possibility of such factors directly affecting the MKRI's decisions, as public debate increases, public opinion on capital punishment will be more fully informed and may change. Indeed, many governments and courts have cited public opinion as a factor in their decisions to abolish the death penalty.[128]

A. Unity and its Role in Indonesia's Culture and History

Indonesia consists of over 17,500 islands and has a population of over 230 million people.[129] Eighty-eight percent of its population is Muslim, giving it the largest Muslim population in the world.[130] Despite having the fourth-largest population in the world and an economy larger than those of all but fourteen other nations, "[t]here is no country in the world of such vital significance to the United States that is less understood than Indonesia"[131]—and this

127. Stockmann, *supra* note 34, at 49–50; *see also* MKRI Decision No. 2-3/PUU-V/2007, *supra* note 41, at 85–86 (discussing the Soares case, MKRI Decision No. 065-PUU-II-2004).

128. *See* Hood, *supra* note 1, at 233–35 (noting that "government officials in Japan, several countries of the USSR, China, Thailand, and elsewhere," and the South African Constitutional Court, have partly justified their abolition of capital punishment by referring to public opinion in those countries). On the other hand, it is possible that one factor in the MKRI's decision to hear arguments in this case was that, by having a court with the authority of the MKRI declare the death penalty constitutional, it would silence the capital punishment debate in Indonesia. *See, e.g.*, Brief for Criminal Justice Legal Foundation as Amicus Curiae Supporting Respondents at 15–16, Baze v. Rees, 128 S. Ct. 1520 (2008) (No. 07-5439), *available at* http://www.cjlf.org/briefs/Baze.pdf (arguing that "bring[ing] the chapter to a close" and foreclosing further litigation on capital punishment is a desirable result). Similarly, the MKRI approving of capital punishment for drug cases could signal to other Southeast Asian countries that Indonesia is not close to ending its use of capital punishment.

129. CIA, *supra* note 37, at 271–272.

130. *Id.*

131. *Indonesia in Transition: Implications for U.S. Interests: Hearing Before the Subcomm. on East Asia and the Pacific of the H. Comm. on International Relations*, 107th Cong. 3 (2001) (statement of Rep. James A. Leach, Member, H. Comm. on International Relations).

lack of understanding is not limited to the United States. This Section will show that explanations for this lack of understanding lie in Indonesia's long and somewhat mysterious history and in its fractured population.

Though Indonesia is seen as dominated by the Javanese, they comprise only forty-five percent of the population.[132] Indonesia has hundreds of ethnic groups, languages and cultures. Besides the Sundanese and the Javanese, no ethnic group individually comprises more than four percent of the population, but together these other groups account for almost half of the population.[133] Despite this diversity, one important and recurring theme in Indonesian history is unity.[134] Within local communities and nationally, Indonesia's hundreds of ethnic groups, languages and cultures are united by a strong national identity. This identity was created and has been manipulated by a series of strongly centralized rulers in order to suppress and marginalize dissent;[135] as such, it could restrict the capital punishment debate by discouraging dissension.

This section will discuss several historical factors affecting Indonesia's death penalty debate, including Indonesia's history and the development of an Indonesian identity, Indonesia's political and legal structure, and human rights protections in Indonesia.

1. Colonization and *Adat*

Following a battle in 1619, the Dutch East India Company (*Vereenigde Oostindische Compagnie*, or VOC) gained control over the Kingdom of Jacatra, and Indonesia's existence as a Dutch colony

132. CIA, *supra* note 37, at 272. Java is Indonesia's most populous island, and Indonesia's dominant linguistic and ethnic groups are Javanese. *Id*.

133. *Id.*

134. *Pancasila* (*see infra* Part III.A.2) sets *Bhinekka Tunggal Ika*, or Unity in Diversity, as Indonesia's motto. P.E. Lotulong, *Judicial Review in Indonesia*, *in* Comparative Studies of the Judicial Review System in East and Southeast Asia 167 (Yong Zhang ed., 1997). Recent amendments added this motto to the 1945 Constitution in the new Article 36A.

135. As a result of this forced (or false) unity, Indonesia has had to deal with several secessionist movements and other rebellions. East Timor has gained its independence, while Aceh and Irian Jaya have strong secessionist movements. Smaller rebellions have occurred repeatedly in Maluku, South Sulawesi, and West Sumatra. Philip J. Eldridge, The Politics of Human Rights in Southeast Asia 139 (2002).

began.[136] Because their main goal was trade, the VOC did not do much to govern Indonesia during this time—they allowed Indonesian customary law, or *adat*, to remain effective.[137]

The Dutch government took over the colony in 1799.[138] By the 1830s, the Dutch were making efforts to collect and codify *adat*, but found that "the multiplicity of religious and racial subcultures within the general community of the Dutch colony" made it impossible to do so.[139] *Adat* is, at its most basic level, based on village-level unity.[140] Penal *adat* focuses on "adjustment," or the process by which the community as a whole is returned to the state it was in before the wrongful act occurred.[141] In some cases, this required the *victim* to give something up, because "harmony was more important than abstract justice."[142] While the colony as a whole had a pluralist legal system—with separate laws for Europeans, Indonesians, and non-Indonesian Asians—control over the native population was distributed locally, with the headman of each village interpreting his own *adat* system.[143]

Adat's focus on harmony over justice and its emphasis on the "adjustment" process could affect the death penalty debate in Indonesia by counteracting the many justice- and human-rights-related arguments offered in opposition to capital punishment.

2. Independence, *Pancasila,* and Indonesia's Political Structure

In 1942, during World War II, Japan took control of Indonesia and exploited differences between "cooperators" working with the Dutch, noncooperators, and Muslims.[144] On August 17, 1945,

136. Peter Burns, The Leiden Legacy: Concepts of Law in Indonesia 48 (2004). The VOC had traded there earlier, but this was the first exercise of dominion over Indonesian territory by a Dutch-affiliated group. *Id.*

137. *Id.* at 49.

138. Int'l Comm'n of Jurists, Indonesia and the Rule of Law: Twenty Years of 'New Order' Government 2 (Hans Thoolen ed., 1987).

139. Burns, *supra* note 136, at 59; *see infra* Part III.A.3 (discussing the Dutch creation of *adatrecht*).

140. Burns, *supra* note 136, at 114.

141. *Id.* at 114–15.

142. *Id.* at 120.

143. *Id.* at 93. The separate penal law systems were unified in 1918, but petty offenses were still controlled by *adat*. *Id.* at 94.

144. Int'l Comm'n of Jurists, *supra* note 138, at 4.

two days after Japan surrendered to the Allies, Sukarno[145] declared Indonesia's independence.[146] Soon after that, the Committee for the Preparation of Independence elected Sukarno as Indonesia's first president and enacted what became known as the 1945 Constitution.[147]

The 1945 Constitution was intended to be temporary, and had little detail on human rights protections, separation of powers, balance of powers, or how the government would work.[148] Due to its intended ephemeral nature, it is "the shortest Constitution in the world, notable more for what it does not state than for what it does."[149] Despite this, it has been Indonesia's constitution since then, except for the period from 1949 to 1959.[150]

The Preamble to the 1945 Constitution lays out the national doctrine of *Pancasila*, which has five elements: belief in one God, national unity, civilized humanitarianism, representative

145. Sukarno, who like many Indonesians used only one name, was a longtime Indonesian nationalist leader, having founded the Indonesian Nationalist Party (Partai Nasional Indonesia, or PNI) in 1927. *Id.* at 5.

146. *Id.*

147. *Id.*

148. *Id.* at 35. Despite its brevity, it has been described as exemplifying "the synthesis of western democratic, modernist Islamic, Marxist, and indigenous-village democratic and communalistic ideas which forms the general basis of the social thought of so large a part of the post-war Indonesian political elite." George McTurnan Kahin, Nationalism and Revolution in Indonesia 123 (Cornell Univ. Press 1952). Also, in the context of the ambiguity of human rights instruments and the interpretation thereof, it is interesting to read the Elucidation to the 1945 Constitution, noting that "the more flexible a provision, the better. We have to see to it that the system of the Constitution does not lag behind the change in time." Andrew Ellis, *The Indonesian Constitutional Transition: Conservatism or Fundamental Change?*, 6 Sing. J. Int'l & Comp. L. 116, 117–18, (2002) (citing § 5(IV) of the Elucidation to the 1945 Constitution).

149. Stockmann, *supra* note 39, at 29.

150. Int'l Comm'n of Jurists, *supra* note 138, at 5–6. There was approximately a one-year period after Holland acknowledged Indonesian independence (from 1949 to 1950), during which time Indonesia was a federal state (Republik Indonesia Serikat, or the United States of the Republic of Indonesia). Lotulong, *supra* note 134, at 176. The constitution of this state allowed judicial review, but it dissolved into the Republic of Indonesia in 1950. *Id.* This resulted in a new 1950 Constitution, which was dissolved when Sukarno reinstated the 1945 Constitution in 1959. Int'l Comm'n of Jurists, *supra* note 138, at 6. It is because of this convoluted history that the 1945 Constitution is still referred to as "the 1945 Constitution."

government, and social justice.[151] Part of the "national unity" goal in *Pancasila* is reflected in the idea that "[d]ecisions are to be made and disputes resolved on the basis of deliberation (*musyawarah*) and consensus (*mufakat*), avoiding competitive voting and associated conflict between majorities and minorities."[152] This focus on consensus-building results in superficial efforts being made to include minority opinions in decision-making,[153] but can also serve as an excuse to ignore those minority opinions. As a result, it may be the case that allowing debate on capital punishment—or allowing a case on it to be heard in the MKRI—does not represent a real possibility of abolition.

The 1945 Constitution also describes Indonesia's political structure. The People's Consultative Assembly (*Majelis Permusyawaratan Rakyat* or MPR) meets annually to set state policy[154] and can amend the Constitution.[155] The MPR is comprised of the People's Representative Council (*Dewan Perwakilan Rakyat* or DPR), which is basically a parliament with legislative power,[156] and the Regional Representative Council (*Dewan Perwakilan Daerah* or DPD).[157] All members of the DPR and DPD are elected,[158] but that was not the case during the Suharto era.[159] Since the 2004 elections, the president and vice-president have been directly elected.[160]

151. Eldridge, *supra* note 135, at 118–19. A 1966 decree by Suharto made *Pancasila* "the source of all sources of law," in effect giving precedence to the Preamble to the 1945 Constitution over the body of the 1945 Constitution. Stockmann, *supra* note 39, at 41.

152. Eldridge, *supra* note 135, at 119. *Mufakat* may also be reflected in statements by Constituional Justice Asshiddiqie that, despite supporting the Bali Nine petitioners' appeal, he joined the majority "because he did not believe that as chief of the bench, he should be in the minority group." Fitzpatrick, *supra* note 38.

153. *See* Eldridge, *supra* note 135, at 121.

154. Ellis, *supra* note 134, at 118–19, 126; Lotulong, *supra* note 134, at 167.

155. Ellis, *supra* note 148, at 126.

156. *See* Stockmann, *supra* note 39, at 160–61 (discussing DPR powers).

157. Indon. Const., *supra* note 23, art. 2.

158. *Id.*

159. *See* Ellis, *supra* note 148, at 131.

160. Stockmann, *supra* note 39, at 340. They were previously selected by the MPR. *Id.*

Pancasila is Indonesia's highest source of law, followed by the 1945 Constitution, MPR decrees, and laws or acts by the DPR.[161] Before the MKRI, the Indonesian judicial system did not allow judicial review of legislation or acts by the MPR or DPR.[162] Besides the MPR and DPR, the highest state institutions are the President, the Supreme Court, two advisory and financial bodies[163] and the MKRI.

3. *Adatrecht* and the Indonesian Identity

It has been argued that the idea of *adatrecht*—a system of laws common to all Indonesians, based on local *adat*—was created by the Dutch to reduce "the danger of a coherent multi-colonial pan-Islamic challenge to European hegemony."[164] The Dutch were facing native resistance across the colony, particularly in Aceh, and to counter the "Islamic thrust" of the resistance the Dutch needed to identify "certain non-Islamic practices which had the force of law for local communities."[165] Over time, *adat* and *adatrecht* "created a sense of national identity among the polyglot peoples of" Indonesia.[166]

The founders of Indonesia relied greatly upon the concept of *Adatrecht* and the ideal of a unified Indonesian people. The first Foreign Minister of Indonesia, Ahmad Subardjo Djojoadisurjo, said that his study of *adatrecht* "strengthened my view that, in the struggle for national independence, we would have to look to the resources of our national identity to resist the strong influence of the foreign powers."[167] This led to a "concept of a peculiar Indonesian quality which is held to mark the institutions of the contemporary

161. Lotulong, *supra* note 134, at 175–76. Though President Habibie has since abolished *Pancasila* as the sole state ideology, it remains relevant to Indonesian culture and politics. Eldridge, *supra* note 135, at 121. It should be noted that *Pancasila* principles are quite general and can "be broadly interpreted depending on which we wish to utilize." MKRI Decision No. 2-3/PUU-V/2007, *supra* note 41, at 61. *Pancasila*'s status as the source of all Indonesian law has also been used to justify ignoring "influences from outside Indonesia." MKRI Decision No. 2-3/PUU-V/2007, *supra* note 41, at 65.

162. Lotulong, *supra* note 134, at 176.

163. *Id.* at 167.

164. Burns, *supra* note 136, at 212–13; *see infra* Part III.B.2 (discussing Islam in Indonesia).

165. Burns, *supra* note 136, at 213.

166. *Id.* at 213.

167. *Id.* at 238–39.

republic, and the social practices of its peoples, as *sui generis*." [168] This "doctrine of difference," in turn, has been used "to excuse various Indonesian administrators and government offices from conformity to international conventions."[169]

Indonesian unity, and the idea of the Indonesian people as *sui generis*, can restrict the death penalty debate in two ways: by discouraging dissent from the pro-death-penalty majority, thereby stifling the debate, and by excusing or even encouraging Indonesia's status as one of the few states to retain, and use, capital punishment.

4. The Suharto Era and the New Order Government

In September of 1965, a coup killed six of Indonesia's most senior generals, who comprised much of the leadership of Sukarno's government at the time. The events are disputed,[170] but their effect was that Sukarno, who had appointed himself "president for life" in 1959,[171] was replaced by Suharto as president.[172]

Regardless of its origins, the attempted coup resulted in the communist political party (*Partai Komunis Indonesia*, or PKI) being declared illegal and the death or disappearance of up to one million actual or suspected communists.[173] The chaos and confusion in that period were used to justify *dwifungsi*, a policy which gives the armed forces a dual military and socio-political function.[174] As he was in

168. *Id.* at 242. *Compare with* Lotulong, *supra* note 134, at 167–68 (discussing the use of *Pancasila* to ignore influences from outside Indonesia, but noting that in recent developments, particularly with business or economic law, Indonesian institutions and practices have been influenced by the common law system).

169. Burns, *supra* note 136, at 242.

170. Suharto's explanation for the coup was that a group of communists had heard rumors of an anti-communist purge, staged a coup, and killed the six army generals. Int'l Comm'n of Jurists, *supra* note 138, at 7. This corresponds to what this Note's author was taught in Indonesia in the mid-1990s. More recently, scholars believe that Suharto himself staged this coup, so that he could take advantage of the resulting instability and take power. Stockmann, *supra* note 39, at 35–36.

171. Int'l Comm'n of Jurists, *supra* note 138, at 6.

172. *Id.* at 7. Suharto, like Sukarno, used one name.

173. *Id.*

174. Stockmann, *supra* note 39, at 28.

control of the Army, Suharto declared a "New Order" government (Orde Baru) and took control in 1967.[175]

Though capital punishment was available under Sukarno, there were no executions in the Republic of Indonesia until 1973, under Suharto.[176] It was also during the Suharto era that drug trafficking became a capital offense.[177]

The New Order years were marked by macroeconomic progress, restrictions on civil society,[178] and repression of minorities and groups seeking greater cultural rights.[179] Suharto also made great efforts to further unify Indonesia, including promoting Bahasa Indonesia as the official language, despite it not being "the mother-tongue of one of the dominant [ethnic, political, or geographic] groups."[180]

Under Suharto, academic freedom was severely restricted.[181] Though his New Order government created thousands of new schools and gave high priority to literacy rates and a well-educated population,[182] many topics could not be discussed publicly[183] and the government could even veto proposed academic field research.[184] The magnitude of restrictions on civil society and political debate was reflected in the policy of "politics, no; development, yes."[185] A gradual buildup of frustration with this situation is a common explanation for why and how Suharto was forced to resign.[186]

175. Int'l Comm'n of Jurists, *supra* note 138, at 7. The army would play a role at all levels of the Indonesian government throughout the New Order government, but has not had as significant a role in policymaking or the death penalty debate since *reformasi* began. *See id.* at 7, 47.

176. Hood, *supra* note 1, at 48.

177. This took place in 1975. *Id.*

178. Int'l Comm'n of Jurists, *supra* note 138, at 7–8. These restrictions included the criminalization of subversion and dissent, *id.* at 90, censorship of movies and books, *id*. at 94, and restrictions on freedom of the press, *id*. at 96–98.

179. *Id.* at 28–29.

180. *Id.* at 28.

181. Human Rights Watch, Academic Freedom in Indonesia: Dismantling Soeharto-Era Barriers 2 (1998), *available at* http://www.hrw.org/reports98/indonesia2/.

182. *Id.* at 10.

183. *Id.* at 2.

184. *Id.* at 7, 80.

185. *Id.* at 15.

186. *Id.* at 28–29.

The roots of much of this suppression of dissent may lie in the idea of *adatrecht*[187]—the universality of the concepts of *musyawarah* (deliberation) and *mufakat* (consensus) "gave the . . . president a 'fundamentally vital unifying element' which he could set against the formalities of parliamentary opposition, majority and minority parties and the separation of the law courts."[188] Indeed, *adatrecht* offers "a rationale for a power state in which the expression of dissent constitutes in itself an anti-social activity."[189]

Suharto's legacies—weak rule of law, corruption in the judicial system and elsewhere, human rights violations, and suppression of dissent[190]—were all serious issues for civil society groups to deal with. As such, these issues could restrict the capital punishment debate in Indonesia by pulling attention away from subtler human rights issues, such as the use of capital punishment for drug-trafficking crimes. Indeed, as *reformasi* (which is discussed next) began, the first actions taken were focused more on political reorganization.

5. *Reformasi*

In 1987, it was noted that "[t]he functioning of democracy in Indonesia has to be understood in its historical and cultural context. From Hindu feudal systems through colonial exploitation and subjugation to a military dominated oligarchy, the ideal of a government responsible to the people has had little chance to develop."[191] In 1998, when Suharto stepped down after thirty-two years in power, many hoped that such a government would finally have a chance to develop—the *era reformasi* had begun.[192]

187. *See supra* Part III.A.3 (discussing *adatrecht*).

188. Burns, *supra* note 136, at 245. The quote here was made in reference to Sukarno, but it is similarly applicable to Suharto.

189. *Id.* at 251.

190. Komnas HAM has claimed that the anti-subversion law was generally used to "punish people whose ideas are different from those of the government." Human Rights Watch, *supra* note 181, at 71.

191. Int'l Comm'n of Jurists, *supra* note 138, at 74.

192. Stockmann, *supra* note 39, at 1. *Reformasi* is roughly equivalent to "reform."

a. Presidential Elections

B.J. Habibie, Suharto's Vice President, became President on May 21, 1998.[193] The first real steps in *reformasi* were taken at the November 1998 session of the MPR, which revoked several of Suharto's decrees on presidential power, limited the role of the armed forces in government, and set the general direction for political reform.[194] Habibie oversaw eighteen months of political liberalization, leading to the first relatively free and fair elections in fifty years.[195] These elections, in 1999, resulted in the presidency of Abdurrahman Wahid, an Islamic cleric.[196] Wahid was succeeded in 2001 by his vice-president Megawati Sukarnoputri, who is also the daughter of Sukarno, Indonesia's first president.[197] Indonesia's current president, Susilo Bambang Yudhoyono, was elected in 2004.[198]

b. Civil Society

In the first few years after the end of Suharto's rule, civil society opened up, "exemplified by a flowering of civil society groups, political parties, labor unions, and a proliferation of new, uncensored media."[199] Presidents Wahid and Habibie increased the freedoms of expression, association and assembly. For example, Law No. 9 of 1998 on the Freedom to Express One's Views before the Public greatly increased freedom of the press,[200] and "the era of politically motivated trials appeared to be over."[201]

193. *Id.* at 65.

194. *Id.* at 73–75.

195. *Id.* at 65. It should be noted that the President and Vice-President were still not directly elected by the general public, but were elected by the MPR. *See supra* Part III.A.2 (discussing direct presidential elections taking place for the first time in 2004).

196. Seth Mydans, *Indonesia Chooses an Islamic Cleric as President*, N.Y. Times, Oct. 21, 1999, at A1.

197. Seth Mydans, *Woman in the News; A Daughter of Destiny; Megawati Sukarnoputri*, N.Y. Times, Jul. 24, 2001, at A9.

198. Jane Perlez, *Man in the News; A Cautious Reformer as Indonesia's Next President; Susilo Bambang Yudhoyono*, N.Y. Times, Sept. 22, 2004, at A8.

199. Human Rights Watch, A Return to the New Order? Political Prisoners in Megawati's Indonesia 3 (2003).

200. Eldridge, *supra* note 135, at 133.

201. Human Rights Watch, *supra* note 199, at 3.

However, the Megawati presidency began with "economic instability [and] domestic terrorism,"[202] including the October 2002 Bali bombings. During the Megawati presidency, politically motivated trials returned, and the Indonesian judiciary was described as showing "weakness" and being "susceptib[le] to political interference."[203] All of these developments and other "high-profile issues swirling in Indonesia" led to both increased restrictions on political freedoms in Indonesia and "little international or domestic attention" to the situation.[204]

c. Constitutional Amendments

The "slow, messy and uneven" process of amending the 1945 Constitution has made "real progress"[205] and has been *reformasi's* driving force. To date, there have been four amendments to the 1945 Constitution.

The First Constitutional Amendment to the 1945 Constitution, in 1999, transferred significant power from the president to the DPR and clarified the power dynamic between the executive and legislature.[206]

In 2000, the MPR made the Second Constitutional Amendment to the 1945 Constitution, adding significant human rights protections[207] and increasing decentralization by allowing some regional autonomy.[208]

The Third Constitutional Amendment, in 2001, made significant changes to Chapter IX, dealing with the judiciary, including Article 24A's mandate to create the MKRI.[209] This

202. *Id.* at 3–4.

203. *Id.* at 21. It should be noted that this was written before the MKRI was formed.

204. *Id.* at 4–6.

205. Tim Lindsey, *Indonesian Constitutional Reform: Muddling Towards Democracy*, 6 Sing. J. Int'l & Comp. L. 244, 244 (2002). For the full text of the 1945 Constitution before and after the four amendments, see *id.* at 278–301.

206. Ellis, *supra* note 148, at 126.

207. Suzannah Linton, *Accounting for Atrocities in Indonesia*, 10 Sing. Y.B. Int'l. L 199, 203 (2006) (explaining that the Second Amendment dealt with several human rights issues, including the right to life, freedom of speech, freedom of religion, and freedom from torture).

208. Ellis, *supra* note 148, at 131.

209. *See id.* at 140–42; Lindsey, *supra* note 205, at 292–93; *see also infra* Part III.B.3 (describing the formation of the MKRI).

Amendment was a "fundamental structural change" in Indonesia, as it changed "Indonesia from a state with a single all-powerful institution . . . to . . . a state with constitutional checks and balances."[210]

The Fourth Constitutional Amendment passed in 2002 and allowed for direct election of the President, prescribed a reduced political role for the military, and rejected the addition of the Jakarta Charter.[211]

d. *Reformasi* and Capital Punishment

As an ongoing process, *reformasi* will affect Indonesia's death penalty debate profoundly and broadly. Most importantly, the increase in civil liberties and political discourse will allow such a debate to take place, which would not have happened in the Suharto era. Though the situation is not ideal, Indonesians today "have freedom of political expression[, . . .] good freedom of the press and freedom of assembly."[212] More immediately, the fact that such massive changes are taking place could accelerate the debate, with capital punishment being just another topic ripe for discussion and reformation. These changes could also restrict the debate, in the sense that people may feel the government should focus on more pressing issues and more severe human rights violations.[213] Indeed, the idea that Indonesia is a young nation still "forming itself democratically" has been used by Teuku Mohammed Hamzah Thayeb, the Indonesian Ambassador to Australia, to justify suggestions that the executive branch should not "interfere [with] the judicial process" by granting clemency in the Bali Nine case.[214]

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210. Ellis, *supra* note 148, at 140.

211. Lindsey, *supra* note 205, at 266–71. For more on the Jakarta Charter, *see infra* text accompanying note 280.

212. Seth Mydans, *A Resilient Indonesia Moves Beyond Suharto*, N.Y. Times, Jan. 12, 2008, http://www.nytimes.com/2008/01/12/world/asia/12indo.html (last visited Jan. 7, 2009) (quoting Bonar Tigor, head of Solidarity Without Borders).

213. Pressing human rights issues in Indonesia include abuses of power by the military, child labor, freedom of expression, and freedom of religion. Human Rights Watch, World Report 2008, at 280–86 (2008), *available at* http://hrw.org/wr2k8/pdfs/wr2k8_web.pdf.

214. Annabelle McDonald, *No Saving Bali Kingpins: New Envoy*, The Australian, Mar. 23, 2006, at 6, *available at* http://www.theaustralian.news.com.au/story/0,25197,18373627-2702,00.html.

6. The Indonesian Legal System

International reports have described the "ineffective justice institutions and poor legal system"[215] in Indonesia and said that even the special human rights courts set up in recent years "in practice . . . have little authority or effectiveness."[216] Similarly, "judges are reluctant to act independently in cases unpopular with the government. This is most obvious in cases with political overtones"[217]—including, one would think, the Bali Nine case.

Indonesia's legal system is further complicated by the fact that each of Indonesia's three constitutions has affirmed the continuing application of Dutch colonial law and other existing laws.[218] This is less an issue for criminal law, because Indonesian criminal law is not based on *adat* or common law, but is regulated by the criminal code, *Kitab Undang-Undang Hukum Pidana* (KUHP).[219] The KUHP is relatively self-contained and clear, but in general the Indonesian "legal system is extremely complicated because of its history and the enormous vagueness of the laws, which leave extraordinary discretion to government authorities."[220]

Corruption has been so extensive in the Indonesian judiciary that an external audit conducted in 2001 found that "the entire judicial system would 'probably collapse' were it not for unlawful payments to the Attorney General's Office . . . and that the web of corruption encompassed not just the Attorney General's Office but also judges, lawyers and police."[221]

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215. Asian Human Rights Comm'n, State of Human Rights in Ten Asian Nations 162 (2005), *available at* http://www.ahrchk.net/pub/pdf/Dec102005-IHRD.pdf.

216. *Id.* at 166.

217. Int'l Comm'n of Jurists, *supra* note 138, at 61.

218. *Id.* at 55. Indonesian courts still use Dutch phrases and Dutch legal theories, which differ from those used in American courts. *See infra* text accompanying note 378 (discussing "systematic interpretation" as used by the MKRI); *infra* note 401 (discussing *in kracht van gewijsde*).

219. Linton, *supra* note 207, at 6.

220. Int'l Comm'n of Jurists, *supra* note 138, at 58.

221. Linton, *supra* note 207, at 32 (quoting *Attorney General Admits Corruption Rampant*, Laksamana Net, May 23, 2002). Laksamana Net, which often published news stories unfavorable to the Indonesian Government, shut down its website in 2005; its disappearance has been alleged to be politically motivated. Bali Broadcasting Service News, *Alas Poor Laksamana Net, We Knew Them Well*, http://www.balibs.org/news-update/laksama_net_journalism.shtml (last visited Jan. 7, 2009).

While the integrity of the legal system does not have a direct impact on Indonesia's death penalty debate, any reason to have less faith in the judiciary increases the risk that such a harsh and irreversible penalty will be given to innocent people. Also, it should be noted that the MKRI, though it is an avenue through which capital punishment can be challenged, does not sentence anyone to the death penalty; it also seems not to be subject to the criticisms of Indonesia's judiciary mentioned in this Section.[222]

7. Indonesian Human Rights Protections and the Right to Life

In 1993, Suharto set up Komnas HAM with the goals of "spreading human rights awareness; offering suggestions on accessing and ratifying U.N. human rights instruments; [and] monitoring, investigating and making recommendations on Indonesian human rights practices."[223] One of Suharto's objectives in setting up Komnas HAM may have been to weaken certain military leaders.[224] It may also have been "a public relations gimmick to divert attention" from Indonesian human rights violations.[225] Regardless of why Suharto established Komnas HAM, its political autonomy was limited and unclear.[226] Nevertheless, the most important result of its creation was to make "it no longer possible to dismiss human rights as a western liberal concept, and [to legitimize human rights] as integral to Indonesian public life."[227] There has been, in fact, some public backlash over a perceived overemphasis on human rights.[228]

Reformasi brought a set of three legislative human rights protections. First, MPR Decree XVII of 1998 set out the Human Rights Charter.[229] Following the Human Rights Charter, Law No. 39

222. *See infra* Part III.B.3 (discussing the MKRI and how it is perceived in Indonesia today).

223. Eldridge, *supra* note 135, at 145.

224. *Id.* at 145.

225. Linton, *supra* note 207, at 8.

226. This has still been the case since Suharto stepped down. Despite increased attention paid to human rights, Komnas HAM has complained that their "recommendations have not been followed up seriously by state institutions." Hikmahanto Juwana, *Assessing Indonesia's Human Rights Practice in the Post-Soeharto Era: 1998-2003*, 7 Sing. J. Int'l & Comp. L. 644, 663 (2003).

227. Eldridge, *supra* note 135, at 147.

228. Juwana, *supra* note 226, at 666–67.

229. Stockmann, *supra* note 39, at 325.

of 1999 on Human Rights (the Human Rights Law) and Law No. 26 of 2000 on Human Rights Courts strengthened human rights protections in Indonesia by creating special Human Rights Courts to try "gross violations" of human rights.[230] In 2001, the Second Constitutional Amendment added Chapter XA, with human rights protections, to the 1945 Constitution.[231]

The Human Rights Charter, the 1945 Constitution (as amended), and Indonesia's Human Rights Law all include the right to life and are all based on the Universal Declaration of Human Rights.[232] The Elucidation[233] to the Human Rights Law extends the right to life to people sentenced to death, but also includes an explicit exception "based on a court verdict in the case of the death penalty."[234] Under the Human Rights Courts Law, in fact, several human rights violations, including forcible transportation of population, unlawful imprisonment, and apartheid, are punishable with the death penalty.[235]

Introduced in 2003, the Human Rights Action Plan discussed preparations for ratification of various human rights instruments, including the ICCPR, and ways to implement human rights instruments which had already been ratified by Indonesia.[236]

All of these actions indicate some dedication to human rights among *reformasi* presidents, but these rights have not been

230. *Id.* at 302–13.

231. Stockmann, *supra* note 34, at 16; *see supra* note 207.

232. Stockmann, *supra* note 39, at 216. Chapter XA does not include all of the UDHR's protections, in part because *Pancasila*'s requirement of belief in one God is interpreted to require all citizens to have a religion, contrary to UDHR Article 18 regarding religious freedom. Ellis, *supra* note 148, at 132.

233. Many Indonesian statutes include Elucidations, which explain the legislators' intent and are used in interpreting the statutes. *See* Susi Dwi Harijanti & Tim Lindsey, *Indonesia: General Elections Test, the Amended Constitution, and the New Constitutional Court*, 4 Int'l J. Const. L. 138, 138 n.2 (2006).

234. Stockmann, *supra* note 39, at 216 (discussing the Elucidation to Law No. 39 of 1999 on Human Rights, Article 9(1)).

235. Law of the Republic of Indonesia, No. 26 of 2000 on Human Rights Courts Law, arts. 8, 9, 36, 37, http://indonesia.ahrchk.net/news/mainfile.php/hrlaw/18?alt=english [hereinafter Law 26 of 2000] (English translation by Asian Human Rights Commission, Indonesia); Stockmann, *supra* note 39, at 313.

236. Stockmann, *supra* note 39, at 206–13.

consistently protected in practice.[237] There are many documented rights abuses, but perpetrators are rarely, if ever, found[238]—a gap that may indicate an institutional unwillingness to fully recognize or guarantee the rights officially protected by law in Indonesia.

Despite a long history of human rights abuses, Indonesia has taken steps to increase *de jure* and *de facto* human rights protections. While the right to life is among these protections, the issue of whether capital punishment for drug-trafficking (or other non-fatal crimes) is a human rights violation remains an open question in Indonesia. Within Komnas HAM, the majority of members reportedly expressed the opinion that there is no longer constitutional support for capital punishment for drug trafficking crimes, though some members still approve of the practice.[239] The Indonesian government, currently and historically, considers capital punishment appropriate for drug trafficking. As a result, any restrictions on the use of the death penalty for drug-trafficking crimes will have to come through international obligations or a change of opinion in the executive or legislative branches, which may in turn require more open and public debate on issues related to the death penalty.

B. Contemporary Domestic Factors

This Section will focus on contemporary issues in Indonesia affecting the death penalty debate, including drug abuse and trafficking, Islam, and the MKRI.[240]

237. Todung Mulya Lubis, *Human Rights: Between Rhetoric and Reality*, The Jakarta Post (Indon.), Dec. 29, 2006, at 18, *available at* http://old.thejakartapost.com/Outlook/pol13b.asp; *see generally* Linton, *supra* note 207 (describing human rights violations in Indonesia and efforts at justice and accountability).

238. Lubis, *supra* note 237.

239. Lufthi Widagdo Eddyono, *Capital Punishment Is Not the Solution*, MKRI, May 8, 2007, http://www.mahkamahkonstitusi.go.id/eng/berita.php?newscode=350 (last visited Jan. 7, 2009) (describing a discussion of an internal meeting of Komnas HAM).

240. While not specifically or directly affecting the Indonesian death penalty debate, other factors are impeding general progress on human rights issues in Indonesia, including: political and military elites still loyal to Suharto; "religious and ethnic disorder; separatist demands in Aceh and Irian Jaya; [and] inter-linked problems of poverty, economic crisis, [and] corruption." Eldridge, *supra* note 135, at 9. These factors go beyond the scope of this Note and will not be discussed.

1. Drug Use and Trafficking

Within Indonesia, drug abuse is perceived as a serious problem. The introduction to the Narcotics Law, which overhauled Indonesia's drug penalties and included capital punishment for drug trafficking, noted that more severe penalties were required because "narcotic related crimes have become transnational, employing sophisticated modus operandi and technology."[241] The Elucidation of the Narcotics Law describes narcotic crimes as "a serious threat to mankind."[242] Reflecting this idea, President Megawati Sukarnoputri said in 2002 that "no sentence is sufficient other than the death sentence" for drug traffickers.[243]

One problem with any discussion of drug use in Indonesia is that there is a long history of "poor documentation and data" that makes it hard to verify any claims, particularly because drug use in the country remains an "extremely sensitive issue."[244] Though the Indonesian government was concerned about intravenous drug use and its related HIV/AIDS risk when it enacted the Narcotics Law, the government was not able to assess the risk until *after* its enactment.[245] In 2001, police estimated that 130,000 Indonesians used illicit drugs, though other estimates have approached as many as two million.[246] By September of 2001, 19% of the 2,313 reported HIV/AIDS cases in Indonesia involved transmission by intravenous drug use, though some estimates predict the true number of HIV/AIDs cases to be over 100,000.[247]

Within Indonesia, estimates on drug use and sales vary. Paulina Padmohoedojo found that prevalence rates of drug use

241. Law No. 22 of 1997, *supra* note 12, Introduction at (e).

242. *Id.* at Elucidation.

243. Amnesty Int'l, Indonesia: A Briefing on the Death Penalty 5 (2004), *available at* http://www.amnesty.org/en/library/asset/ASA21/040/2004/en/dom-ASA210402004en.html (quoting Agence France-Presse, *Mega: It Must be Death for Drug Traffickers*, Jun. 27, 2002).

244. Gary Reid & Genevieve Costigan, Burnet Inst., Revisiting 'The Hidden Epidemic'—A Situation Assessment of Drug Use in Asia in the Context of HIV/AIDS 91–92 (2002), *available at* http://www.unodc.un.or.th/drugsandhiv/projects/g22/0_introduction.pdf.

245. *Id.* at 90.

246. *Id.* at 93.

247. *Id.* at 94.

varied by age group, residence, and location.[248] Overall, 2.4% of household residents and 13.1% of boarding house residents had used drugs in their lifetime, while 0.4% and 2.1%, respectively, had done so in the previous month.[249] Marijuana (or ganja) was by far the most prevalent drug used by both groups, followed by ecstasy and methamphetamine.[250]

At a hearing in 2007, General I Made Mangku Pastika, the Executive Director of Indonesia's National Narcotics Agency, presented a worsening situation to the MKRI, with a 34.4% yearly increase in drug-related crimes in the five years leading up to 2007 and forty-one deaths in Indonesia every day due to overdose or drug-related HIV/AIDS.[251] Dr. Hamid Awaludin, Indonesia's Minister of Law and Human Rights, estimated that there were 3.2 million drug users in the country and stated that 30% of all Indonesian prisoners were incarcerated as a result of drug charges.[252]

Regarding drug trafficking, U.N. Office on Drugs and Crime data covering 2004-2005 show that Indonesian traffic flows of amphetamines and ecstasy are increasing, though the quantities are significantly smaller than those flowing through other regions of the world.[253] In addition, use of those drugs in Indonesia declined in that same time period.[254] There is very little cocaine trafficking in

248. Paulina G. Padmohoedojo, National Survey of Illicit Drug Use and Trafficking Among Household Groups in Indonesia 2005, at 5–7 (2005), *available at* http://www.accordplan.net/file/032007/29/NATIONAL%20SURVEY%20OF%20ILLICIT%20DRUG%20USE%20IN%20INDONESIA.pdf (presenting survey data collected by the Health Research Center of the University of Indonesia and the BNN).

249. *Id.* at Table 4.

250. *Id.* at Table 7.

251. *The Government Refuses to Abolish Capital Punishment*, *supra* note 21. The details surrounding these deaths are not clear because General Pastika did not give any sources for the data presented. It is also unknown what proportion of the deaths was due to overdose and what proportion was due to HIV/AIDS. Furthermore, in the HIV/AIDS cases, it is unclear whether the source of transmission was intravenous drug use or sexual activity. This means that the actual number of deaths directly related to drugs is uncertain. *See also supra* text accompanying note 244 (describing "poor documentation and data" on drug use in Indonesia).

252. *Id.*

253. *See* U.N. Office on Drugs and Crime (UNODC), 2007 World Drug Report 17 (2007) (showing that seizures of ecstasy and amphetamines in Indonesia are less than in other regions of the world).

254. *Id.* at 18.

Indonesia[255]—in fact, cocaine prevalence rates there are among the lowest in the world[256]—but Indonesia is a major regional cannabis producer.[257] Overall, while Indonesia is a significant source and destination of illegal drugs, its trafficking volume is not commensurate with the size of its population or economy.[258]

Though capital punishment had previously been available for drug traffickers, it was used very rarely until the late 1990s.[259] There is a prevalent belief that most people caught trafficking receive minimal sentences (such as days or months in jail and a fine) but there appears to be no data on the proportion of drug traffickers that receive light sentences, and it can be shown that capital punishment is becoming a more popular sentence for drug trafficking charges in Indonesia.[260] As of 2004, fifty-four people were believed to be on death row in Indonesia, and thirty of them had received death sentences as a result of drug charges.[261] Twenty of the twenty-two foreigners on death row in Indonesia at the time were there because of drug charges.[262] In 2004 there had not been any executions in the preceding three years, but the Indonesian government had indicated

255. *See id.* at 77 (stating that only one kilogram of cocaine was seized in Indonesia in 2005, which is very low compared to other countries in Asia and other regions of the world).

256. *Id.* at 243.

257. *Id.* at 99; *see also* Reid & Costigan, *supra* note 244, at 91 (stating that Indonesia is a major regional cannabis producer). Despite its reputation as a major cannabis producer, the quantity of cannabis trafficking in Indonesia is dwarfed by that of countries in Africa, Europe, North America, and South America. *See* UNODC, *supra* note 253, at 15 (indicating quantity of cannabis trafficking in various countries); *id.* at 107 (indicating that Indonesia's quantity of cannabis trafficking is much less than world leaders, and that East and Southeast Asia combined have significantly lower quantities of cannabis trafficking than other regions of the world).

258. UNODC trafficking data shows Indonesia to have one of the smallest annual quantities of seized heroin and morphine, smaller than other countries in its region (including Malaysia, Thailand and Australia) and most countries worldwide, regardless of population (including Canada, Mexico, Kazakhstan, and Turkey, and various aggregations in Europe and Africa). UNODC, *supra* note 253, at 11. Given the size of its population and these comparisons, it appears that Indonesia's drug seizures per capita are among the lowest in the world.

259. Reid & Costigan, *supra* note 244, at 94.

260. *Id.* at 94; *see also supra* text accompanying note 99 (BNN official's testimony on which drug crimes are more likely to receive death sentences).

261. Amnesty Int'l, *supra* note 243, at 1.

262. *Id.* at 2.

an intention to use capital punishment for more offenses[263] and carry out executions more quickly following convictions.[264] Death sentences seem to have increased since then—by 2008 the number of people on death row in Indonesia had increased to 112, including 58 for drug offenses.[265]

Indonesia's drug consumption and drug trade necessarily have a significant impact on the discussion of whether capital punishment should be used for drug-trafficking crimes. While drug use does not appear to be as high in Indonesia as it is elsewhere, there is a perception of a serious problem.[266] Moreover, the government does not want Indonesia to become a transshipment point—Indonesia is suitably located to be a center of drug distribution, as it is with many other goods.[267] The government's solution seems to involve making capital punishment available for large-scale traffickers, but not using it for relatively small-scale or local traffickers. The Bali Nine's attempts to use Indonesia as a transshipment point for a relatively dangerous and rare (in Indonesia) drug like heroin may have put them in the worst possible position, regarding their likelihood of receiving a death sentence.

It should be noted, however, that Indonesia's focus on cases similar to that of the Bali Nine—who were essentially "mules," merely carrying drugs, and who travelled by commercial aircraft—

263. Capital punishment is currently used for charges of murder, crimes against state security, assassination of the President or Vice President, and drug-related crimes. *Id.*; *see also* Kitab Undang-undang Hukum Pidana [Penal Code of Indonesia], art. 104 (assassinating the President or Vice-President), arts. 111, 124, 127 (state security), arts. 140, 340, 365, 444 (murder-related crimes), http://www.unhcr.org/refworld/country,,,LEGISLATION,TMP,4562d8cf2,3ffbcee24,0.html (English translation by Directorate General of Law and Legislation Ministry of Justice); Law 22 of 1997, *supra* note 12, art. 82; Law 26 of 2000, *supra* note 235.

264. Amnesty Int'l, *Urgent Action: Death Penalty*, UA-109/2006, AI Index ASA 21/002/2006, Apr. 28, 2006, *available at* http://www.amnesty.de/umleitung/2006/asa21/002?lang=de%26mimetype%3dtext/html.

265. Gelling, *supra* note 68.

266. *See* Hani Mumtazah, *Drug Abuse Threatens Indonesia's Younger Generation,* IslamOnline.net, http://www.islamonline.net/servlet/Satellite?c=Article_C&cid=1157365868395&pagename=Zone-English-HealthScience/HSELayout (last visited Jan. 7, 2009).

267. It is common for internationally-trafficked narcotics to pass through a "midshipment" or "transshipment" country on the way to their destination. *See, e.g.*, Decker & Chapman, *supra* note 62, at 62–65 (describing different ways drugs get shipped from Colombia to the United States).

may be ineffective as a strategy to reduce drug trafficking and consumption, for four reasons: (1) there is a growing consensus that the best way to reduce drug consumption is through the demand side;[268] (2) drug traffickers avoid commercial aircraft because of an excessively high level of risk;[269] (3) there is a clear distinction between "mules" and other drug handlers, who know little about a drug-trafficking organization's structure,[270] and individuals at the managerial or organizational level, who rarely if ever actually handle the drugs;[271] and (4) when drug enforcement efforts focus on one drug, smugglers shift their focus to "harder" drugs that provide higher profits for smaller loads rather than leaving the drug smuggling business altogether.[272]

2. Islam

Islam is relevant to the capital punishment debate in Indonesia in that there have been several efforts to install *shari'a*, or Islamic religious law, as the basis of law in Indonesia.[273] While it is not clear that *shari'a* requires capital punishment, many states with systems of law based on *shari'a* do include capital punishment.[274] Regardless of whether *shari'a* is a factor, it has been noted as "a

268. Fagan, *supra* note 60, at 6, 43; *see also* Decker & Chapman, *supra* note 62, at 142 (noting that one of the most common recommendations by drug smugglers who were asked how to address the drug problem in the United States is to reduce demand through rehabilitation and education).

269. Decker & Chapman, *supra* note 62, at 83–85.

270. *Id.* at 90–91.

271. *Id.* at 90, 93–95.

272. *Id.* at 125.

273. Peter G. Riddell, *Islamization, Creeping* Shari'a*, and Varied Responses in Indonesia*, *in* Radical Islam's Rules: The Worldwide Spread of Extreme *Shari'a* Law 161–81 (Paul A. Marshall ed., 2005). Even when Indonesia was a Dutch colony, there were *Priesterraden*, Islamic tribunals which ruled on disputes between Muslims which were not clearly within another court's jurisdiction. Azyumardi Azra, *The Indonesian Marriage Law of 1974: An Institutionalization of the* Shari'a *for Social Changes, in Shari'a* and Politics 80 (Arskal Salim & Azyumardi Azra, eds., 2003).

274. Nina Shea, *Conclusion: American Responses to Extreme* Shari'a, *in* Radical Islam's Rules: The Worldwide Spread of Extreme *Shari'a* Law, *supra* note 273, at 196–202. In contrast, Turkey, a largely Muslim nation, abolished the death penalty through legislation in 2002. Turkey previously had a moratorium on capital punishment and public opinion supported the abolition. Karl Vick, *Turkey Passes Rights Reforms In Bid for EU*, The Washington Post, Aug. 4, 2002, at A21.

striking fact" that over half of "actively retentionist" countries have majority-Muslim populations, as do most of the countries which voted against the 2007 U.N. resolution calling for abolition of capital punishment.[275]

Islam and *shari'a* have varied in their prominence in Indonesian political discourse, and the "infinite subtleties and cross-currents within Indonesian Islam" make it difficult to discuss Indonesian Muslims as a group.[276] When the Republic of Indonesia declared independence in 1945, it did not just have the largest number of Muslims in one nation, it also "pioneered a new kind of religious pluralism."[277] *Pancasila*'s first principle, belief in God, was not focused solely on Islam, but included the five official (monotheistic) religions: Islam, Hinduism, Buddhism, Catholicism and Protestantism.[278]

Despite this pluralism, Islam was clearly the dominant religion, and the religion of the vast majority of Indonesians. There was intense debate over whether Islam should be the official state religion or whether the state as a whole should be based on *shari'a*.[279] A draft version of the 1945 Constitution included a preamble known as the Jakarta Charter, which required all Muslims (but not non-Muslims) to follow *shari'a*.[280]

For the first few decades of independence, Islam was marginalized as a political force.[281] Though there was a movement (known as Darul Islam) to form a separate Islamic state which supported several uprisings, there was no large, coherent Muslim

275. Roger Hood & Carolyn Hoyle, *Abolishing the Death Penalty Worldwide: The Impact of a 'New Dynamic,'* 38 Crime & Just. (forthcoming 2009) (manuscript at 45, 48, on file with author); *see* Warren Hoge, *supra* note 2 (discussing U.N. resolution for a moratorium on the death penalty). For a list of countries voting for and against the moratorium, and those abstaining, see Press Release, General Assembly, General Assembly Adopts Landmark Text Calling for Moratorium on Death Penalty, U.N. Doc. GA/10678 (Dec. 18, 2007), *available at* http://www.un.org/News/Press/docs/2007/ga10678.doc.htm.

276. Eldridge, *supra* note 135, at 126.

277. Riddell, *supra* note 273, at 161.

278. *Id.*

279. *Id.*

280. *Id.* The Jakarta Charter read "Dengan kewajiban menjalankan syariah Islam bagi pemeluknya . . . ." or "With the duty to practice Islamic shari'a *by the faith's adherents* . . . ." (emphasis added).

281. Riddell, *supra* note 273, at 162.

political group from 1945 to 1990.[282] Muslim parties did not do well in early Indonesian elections, and in 1973 Suharto merged the parties—all Muslim parties, extreme and moderate, were combined to form the PPP (*Partai Persatuan Pembangunan*, or United Development Party).[283] A general lack of unity in the PPP, combined with a 1973 ban on using Islam as a unifying principle,[284] further weakened Islam's political strength.[285] Then in 1984, it became criminal to advocate for an Islamic state.[286] All of these changes were motivated by a fear of Islam's potential to unify Indonesians without control by Suharto and the Suharto-supporting military, but by the 1990s opposition in the military led to Suharto cultivating a stronger relationship with Muslims.[287]

Islam's popularity was surging by the time Suharto left office, and the confusion that followed his departure created "an ideal breeding ground for religious radicalism."[288] Darul Islam, and its dedication to making an Indonesian state based on *shari'a*, became more popular.[289] Militant groups dedicated to creating an Islamic state in Southeast Asia, such as Jemaah Islamiah and Laskar Jihad, expanded their operations.[290] Legislation in 1998, intended to allow more autonomy for local communities, led to the formation of several Islamic courts.[291]

Despite increased activity by these groups, Islam in Indonesia is generally moderate, with fundamentalist Islam seen as a "foreign," "Arab" influence.[292] Though fifty-eight percent of Muslim

282. *Id.* at 162.
283. *Id.* at 163.
284. *Id.* at 164.
285. *Id.*
286. *Id.*
287. *Id.* This fear of Islam's unifying power echoes actions of the Dutch colonizers. *See supra* Part III.A.3 (discussing theories that *adatrecht* was created to minimize the unifying force of Islam in Southeast Asia).
288. Riddell, *supra* note 273, at 166.
289. *Id.*
290. *Id.* at 166–69.
291. *Id.* at 166. One of the Islamic courts used stoning as a punishment; stoning is illegal under Indonesian law but no prosecutions followed. *Id.*
292. Mark Bowden, *In Indonesian Tug of War, Radical Islam Thrives on Democracy and Despair*, N.Y. Times, Apr. 19, 2007, at E9 (noting that Islam long ago adapted to Indonesian culture and fundamentalist Islam is seen as a "foreign," "Arab" influence); *see also* Seth Mydans, *Religiosity, Not Radicalism, Is New Wave in Indonesia*, N.Y. Times, Jul. 2, 2007, at A7 (observing that Islam in Indonesia is "tolerant" and "moderate").

respondents to a 2001 survey by the State Islamic University of Jakarta supported an Islamic government run by Islamic clerics, the MPR strongly rejected an effort in 2002 to add the Jakarta Charter (which, again, would only apply to Muslims) to the 1945 Constitution.[293] Further, some of the most prominent Islamic voices in Indonesia—including Amien Rais, a presidential candidate and chairman of the MPR, and Hasyim Muzadi, chairman of the traditionalist Muslim group Nahdlatul Ulama—have repeatedly rejected suggestions to implement *shari'a* as Indonesia's main legal system.[294] In the 2004 parliamentary elections, radical *shari'a*-supporting parties won about ten percent of the seats, and the PPP, still the main Muslim political party, won another ten percent.[295] In the 2004 presidential elections, the two candidates with strong Islamic credentials (Amien Rais and Hamzah Haz, the head of the PPP), finished fourth and fifth out of five candidates.[296]

Overall, while Islam is an important social and religious force in Indonesia, it is not a strong political force, and it seems unlikely that efforts to install *shari'a* as the basis for Indonesian law will succeed. While no discussion of Indonesia or Indonesian policy would be complete without consideration of Islam, it does not appear to be very relevant to the death penalty debate in the context of drug trafficking.[297]

3. The MKRI and its Justices

While Indonesia's justice system in general has been described as "in a state of collapse," with a "politically motivated" attorney general and a corrupt court system largely as a result of years of "authoritarian rule and political suppression under the

293. Riddell, *supra* note 273, at 173.

294. *Id.* at 176–78. Abdurrahman Wahid, President of Indonesia from 1999 to 2001, was previously the chairman of Nahdlatul Ulama. *Id.* at 178.

295. *Id.* at 179. In a country as overwhelmingly Muslim as Indonesia, these are not large percentages.

296. *Id.*

297. While it may be difficult or impossible to separate political Islam from cultural Islam, the Indonesian population is so overwhelmingly Muslim that any cultural effects of Islam are subsumed in the larger discussion of Indonesian culture. *See also infra* text accompanying notes 393–394 (regarding the MKRI majority's limited discussion of Islamic issues); *infra* text accompanying notes 409–411 (discussing C.J. Roestandi's dissent, which distinguishes between legal and religious norms).

Suharto regime,"[298] the MKRI is a "relatively well established institution," having decided over 120 cases as of April 2007.[299] It is seen as "honest, transparent, fair and independent" by most of the public.[300] MKRI rulings "have strengthened human rights protections," though they are not all seen that way.[301]

One prominent case supporting the MKRI's strong reputation for independence was decided in 2004. The Court set aside the conviction of Masykur Abdul Kadir, a participant in the Bali bombings of 2002, who was charged with violating an anti-terrorism statute enacted six days after the Bali bombings.[302] The Court ruled five to four that the charges were unconstitutional because of their retrospective effect.[303] This ruling came despite "considerable pressure upon the Indonesian authorities to ensure that those responsible for the bombings were brought to justice," significant international implications, "substantial evidence against the accused of involvement," and "the importance to Indonesia of being seen to act strongly against terrorism."[304]

The Court has been criticized as a "superbody"[305] that "abuses its power," and its decisions have offended parties on both sides of the political spectrum: human rights groups protested a decision

298. Press Release, Asian Human Rights Comm'n, Indonesia: Ratification of Key Human Rights Instruments Must Be Followed by Legal Reform (Mar. 22, 2006), *available at* http://www.ahrchk.net/statements/mainfile.php/2006statements/457/.

299. Stockmann, *supra* note 34, at 29.

300. *Id.* at 63.

301. *Id.* at 64.

302. Michael Kirby, Justice, High Court of Austl., Address at the Law Council of Australia's Presidents of Law Associations in Asia Conference: Independence in the Legal Profession, Global and Regional Challenges (Mar. 20, 2005), *available at* http://www.hcourt.gov.au/speeches/kirbyj/kirbyj_20mar05.html.

303. *Id.*; Kadir/Indonesia, MKRI, 23 Juli 2004, Decision No. 013/PUU-I/2003 (Indon.), *available at* http://www.mahkamahkonstitusi.go.id/download/putusan_sidang_eng_ConstitutionalCourtDecisionTerroristAct.pdf (English translation by MKRI).

304. Kirby, *supra* note 302. Previous case law invited the Court to find that the prohibition against retroactive laws was not absolute. The Court instead distinguished the present case based on the fact that the law under which Kadir was charged was inspired directly by the Bali bombings. In contrast, the earlier Soares case, see *infra* note 377, involved a more general human rights law. *See* Stockmann, *supra* note 34, at 49–50.

305. Stockmann, *supra* note 34, at 64.

which limited the powers of the Corruption Eradication Commission, and conservative groups have decried decisions allowing independent candidates greater participation in regional and provincial elections and decisions striking down criminal provisions banning "speeches and writings that incite hatred towards the government."[306]

A reputation for *independence*, however, does not guarantee impartiality, particularly if the "superbody" criticisms are taken seriously. Jimly Asshiddiqie, president of the MKRI, publicly supported the death penalty in a 2004 seminar on corruption, and expanded his support for its constitutionality with respect to terrorism in comments published in 2004.[307] The vetting and approval process for MKRI Justices includes a thorough review of their previous work as a judge, academic, or practitioner, but it is unclear whether the Judicial Commission (*Komisi Yudisial*) looks for their personal opinions on hot-button issues.[308] With this in mind, it is hard to say to what extent the personal opinions of the MKRI's justices may affect their review of Indonesia's drug statute.[309]

306. Desy Nurhayati, *Jimly Asshiddiqie: The Face of Controversial Constitutional Court,* The Jakarta Post (Indon.), Jan. 3, 2008, at 20, *available at* http://www.thejakartapost.com/yesterdaydetail.asp?fileid=20080103.S03. Another concern may be competition or tension between the MKRI and other institutions, particularly the Supreme Court. *See, e.g.*, Lee Epstein et al., *The Role of Constitutional Courts in the Establishment and Maintenance of Democratic Systems of Government,* 35 Law & Soc'y Rev. 117 (2000) (creating a game-theoretic model of conflict between constitutional courts and other governmental bodies, and applying it to the Russian Constitutional Court); Lech Garlicki, *Constitutional Courts Versus Supreme Courts*, 5 Int'l J. Const. L. 44 (2007) (examining tensions between constitutional courts and supreme courts in a sampling of European countries).

307. Hukumonline.com, *A Constitutional Debate—To Kill or Not To Kill—Capital Punishment*, Indon. Wkly. L. Dig., Issue 64, at 2, May 4, 2007 (Indon.) (on file with author). *But see* Fitzpatrick, *supra* note 38, at 7 (quoting public comments by C.J. Asshiddiqie to the effect that he supported the Bali Nine petitioners' appeal).

308. Hukumonline.com, *supra* note 307, at 3. The article also mentions Indonesia's Attorney General, Abdul Rahman Saleh, who went from being "an avid capital punishment opponent" while at the Indonesian Legal Aid Foundation (*Yayasan Lembaga Bantuan Hukum Indonesia*) to strongly supporting it in his work as Attorney General. *Id.*

309. It would also be helpful to analyze each Constitutional Justice's background and opinion on the death penalty. However, biographical information on the Justices (besides Court President Jimly Asshiddiqie) is not readily available in English. For limited biographies of current justices, *see* MKRI, http://www.mahkamahkonstitusi.go.id/eng/index.php (mouseover "justices profile";

4. Summary of Indonesia Today

Politically and ideologically, "the balance between *Pancasila*, Islam and liberal democracy remains the focus of confusing struggle."[310] Despite this, Indonesia's unity, and its corresponding history of repressing dissent, seems to have become a much less pressing issue in recent years. Indonesia today is "one of the most . . . free, open and self-regulating" countries in Southeast Asia.[311] It remains "one of the world's . . . most disparate societies,"[312] and since Suharto's fall Indonesia has decentralized politically and financially.[313] There are still threats to stability—political decentralization has encouraged corruption at the local and regional level, unemployment and poverty levels are high, and the health and education systems need improvement—but it seems that "small and incremental changes" will continue to improve Indonesia's governance and political discourse.[314] This in turn will open up Indonesia's capital punishment debate, though fears of drug abuse and drug trafficking may overwhelm efforts to restrict or abolish the death penalty.

C. Foreign Relations

Indonesia's relations with foreign countries—particularly Australia and the nations of Southeast Asia—affect the death penalty debate in Indonesia through foreign states' efforts (or lack thereof) to influence Indonesia's death penalty policy, and through Indonesia's perceived role in the regional and global community. This Section will examine Indonesia's relations with Southeast Asia, Australia, and the rest of the world, and discuss how they may influence Indonesia's death penalty debate.

then click on the relevant Constitutional Justice's name) (last visited Jan. 7, 2009).

310. Eldridge, *supra* note 135, at 199.

311. Mydans, *supra* note 212.

312. *Id.* (quoting Ralph Boyce, former U.S. Ambassador to Indonesia).

313. *Id.* (noting that the share of Indonesia's bank deposits kept in Jakarta has fallen from 70% in the late Suharto era to 35% currently).

314. *Id.*

1. Southeast Asia

The Association of Southeast Asian Nations (ASEAN) necessarily influences any discussion of foreign relations in Southeast Asia. A consensus principle (similar to Indonesia's *mufakat*[315]) is "at the core of ASEAN's ethos and practice," and "requires countries to avoid interference with each others' internal affairs and to cooperate in resisting outside intervention."[316] This principle would serve not only to prevent other ASEAN countries from pressuring Indonesia to restrict or abolish capital punishment, but to encourage them to assist Indonesia in resisting attempts by Western nations and international organizations to affect the Indonesian death penalty debate.

Southeast Asia is one of the last regional strongholds of capital punishment in the world. Indonesia was one of eight Asian nations—out of eleven nations in total—to vote against a 1997 U.N. Human Rights Commission resolution to suspend executions and consider abolishing the death penalty.[317] However, the Bali Nine case was "only the third occasion in nearly a generation in which the apex court of a major Asian jurisdiction has had the opportunity to examine in depth the question of the death penalty and its legality under international human rights law."[318] More recently, the Philippine government abolished the death penalty in 2006,[319] and in 2007 South Korea found the mandatory death penalty to be unconstitutional.[320] It is unclear how much of an effect these

315. *See supra* text accompanying notes 152–153 (discussing *mufakat* and its effect on decisionmaking); *supra* text accompanying note 188 (discussing *mufakat* as an excuse to suppress dissent).

316. Eldridge, *supra* note 135, at 60.

317. Press Release, Amnesty Int'l, Asia Votes for the Death Penalty (Apr. 4, 1997), *available at* http://www.amnesty.org.ru/library/Index/ENGIOR410061997?open&of=ENG-392.

318. Byrnes, *supra* note 27, ¶ 2.

319. Alston Report, *supra* note 54, ¶ 4. China has also taken steps to reduce its use of the death penalty by allowing the Supreme People's Court in Beijing to review every case, which is expected "to develop a jurisprudence that is more restrictive and limiting than that which has been developed by the various regional courts." *Id.* ¶ 7.

320. King Min Case, [Nov. 29, 2007] 19-2 KCCR 535, 2006 Hun-Ka 13 (Supreme Court of South Korea), *translated in* Constitutional Court of Korea, Decisions of the Constitutional Court of Korea 2007, at 135 (2008) (holding that the mandatory death penalty for the murder of a superior military officer,

developments will have on the regional death penalty debate, as South Korea is not a member of ASEAN and the Philippines has been a leader (or perhaps an aberration) as the first ASEAN member to ratify several human rights treaties.[321] Further, Malaysia has shown an openness to abolition: in 2006, its Bar Association recommended abolition of capital punishment, and the Malaysian cabinet minister in charge of law made comments supporting this change.[322]

Since the 1990s, a doctrine of exceptionalism based on "Asian values" has been used to excuse many human rights violations in Southeast Asia.[323] These values focused on "the primacy of community over individual rights [and] respect for . . . authority,"[324] echoing the Indonesian concept of unity and discouragement of dissent. This exceptionalism applies to human rights, as seen in the 1993 Bangkok Declaration, which said that human rights should be applied "bearing in mind the significance of national and regional particularities and various historical, cultural and religious backgrounds."[325]

Despite this general policy of cooperation and nonintervention, international relations among Southeast Asian countries are often marked by tension and competition.[326] In this context, a domestic policy decision as significant as the abolition of capital punishment will likely affect regional relations. Abolishing capital punishment for drug crimes is a decision that could be

imposed regardless of motive and mode, was "remarkably out of proportion to the gravity of the offence" and "illegitimate in the criminal penalty system").

321. Eldridge, *supra* note 135, at 67.

322. Hood & Hoyle, *supra* note 275, at 58.

323. Eldridge, *supra* note 135, at 32–33. Much of the "Asian values" rhetoric parallels *Pancasila* principles. *Id.* at 119; *see also supra* text accompanying notes 168–169 (discussing the perception of Indonesia as *sui generis* being used to excuse human rights violations).

324. Eldridge, *supra* note 135, at 33.

325. *Id.* at 61.

326. *See, e.g.*, I Made Andi Arsana, *Good Fences Mapping Borders with Singapore*, The Jakarta Post, Feb. 28, 2007, at 6, *available at* http://www.littlespeck.com/content/security/CTrendsSecurity-070228.htm (describing conflict between Indonesia and Singapore regarding their shared maritime boundary); Bantarto Bandoro, *Neighbors in Disharmony*, The Jakarta Post, Jan. 11, 2008, at 6, *available at* http://indonesia.pelangi.org/malaysia/neighbors-in-disharmony-63 (discussing the stability of relations between Indonesia and Malaysia).

particularly unpopular with Indonesia's neighbors in the region.[327] Overall, in the context of capital punishment, "[t]here is . . . unlikely to be any abolitionist or restrictive regional custom or pressure in Southeast Asia in the near future,"[328] and there may in fact be pressure to preserve capital punishment.[329] Professor Michael Hor[330] attributes this to the tradition of "non-interference in 'domestic affairs'" among ASEAN members and to the retention of capital punishment in Indonesia, Malaysia, and the Philippines.[331] However, given the Philippines' abolition of capital punishment and Indonesia's role as a leader in ASEAN, this could change in coming years, especially if Indonesia were to restrict or abolish capital punishment.

327. *See, e.g.*, Marianne Bray, *Asia's 'Grim View on Drug Crime*,' CNN.com, Dec. 4, 2005, http://edition.cnn.com/2005/WORLD/asiapcf/12/01/execution/index.html (last visited Jan. 8, 2009) (stating that Singapore executes more people per capita than any other nation and that most of those executed there are convicted of drug trafficking); Baradan Kuppusamy, *Hundreds of Migrants Face Executions for Drug Crimes*, Inter Press Service News Agency, Jun. 29, 2007, http://ipsnews.net/news.asp?idnews=38380 (last visited Jan. 8, 2009) (stating that many Southeast Asian countries use capital punishment more for drug crimes than any other crime, that hundreds of Indonesians have been sentenced to death in Malaysia for drug trafficking, and that most Malaysians oppose capital punishment).

328. Hor, *supra* note 32, at 117 n.83.

329. The idea of "jurisdictional competition" could raise this lack of abolitionist pressure into an incentive to preserve capital punishment. Doron Teichman argues that within a federal system—or within a region such as Southeast Asia—a desire to deter a certain type of crime or criminal in one's own jurisdiction can create a race to the bottom, with penalties across the region becoming increasingly harsh. Doron Teichman, *The Market for Criminal Justice: Federalism, Crime Control, and Jurisdictional Competition*, 103 Mich. L. Rev. 1831, 1858–64 (2005). With this in mind, it seems counterintuitive that a comparison of the drug laws for sixteen categories of offenses in Indonesia, Malaysia, and Singapore shows four offenses for which only Malaysia allows capital punishment, six offenses for which two of the countries allow capital punishment, eight offenses for which none allows capital punishment, and not a single offense for which all three allow capital punishment. MKRI Decision No. 2-3/PUU-V/2007, *supra* note 41, at 105–07.

330. Professor, Faculty of Law, National University of Singapore.

331. Hor, *supra* note 32, at 117 n.83. Hor contrasts ASEAN with the Council of Europe, which requires new members to abolish peacetime use of the death penalty. *Id.*

2. Australia

Indonesia's relations with Australia are also important in the death penalty debate—particularly so for the Australians charged in the Bali Nine case. The two nations generally work closely together, and they have a cooperation treaty for criminal matters.[332] However, their relationship has been described as "complex and fragile" by a former Australian ambassador to Indonesia,[333] and relations have "swung to both extremes" in recent years.[334] Among "western" nations, Australia has the closest political and academic ties to Southeast Asia.[335] Despite these close ties, Australia is clearly not a part of Asia—though ASEAN countries buy over fifty percent of Australian exports, Australia is not a member of the ASEAN Free Trade Area.[336]

Regarding capital punishment, Australia's 2004 National Framework for Human Rights supported "the general principle that the punishment should fit the crime" but pointed out that "the death penalty has not been supported by governments in Australia for over 25 years."[337] Following the attacks on September 11, 2001, Australia's stance on the death penalty changed, particularly with respect to terrorism. Regarding the men convicted of planning bombings in Bali in 2002, former Australian Prime Minister John Howard said that "if [the death penalty] is what the law of Indonesia

332. Mutual Assistance in Criminal Matters Act, 1987 (Austl.). This treaty was not used in relation to the Bali Nine. Rush v. Comm'r of Police (2006) 150 F.C.R. 165, 175 (Austl.). The agreement bars assistance for prosecution or punishment of crimes for which the death penalty may be imposed. Bampton, *supra* note 14, at 11 (citing Mutual Assistance in Criminal Matters Act, 1987, § 8(1A) (Austl.)).

333. Bampton, *supra* note 14, at 18 (citing Richard Woolcott, *John Howard is Right to Placate Indonesia*, The Australian, Apr. 21, 2006, at 14, *available at* http://www.theaustralian.news.com.au/story/0,25197,18874030-7583,00.html).

334. Eldridge, *supra* note 135, at 11. Former Foreign Minister Alexander Downer has discussed Australia's improved relationship with Indonesia and the good relations among himself, the former Australian Prime Minister John Howard, and Indonesian President Susilo Bambang Yudhoyono. Bampton, *supra* note 14, at 18 (citing Interview by Kieran Gilbert with Alexander Downer, Former Foreign Minister of Austl. (Sky News broadcast Feb. 15, 2006) (U.K.), *available at* http://web.archive.org/web/20060221093122/http://www.foreignminister.gov.au/transcripts/2006/060215_sky.html).

335. *See* Eldridge, *supra* note 135, at 160.

336. *Id.* at 161–62.

337. Bampton, *supra* note 14, at 11 (quoting Commonwealth of Australia, National Framework for Human Rights—National Action Plan 82–83 (2004)).

provides, well, that is how things should proceed."[338] The election of current Prime Minister Kevin Rudd, in November 2007,[339] may increase the Australian government's willingness to fight against capital punishment of Australian citizens abroad. In June 2008, the Australian Parliament recommended a review of ties between the Australian Federal Police and foreign police forces, particularly with regard to information-sharing activity in countries that allow the death penalty.[340] Rudd has said that the Labor Party's "policy on the death penalty . . . has always been one of universal opposition,"[341] and current Foreign Minister Stephen Smith signaled an intention to request clemency before an official visit to Jakarta in August 2008.[342]

In the context of human rights issues in Southeast Asia, Australia's foreign policy approach has shifted from a realist, hands-off approach to "incorporating [human rights concerns] within frameworks of national interest."[343] Australia has also shifted from "a multilateral to bilateral focus," which leads to inconsistent "human rights policies [applying] to different countries and issues."[344] In

338. *Id.* at 14 (quoting Interview by Chris Reason with John Howard, Former Prime Minister of Austl., on *Sunday Sunrise* (Channel 7 television broadcast Feb. 16, 2003) (Austl.)). The inconsistency inherent in arguing for clemency for one's own citizens facing capital punishment abroad, but supporting its use for others, may weaken Australia's credibility and reduce the likelihood of success of those clemency requests.

339. Tim Johnston, *Ally of Bush is Defeated in Australia*, N.Y. Times, Nov. 25, 2007, at 8.

340. Andrew Fraser, *Inquiry into AFP's Foreign Links 'Overdue'*, Canberra Times (Austl.), Oct. 9, 2008, at A11, *available at* http://www.canberratimes.com.au/news/local/news/general/inquiry-into-afps-foreign-links-overdue/1329052.aspx.

341. *See, e.g.,* Australian Associated Press (AAP), *Kevin Rudd Opposed to Death Penalty as Bali Bombers Face Execution*, Herald Sun (Austl.), Oct. 30, 2008, *available at* http://www.news.com.au/heraldsun/story/0,21985,24575564-661,00.html (reporting that even though the bombers' "murderous, cowardly and callous acts" were "appalling," the Labor Party's position on the death penalty had not changed). *But see* Dan Harrison, *PM Slams Rudd Over Death Penalty*, The Age (Austl.), Oct. 9, 2007, *available at* http://www.theage.com.au/news/national/pm-slams-rudd-over-death-penalty/2007/10/09/1191695867280.html (reporting that Kevin Rudd "distanced himself" from comments by fellow Labor Party member Scott McLelland promising to campaign against the use of capital punishment in Indonesia on the Bali bombers).

342. AAP, *Smith to Appeal for Bali Nine Clemency*, The Sydney Morning Herald, Aug. 10, 2008, *available at* http://www.smh.com.au/news/national/smith-to-appeal-for-bali-nine-clemency/2008/08/10/1218306632402.html.

343. Eldridge, *supra* note 135, at 10.

344. *Id.* at 168.

addition, the general policy of the United States and Australia to let the Indonesian police and military do as they please to support an "agenda of securing the TNI [Indonesian Army] as a regional ally against al-Qaeda"[345] may make it more difficult, and less likely, for Australia to take a strong stand on an issue as controversial and divisive as the death penalty.

Moreover, Australia is rarely in a position to make real demands on Indonesia; a longstanding "semi-official doctrine of 'asymmetry'" leaves Australia "overwhelmingly more in need of Indonesia's cooperation than vice versa" because of "Indonesia's size, population, geo-strategic location and resource base."[346] Asymmetry was "a major cause of Australian quiescence on human rights issues until at least the early 1990s."[347]

The Bali Nine case also implicates a topic which has been the source of increasing friction between Indonesia and Australia—border security.[348] Besides drug smuggling, there have been additional conflicts involving people smuggling,[349] terrorism,[350] and asylum issues.[351]

Australia may be the strongest non-Asian voice for human rights with respect to Indonesia: "As a small to medium power, it poses no threat, and may be able to exert modest influence, particularly via personalised, non-public persuasion in areas of specialised cooperation."[352] Despite this, and despite several of its citizens facing capital punishment in the Bali Nine case, Australia

345. Human Rights Watch, *supra* note 199, at 4.

346. Eldridge, *supra* note 135, at 185.

347. *Id.*

348. *See, e.g.*, Australian Broadcasting Corporation (ABC) Radio Australia, *Australia to Boost Efforts to Stop People Trafficking*, Aug. 13, 2008, http://www.radioaustralia.net.au/news/stories/200808/s2334443.htm (last visited Jan. 8, 2009) (reporting that Australia's immigration minister was in talks with Indonesian officials and other countries regarding border security in order to address the issues of terrorism and human trafficking).

349. *Id.*

350. *Id*.

351. *See, e.g.*, Virginia Marsh & Shawn Donnan, *Australia Moves to Ease Asylum Row with Indonesia,* The Financial Times (U.K.), Apr. 18, 2006, http://www.ft.com/cms/s/0/c7d3aee8-cec2-11da-925d-0000779e2340.html?nclick_check=1 (last visited Jan. 8, 2009) (reporting about efforts to "repair a rift" between Australia and Indonesia caused by Australia's decision to grant asylum to a group of activists from Indonesia's conflict-torn Papua province).

352. Eldridge, *supra* note 135, at 195.

seems very unlikely to initiate strong efforts to influence Indonesia's death penalty debate.

3. Global Relations

Internationally, more and more states are abolishing the death penalty. In one of the more recent cases to find capital punishment unconstitutional, the High Court of Malawi abolished the mandatory death penalty for murder and treason and noted that among "comparable jurisdictions" there was "discernible consistency declaring the mandatory death penalty to be unconstitutional."[353] In his testimony to the MKRI, Philip Alston noted that "[t]he Middle East, Asia and the United States are the areas with widespread retention" of the death penalty—all other regions have largely eliminated it or have been moving in that direction.[354] However, it is not likely that other nations or international organizations will put effective pressure on Indonesia to abolish or restrict capital punishment.

India, China, and the United States are large, powerful countries which actively trade with Indonesia and would be most able to influence it. However, the United States and India[355] retain capital punishment, making them unwilling and unconvincing advocates for restrictions on or abolition of the death penalty.[356] Similarly, while China has had surprising success in using economic pressure to limit opium production in the Golden Triangle area of Southeast Asia,[357] and has shown a willingness to reduce its use of

353. Kafantayeni v. Attorney Gen. of Malawi, (2005) Constitutional Case No. 12 (High Court of Malawi), http://www.saflii.org/mw/cases/MWHC/2007/1.html (last visited Jan. 6, 2009). It should be noted that *Kafantayeni* involved *mandatory* capital punishment, which is not true of the Bali Nine case.

354. Alston Report, *supra* note 54, ¶ 3.

355. Agence France-Presse, *World Briefing Asia: India: First Execution in a Decade*, N.Y. Times, Aug. 14, 2004, at A4.

356. A study of foreign countries' efforts to influence Indonesian human rights policy under Suharto found that the "severity and credibility" of the threat or action, compared to the desirability of the human rights violation, is the crucial balance. If the influencing country appears "half-hearted"—for example, by engaging in the human rights violation from which it is trying to convince Indonesia to refrain—its efforts are less likely to succeed. Marlies Glasius, Foreign Policy on Human Rights: Its Influence on Indonesia Under Soeharto 311–37 (1999).

357. Thomas Fuller, *No Blowing Smoke: Poppies Fade in Southeast Asia*, N.Y. Times, Sept. 16, 2007, at A3.

capital punishment, it is still "believed to carry out more court-ordered executions than all other countries combined."[358]

Dependence on "international agencies dominated by western, particularly US interests and opinions, has created a sense of resentment and humiliation,"[359] and this will make it more difficult for such groups to influence the Indonesian death penalty debate. On the other hand, Indonesia has been "seeking a broader regional and global role" since the early 1990s,[360] and joining other nations in strengthening human rights protections could improve Indonesia's standing in the global community.

Besides the aforementioned ASEAN, the main international organizations of which Indonesia is a member are the United Nations[361] and the World Trade Organization (WTO).[362] Though the United Nations and its General Assembly have encouraged the abolition of capital punishment,[363] it does not appear willing or able to take binding action on the subject in the near future—especially when the United States, its largest contributor,[364] continues to use capital punishment.[365] The WTO, with its focus on labor- and trade-related issues, is extremely unlikely to be the source of change in Indonesia's death penalty policy, particularly when trade-related

358. *China: Limits Ordered on Death Penalty*, Washington Post, Sept. 15, 2007, at A13. It should be noted that the "official and academic view" in China is that capital punishment "will be abolished when conditions are appropriate some time in the future." Hood, *supra* note 1, at 1.

359. Eldridge, *supra* note 135, at 137.

360. *Id.* at 162.

361. United Nations, United Nations Member States, http://www.un.org/members/list.shtml (last visited Jan. 9, 2009).

362. World Trade Organization, Understanding the WTO—Members, http://www.wto.org/English/thewto_e/whatis_e/tif_e/org6_e.htm (last visited Jan. 9, 2009).

363. *See, e.g.*, U.N. Gen. Assembly, Third Comm., *supra* note 83, ¶ 76 (arguing, in part, that the United Nations has abandoned the death penalty, even for serious international crimes, and recent criminal tribunals in which the United Nations was involved imposed life imprisonment as the most severe penalty); *supra* note 2 (discussing the recent U.N. General Assembly resolution calling for a moratorium on capital punishment).

364. United Nations Assoc. of the United States, All About the United Nations Budget, Jun. 2006, http://www.unausa.org/site/pp.asp?c=fvKRI8MPJpF&b=1813833 (last visited Jan. 9, 2009).

365. *See supra* note 4 (discussing U.S. Supreme Court consideration of the constitutionality of lethal injection).

areas of concern for Indonesia, such as deforestation[366] and labor[367] issues, remain controversial. Finally, because Indonesia is not a party to the First Optional Protocol to the ICCPR, complaints against Indonesia for ICCPR violations (including certain uses of capital punishment) cannot be brought to the Human Rights Council by individuals.[368] Judging by Australia's responses to the Van Nguyen[369] and Bali Nine cases, other states are not likely to pursue international legal action in response to Indonesia's use of capital punishment on their citizens.

Despite the general and accelerating international trend toward restricting or abolishing capital punishment, no organization in the international community appears poised to serve as a catalyst for Indonesia's abolition or restriction of the death penalty.[370]

IV. THE MKRI'S DECISION AND ITS REASONING

Previous Parts have discussed the context in which the MKRI heard the Bali Nine appeal, and the various factors which may have affected its debate. This Part will discuss the MKRI's decision regarding the constitutionality of capital punishment for drug-trafficking crimes in Indonesia. On October 30, 2007, the MKRI released its decision[371] rejecting the Bali Nine appeal by a vote of six to three.[372]

366. *See* Global Forest Watch, Indonesia's Forests in Brief, http://www.globalforestwatch.org/english/indonesia/forests.htm (last visited Jan. 9, 2009).

367. *See, e.g.*, Richel Dursin, *Indonesia's Working Children Find No Rest,* Asia Times Online, Jun. 24, 2000, http://www.atimes.com/se-asia/BF24Ae01.html (last visited Jan. 8, 2009) (describing the problems of child labor in Indonesia).

368. Optional Protocol to the International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), at 59, U.N. GAOR Supp. (No. 16), U.N. Doc. A/6316 (Dec. 16, 1966). For a current list of states which have ratified the Optional Protocol, *see* UNHCHR, http://www2.ohchr.org/english/bodies/ratification/5.htm (last visited Jan. 6, 2009).

369. *See supra* text accompanying note 30 (discussing Van Nguyen case).

370. This is not meant to belittle the contributions of NGOs and other international actors. However, nothing in Indonesia's history indicates a role for such groups beyond encouraging debate and drawing attention to human rights abuses—these groups have been unable to force or persuade the Indonesian government to significantly change its practices.

371. MKRI Decision No. 2-3/PUU-V/2007, *supra* note 41. It should be noted that the original opinion, in Bahasa Indonesia (*available at* http://www.mahkamahkonstitusi.go.id/download/putusan_sidang_Putusan%2023%20PUUV2

A. The Majority

First, the Court found that the foreign petitioners had no legal standing to make this appeal.[373] Whether that is a violation of international human rights norms is outside the scope of this Note. The Bali Nine petitioners were joined by two Indonesian women, and the rest of the decision officially only applies to the Indonesian citizens.[374]

The Court found that the right to life is not made a non-derogable right by Article 28I(1) of the 1945 Constitution.[375] They said that the original intent of the 1945 Constitution's drafters allowed limitations on human rights.[376] They also pointed to Article 28J of the 1945 Constitution, which comes at the end of Article 28's human rights provisions and allows for limitations on such rights.[377] The Court based this method of reasoning on *sistematische*

007ttgPidana%20Mati30Oktober2007.pdf) is 471 pages long while the MKRI's official English translation of the decision (*available at* http://www.mahkamahkonstitusi.go.id/download/putusan_sidang_eng_PUTUSAN%202_PUU_V_07%20-%20Hukuman%20Mati%20(Eng).pdf) is only 168 pages long. While both versions include a Part 3 summarizing the main expert testimony, the original Bahasa also includes a lengthy Part 2 which describes the arguments and testimony from each side in greater detail, including several charts and tables. Aside from that difference, the two versions are basically identical and the differences are not significant for the purposes of this Note.

372. Though four judges dissented, one of them dissented only with respect to the standing issue. *See infra* Part IV.B (discussing dissents). C.J. Asshiddiqie has said that he supported the Bali Nine petitioners' appeal, but joined the majority "because he did not believe that as chief of the bench, he should be in the minority group." Fitzpatrick, *supra* note 38; *see also supra* note 155 and accompanying text (discussing *Pancasila's* emphasis on *mukafat* or consensus). As a result, five to four is an accurate count of how the constitutional justices felt about the appeal.

373. MKRI Decision No. 2-3/PUU-V/2007, *supra* note 41, at 109; Alfian, *Court Rejects Challenge to Death Penalty*, The Jakarta Post (Indon.), Oct. 31, 2007, at 9, *available at* http://www.thejakartapost.com/detailweekly.asp?fileid=20071031.@03.

374. Alfian, *supra* note 373.

375. MKRI Decision No. 2-3/PUU-V/2007, *supra* note 41, at 77–83.

376. *Id.* at 79–80; *see* Alfian, *supra* note 373.

377. MKRI Decision No. 2-3/PUU-V/2007, *supra* note 41, at 80–81; *see also* text accompanying notes 126–127 (discussing the Soares case, a previous MKRI decision using Article 28J to justify prosecution under a retroactive human rights law, in apparent contravention of Article 28I's inclusion of the right not to be prosecuted under retroactive laws as a right "which cannot be reduced under any circumstances").

interpretatie or systematic interpretation—because Article 28J is the concluding article of Chapter XA's human rights protections, all of Chapter XA's protections are subject to Article 28J's limitations.[378]

The Court found more support for limitations on the right to life in various international legal instruments.[379] Regarding the petitioners' argument that capital punishment was only appropriate for "the most serious crimes," the Court asserted that the ICCPR allowed capital punishment for "the most serious crimes in accordance with the law in force at the time of the commission of the crime,"[380] and that the crimes in the various provisions of the Narcotics Law "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."[381] The Court said this was appropriate because drug trafficking affects "the economic, cultural and political foundation of society"[382] and drugs in general pose "a danger of incalculable gravity."[383]

A significant part of the Court's discussion of international instruments focused on the U.N. Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances.[384] The Court held that

378. *Id.* at 80–81.

379. *Id.* at 86–103. These instruments included the ICCPR, the Rome Statute of the International Criminal Court, the European Convention on Human Rights, and the American Convention on Human Rights. The Court also mentioned that, due to its nature as a constitutional court, only the constitutional arguments (and not the arguments based on international law or trends) were "relevant to be considered by the Court," but that it was "important for the Court to state its position pertaining to" the international arguments. *Id.* at 78. Further, unless "Indonesia has violated an international *obligation* based on international covenants," arguments based on such agreements will be limited to "moral appeal[s]." *Id.* at 91–92 (emphasis added).

380. *Id.* at 93.

381. *Id.* at 101–02.

382. *Id.* at 100 (quoting Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, *supra* note 107).

383. *Id.* at 101 (quoting Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, *supra* note 107); Mark Forbes, *Judges Reject Bali Nine Challenge*, Brisbane Times (Austl.), Oct. 31, 2007, *available at* http://www.brisbanetimes.com.au/news/world/judges-reject-bali-nine-challenge/2007/10/30/1193618855924.html.

384. MKRI Decision No. 2-3/PUU-V/2007, *supra* note 41, at 96–103. Indonesia ratified the Convention through Law No. 7 of 1997. *Id.* at 96. The Court also discusses Articles 27 and 46 of the Vienna Convention on the Law of Treaties. *Id.* at 92. Vienna Convention Article 27 prevents a state party from invoking a "provision[] of its internal law as justification for its failure to perform

this Convention is the relevant law at the international level, and the Convention states that a state party must "maximize the effectiveness of law enforcement measures in respect of [drug] offences, . . . with due regard to the need to deter the commission of such offences."[385] The Convention describes certain drug offenses as "particularly serious,"[386] and the Court went on to apparently equate these "particularly serious" crimes with the "most serious" crimes of the ICCPR, thereby justifying use of the death penalty for such crimes.[387] It does not appear that any other tribunal, domestic or international, has combined the two instruments in order to reach such a conclusion.

The Court mentioned that it has "a duty . . . not only to uphold the law but also justice," and that justice included the perspectives of the "victims and their family of the crime subject to capital punishment."[388] The Court described "almost all" of the petitioners' arguments as being "solely taken from the perspective of the right to life of a person sentenced with capital punishment."[389] The Court found it "problematic" that petitioners were arguing that those sentenced to capital punishment should have an absolute right to life, while "ignoring the right to life of the crime victims."[390]

The Court discounted the chance of sentencing innocent people to capital punishment, saying that abolishing capital punishment will not eliminate mistakes, and that people will focus on the mistakes rather than "the substance of the real debate, that

a treaty" while Article 46 allows a state to do so if the conflict between internal law and treaty is "manifest and concern[s] a rule of its internal law of fundamental importance." *Id.* As such, the Court or the government could presumably argue that capital punishment provisions in drug laws are of "fundamental importance" to Indonesian drug policy.

385. *Id.* at 97.

386. *Id.* (quoting Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, *supra* note 107, art. 3(5)).

387. *Id.* at 101–02. The Convention also includes a provision allowing stricter laws than those listed in the Convention if "in [the state party's] opinion, such measures are desirable or necessary for the prevention or suppression of illicit traffic." *Id.* at 103 (quoting Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, *supra* note 107, art. 24).

388. *Id.* at 70.

389. *Id.*

390. *Id.* at 71. This seems to mischaracterize the arguments of petitioners, which did not argue that criminals sentenced to capital punishment should go unpunished or were justified in their actions.

is, why the . . . right to life of the criminals subject to capital punishment [is] more valuable than . . . the right to life of crime victims."[391]

Regarding evidence (or lack thereof) of the deterrent effect of capital punishment, the Court found the data insufficient to answer the questions of whether there is a general deterrent effect, or of whether drug crimes in Indonesia increased during the time that drug use increased.[392] As a result, the Court essentially ignored these arguments.

While it does not seem to be a dispositive issue, the Court acknowledged Indonesia's status as the "country with the greatest Moslem population in the world," and discussed the Cairo Declaration of Islamic Rights.[393] The Court cited the view of the Islamic Conference Organization that prohibits deprivation of the right to life based on anything other than Islamic law,[394] but the Court did not discuss whether Islamic law supports capital punishment for drug-trafficking crimes.

Portions of the decision echoed *adat*[395] principles, such as when the Court said "[t]he punishment given to these criminals has to be looked at as an effort to bring back social harmony to society."[396] Similarly, the Court said that "every crime . . . is actually an attack to the social harmony of society, which also means that every crime must cause [a] 'wound' in the form of social disharmony in society."[397] Therefore, the Court argued, criminal punishments based on retribution, as opposed to rehabilitation and social reintegration, are

391. *Id.* at 74. This again seems to mischaracterize the petitioners' arguments, which were based on the right to life in general and did not suggest that people who break drug-trafficking laws have a right to do so.

392. *Id.* at 74–76. Some would argue that an inability to prove a deterrent effect is evidence that such an effect does not exist.

393. *Id.* at 84.

394. *Id.* at 84–85.

395. *See supra* text accompanying note 141 (discussing *adat* and its goal of adjustment).

396. Forbes, *supra* note 383. This article was written before the official English translation of the decision was available, and likely refers to a portion where the Court says that retribution is acceptable when "seen as an effort to restore the disturbed social harmony." MKRI Decision No. 2-3/PUU-V/2007, *supra* note 41, at 73.

397. MKRI Decision No. 2-3/PUU-V/2007, *supra* note 41, at 73.

"an effort to restore the disturbed social harmony[;] . . . those who need the restorative efforts are actually . . . society."[398]

The Court also noted that the death penalty is a special and alternative penalty, not a mandatory penalty, and supported an alternative to a regular death penalty.[399] In this alternative the convict would have a ten-year probationary period in prison, at the end of which they would be sentenced to twenty more years in prison or capital punishment, depending on their behavior.[400]

Finally, the Court recommended that all capital punishment decisions that have obtained permanent legal force should be carried out immediately.[401] This recommendation could be seen as an effort to discourage further appeals or discussion.

B. The Dissents

Four Constitutional Justices dissented and three focused on the constitutionality of the Narcotics Law, as discussed below.[402]

The dissent of Constitutional Justice H. Achmad Roestandi found that capital punishment in Indonesian drug laws was unconstitutional.[403] This was based on a direct reading of the "cannot be limited under any circumstances whatsoever" language in Article 28I(1) of the 1945 Constitution[404] and the ICCPR.[405] C.J. Roestandi

398. *Id.*

399. *Id.* at 108.

400. *Id.*; *see supra* text accompanying note 119 (regarding inclusion of such a probationary period in the Draft Law of the Indonesian Criminal Code).

401. *Id.* The MKRI used the phrase *in kracht van gewijsde*, which is a Dutch legal term referring to when every possible appeal to a case has been filed. Its equivalent in the American legal system is *res judicata*. Indonesia did resume executing drug offenders in June 2008, and Deputy Attorney General A.H. Ritonga said drug offenders would be executed soon after their appeals were exhausted and pleas for clemency rejected. Gelling, *supra* note 68.

402. Constitutional Justice H. Harjono issued a dissent which solely discussed the standing of the foreign petitioners, which is outside the scope of this Note. MKRI Decision No. 2-3/PUU-V/2007, *supra* note 41, at 112–15. C.J. Harjono's main point was that foreign petitioners should be able to challenge laws that affect them, but not laws that only affect Indonesian citizens. *Id.*

403. *Id.* at 115–21.

404. *Id.* at 116. C.J. Roestandi pointed out that, although the army and police may kill people, their main goal is "but to **paralyze** the enemies or the criminals." *Id.* at 116–17. *Compare with supra* text accompanying note 101 (discussing a BNN expert's argument that an absolute right to life would require dissolution of armies and police worldwide).

used the ICCPR as a "comparison tool" and not as an independent source of obligations.[406] He explicitly said that if international instruments conflict with the 1945 Constitution, "as a Constitutional Court Justice, [he would] have to prioritize the 1945 Constitution."[407] C.J. Roestandi closes his dissent by pointing out that Indonesia has *Pancasila* and the 1945 Constitution as its sources of positive law, and the permissibility of capital punishment should be determined solely in relation to these sources of law.[408]

C.J. Roestandi's dissent also included an interesting discussion of Islamic law.[409] C.J. Roestandi drew a distinction between positive or legal norms, which are external, and religious norms, and argued that in a positive law framework capital punishment is "worrisome" because it can never be corrected.[410] Religious law, however, considers the "re-calculation (*penghisaban*) in the afterlife" as death is not the end of the criminal's punishment (and, in a sense, clemency can come after capital punishment).[411]

Constitutional Justice H.M. Laica Marzuki's dissent[412] found capital punishment unconstitutional based on a direct reading of Articles 28A and 28I(1) of the 1945 Constitution,[413] and also discussed the standing issue.[414] C.J. Laica Marzuki expressed the

405. MKRI Decision No. 2-3/PUU-V/2007, *supra* note 41, at 117–18.

406. *Id.* at 117–19.

407. *Id.* at 119.

408. *Id.* at 121. C.J. Roestandi prefaced this statement by saying that it is necessary because of Indonesia's nature as a pluralistic country with many "races, languages, cultures and religions," implying that it would be inappropriate to base a national rule on the beliefs of one religion. *Id.*; *see also supra* Part III.A (discussing Indonesian unity); *supra* Part III.B.2 (discussing Islam's role in Indonesia).

409. MKRI Decision No. 2-3/PUU-V/2007, *supra* note 41, at 119–21.

410. *Id.* at 120.

411. *Id.* at 120–21.

412. *Id.* at 121–31.

413. *Id.* at 129–30.

414. *Id.* at 126–28. Standing was based on the status of the right to life as a "basic right" and Article 28D(1)'s guarantee that every person receive equal treatment before the law, and C.J. Laica Marzuki compared this petition to decisions of the German *Bundesverfassungsgericht* (Federal Constitutional Court) and the Mongolian Constitutional Court. *Id.* C.J. Laica Marzuki said that Article 51(1)(a) of the Constitutional Court Law (restricting access to Indonesian citizens) should be "put aside . . . in this case particularly." *Id.* at 128. This is not the same as declaring that a law has no binding legal effect, and the Court had done it before with a different provision of the same law.

opinion that capital punishment should be abolished for all crimes in Indonesia because the right to life is a "basic right" that "directly bind[s] the three branches of state powers to comply [with] and respect them."[415] He also discussed the Cairo Declaration and *shari'a*[416] and says that "[l]ife . . . cannot be taken away by any persons,"[417] implying that it is inappropriate for secular—or even human—courts and nations to impose capital punishment.

Finally, Constitutional Justice Maruarar Siahaan issued a lengthy dissent,[418] including a discussion of the legal standing of the foreign petitioners[419] and a finding that the 1945 Constitution does not support capital punishment for any crime.[420] The constitutionality discussion included arguments based on a wide range of sources: the 1945 Constitution itself, including its preamble and *Pancasila*;[421] international human rights instruments and the decisions of foreign courts;[422] philosophical arguments;[423] and criminological arguments on penal theory and deterrence.[424]

C.J. Siahaan explained that *Pancasila* is "a construction of thoughts" which "direct[s] the law to the intended and targeted aspirations," and law "shall be understood as an instrument full of

415. *Id.* at 129.

416. *See supra* text accompanying notes 393–394 (describing the majority decision's discussion of the Cairo Declaration); *supra* Part III.B.2 (discussing the role of Islam and *shari'a* in Indonesia).

417. MKRI Decision No. 2-3/PUU-V/2007, *supra* note 41, at 131.

418. *Id.* at 131–67.

419. *Id.* at 131–38. C.J. Siahaan argued (1) that human rights are the "basic norm" of the 1945 Constitution, and (2) that the ratification of the ICCPR "results in Indonesia's international obligation to be bound to provide protection to every person while they are within Indonesian territory legally." *Id.* at 132. C.J. Siahaan also argued that not all of the 1945 Constitution's human rights protections include foreigners, but that the right to life is among those that do. *Id.* at 134–35.

420. *Id.* at 166 ("capital punishment . . . concerning all laws outside or inside the Indonesian Criminal Code . . . [is] contrary to the 1945 Constitution").

421. *Id.* at 139–47, 152–53, 158–60.

422. *Id.* at 149–51, 155–58.

423. *Id.* at 152–55.

424. *Id.* at 148–49, 151–52, 160–65. C.J. Siahaan noted that "deterrence is not . . . a result that can solely be achieved by capital punishment;" i.e., other punishments can have the same deterrent effect as capital punishment, but without as serious a risk of error and with less significant human rights implications. *Id.* at 161.

values which is in harmony with its source."[425] As a result of Indonesia's ratification of the ICCPR and other instruments, he argued that such instruments "will also give color on how the Constitutional Court . . . must understand the constitutional norms in the 1945 Constitution."[426] In light of *Pancasila* and international human rights instruments, C.J. Siahaan found that the 1945 Constitution does not support capital punishment:[427]

> "even though . . . the right to life is not . . . absolute in nature . . . such limitation cannot be interpreted as [the] right of the state to eliminate the life itself, and consequently cannot be interpreted as granting authority to the Government . . . to impose capital punishment."[428]

In fact, C.J. Siahaan said the basic moral philosophy of the 1945 Constitution is such that "there is no justification from the side of expected deterrent effect of capital punishment [which can] logically, proportionally and reasonably" support capital punishment.[429]

C. Discussion

On its face, the MKRI's decision does not leave much room for further challenges to capital punishment in Indonesia. Despite talking about the seriousness of Indonesia's drug problem, the majority's constitutional discussion—which, based on the Court's jurisdiction, is the only discussion that really matters—focused solely on Article 28A's right to life and Article 28I(1)'s potential limitation thereon. This implies that the decision applies to all capital punishment in Indonesia, and not just capital punishment as applied to drug crimes. Similarly, the dissents—while arguing that capital

425. *Id.* at 140.

426. *Id.* at 142. In this discussion, C.J. Siahaan used international human rights instruments to interpret the 1945 Constitution. There was no discussion of Indonesia's human rights obligations stemming from those instruments.

427. *Id.* at 143–60. C.J. Siahaan noted that, on its face, the "formulation of [the] relationship between the right to life in articles 28A and 28I paragraph (1)" is "unclear"; it is this lack of clarity that required reference to *Pancasila* and the international human rights instruments. *Id.* at 147.

428. *Id.* at 160.

429. *Id.* at 165. C.J. Siahaan also pointed out that, given the complexity of drug use in Indonesia, "the focus should be policy and action, and not whether to adopt capital punishment." *Id.* at 149. C.J. Siahaan then quoted extensively from the *Makwanyane* case, *see supra* note 60, regarding underlying issues which are greater than the constitutionality or desirability of capital punishment. MKRI Decision No. 2-3/PUU-V/2007, *supra* note 41, at 149–51.

punishment for drug crimes is not supported by the 1945 Constitution—offer no guidance for further adjudication of the issue. As such, it seems that the only hope for the Bali Nine defendants is clemency from the President or from the Supreme Court, and the only way to remove capital punishment from Indonesia's available penal options is legislative or executive action.

There is, however, one way in which capital punishment could again be challenged in Indonesian courts. The principal issue before the Court was relatively narrow, dealing only with the "[c]onstitutionality of the capital punishment provisions *in the Narcotics Law*."[430] This means that the constitutionality of other capital punishment provisions in Indonesian law[431] has not been determined by the MKRI. Such an argument may not be well-received by the current Court, but if the composition of the MKRI were to change—to one in which a majority of the Constitutional Justices were more receptive to anti-death-penalty arguments—it is not unreasonable to think that such a court would consider the issue[432] and find capital punishment unconstitutional for the crime at issue. This could reopen the capital punishment debate, and possibly require the MKRI to rule on the constitutionality of capital punishment in general.

This idea is supported by recent comments by Constitutional Justice Jimly Asshiddiqie, who remarked that "the next generation of constitutional judges might have a different opinion," and that "maybe in ten years they'll be ready to adopt the new way of thinking."[433]

430. *Id.* at 6 (emphasis added). Similarly, the MKRI's conclusion only mentions provisions of the Narcotics Law related to capital punishment; it does not mention capital punishment more generally. *Id.* at 109–10.

431. *See supra* note 263 (describing some other crimes for which capital punishment is an available penalty in Indonesia).

432. That is, they would not consider it *res judicata* as a result of MKRI Decision No. 2-3/PUU-V/2007.

433. Fitzpatrick, *supra* note 38 (remarking that the justices' terms will end "within months" and that "intense wrangling [is] going on over their replacements"); *see supra* text accompanying note 38 (discussing how the constitutional justices are selected).

V. CONCLUSION

Internationally, there is a clear trend toward abolition of the death penalty: over half of all sovereign states have abolished capital punishment, *de facto* or *de jure*;[434] from 1999 to 2003, the number of countries completely abolishing the death penalty, the number abolishing it for ordinary crimes, and the number of "de facto abolitionist"[435] countries all rose; and the number of countries retaining capital punishment in that same period declined from seventy-nine to sixty-two.[436] In its international criminal tribunals dealing with crimes such as genocide and crimes against humanity (including the International Criminal Tribunal for Yugoslavia, the International Criminal Tribunal for Rwanda, and the International Criminal Court), the United Nations has chosen not to include the death penalty as an available punishment.[437]

The next step in this trend, before all capital punishment is abolished, is twofold: there must be a strong, unambiguous, and binding international definition of "most serious" crimes,[438] and domestic or internal debate on the moral and constitutional legitimacy of capital punishment must increase in non-abolitionist states. Unless the principle of "autonomous interpretation" becomes binding, as customary international law or by some written agreement, and unless the United Nations or some other international organization becomes capable of implementing and

434. *See* Hood & Hoyle, *supra* note 275, at 1.

435. "De facto abolitionist" refers to countries which officially retain the death penalty, but which do not use it. The United States is considered a de facto abolitionist country for ordinary crimes, in that various federal and state statutes allow the death penalty for crimes not involving the death of the victim but it is extremely rare for anyone to be sentenced to death under them. Two people are currently on death row for such offenses and they have applied to be heard by the Supreme Court. *See* Death Penalty Information Ctr., Death Penalty for Offenses Other Than Murder, http://www.deathpenaltyinfo.org/article.php?&did=2347 (last visited Jan. 8, 2009).

436. Byrnes, *supra* note 27, ¶ 75 (citing The Secretary-General, *Report of the Secretary-General on Capital Punishment and Implementation of the Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty*, ¶¶ 9□40, *delivered to the Econ. & Soc. Council and the Comm'n on Crime Prevention & Justice,* U.N. Doc E/2005/3 (Mar. 9, 2005)).

437. *Id.* ¶ 76. The heaviest available sentence is life imprisonment.

438. *See* Hor, *supra* note 32, at 108 (noting that "[t]his is where international norms, if they do exist, must firm up much more before the matter can be usefully analysed.").

enforcing a ban on capital punishment, the question of which crimes satisfy the "most serious" standard will be argued state-by-state, and crime-by-crime. For the Bali Nine petitioners in Indonesia, this ambiguity and lack of binding power may be fatal.

Despite the strong international trend toward abolitionism, each country in deciding to abolish capital punishment has been "influenced by its own cultural and political interpretation of the need for capital punishment as an arm of its crime control policy."[439] Professor Hood has noted that among majority-Muslim countries, "the prospects for abolition will depend on whether political stability can be achieved [and] whether governments [are] politically and legally dominated by fundamentalist interpretations of Islam."[440] In each of these respects—political stability and the role played by fundamentalist Islam—Indonesia is well-situated to abolish capital punishment.

The most significant factors in Indonesia's continued use of capital punishment appear to be the extent of drug abuse in Indonesia (which may not be as serious as the government believes), foreign relations issues with Australia and Indonesia's Southeast Asian neighbors, and several factors which are related to conceptions of unity and Indonesian culture: *adat* and its focus on adjustment before justice, the desire for *mufakat* or consensus, a history of suppressing dissent, and the idea that Indonesia is *sui generis* and does not need to conform to international standards. By understanding these factors and finding ways to work with them or neutralize them, abolitionist advocates can foster more open debate on capital punishment's role in Indonesia, and allow it to join the growing majority of countries worldwide in ending the use of capital punishment.

439. Hood & Hoyle, *supra* note 275, at 4.
440. *Id.* at 49.

APPENDIX

Table 1

Bali Nine Members and their Sentences (as of February 24, 2009)

Name	Initial Sentence	Sentence After Supreme Court Appeals
Andrew Chan	Death	Death
Si Yi Chen	Life in Prison	Life in Prison
Michael Czugaj	Life in Prison	Life in Prison
Renae Lawrence	Life in Prison	19 years, 8 months
Tach Duc Thang Nguyen	Life in Prison	Life in Prison
Matthew Norman	Life in Prison	Life in Prison
Scott Rush	Life in Prison	Death
Martin Stephens	Life in Prison	Life in Prison
Myuran Sukumaran	Death	Death

Sources: Rush v. Comm'r of Police (2006) 150 F.C.R. 165, 174 (Austl.); Australian Associated Press (AAP), *Bali Duo Sentenced to Death*, Sydney Morning Herald, Feb. 14, 2006, *available at* http://www.smh.com.au/news/world/bali-duo-sentenced-to-death/2006/02/14/1139679580306.html; Mark Forbes, *Bali Three Spared Death*, The Age (Melbourne), Mar. 6, 2008, at 1, *available at* http://www.theage.com.au/news/national/bali-three-spared-death-penalty/2008/03/06/1204402565563.html; Mark Forbes, *Execution Shock for Four of the Bali Nine; Another Four Australians Sentenced to Death*, The Age (Melbourne), Sep. 6, 2006, at 1, *available at* http://www.theage.com.au/news/national/execution-shock-for-four-of-the-bali-nine/2006/09/05/1157222131815.html?page=fullpage#contentSwap1; Agence France Presse, *Indonesia Cuts Corby's Sentence: Official*, Aug. 16, 2008, http://afp.google.com/article/ALeqM5gwhlq80RAwmb7LXtRkw6-hb5hLBA (last visited Jan. 8, 2008); Australian Associated Press (AAP), *Don't Rely on Clemency: PM*, National Nine News, http://web.archive.org/web/20060920094516/http://news.ninemsn.com.au/article.aspx?id=86883 (last visited Jan. 6, 2009).