



# DEATH PENALTY IN DRUG CRIMES: Analysis of Constitutional Court Decisions from a Human Rights Perspective

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**Abstract:** *The application of the death penalty for narcotics crimes in Indonesia remains controversial because it involves a conflict between the state's authority to impose criminal sanctions and the protection of the fundamental right to life guaranteed by the 1945 Constitution and international human rights instruments. This study aims to analyze the Constitutional Court's legal reasoning regarding the constitutionality of the death penalty for narcotics crimes, examine international human rights perspectives, and evaluate its proportionality in modern criminal law. This research uses a normative juridical method with statutory, case, and conceptual approaches. The analysis is based on Constitutional Court decisions related to the Narcotics Law and relevant international human rights instruments such as the International Covenant on Civil and Political Rights (ICCPR). The results show that the Constitutional Court maintains the constitutionality of the death penalty by classifying narcotics crimes as extraordinary crimes, while emphasizing that its application must be limited as an ultimum remedium. However, international human rights standards increasingly criticize the death penalty for drug crimes because it does not meet the category of "most serious crimes." This study concludes that although constitutionally permissible, the death penalty for narcotics crimes raises concerns regarding proportionality and compatibility with international human rights standards.*

**Keywords:** *Death Penalty; Narcotics; Constitutional Cour; Human Rights; Proportionality.*

## Introduction

The application of the death penalty in drug crimes is one of the most controversial legal issues in Indonesia. This country views narcotics as extraordinary for the younger generation and the sustainability of the nation, as reflected in Law Number 35 of 2009 concerning Narcotics which regulates the threat of the death penalty in several articles, including Articles 113, 114, 116, 118, 119, 121, and 133. On the other hand, the application of the death penalty also includes related matters that include the principle of human rights, especially the right to life guaranteed in Article 28A of the 1945 Constitution of the Republic of Indonesia. The fundamental tension between the state's authority to punish and the inalienable right to life has been tested repeatedly in the Constitutional Court, resulting in

important decisions that are the main focus of this research. Previous studies, such as those by (Harkrisnowo, 2005) and (Harkrisnowo, 2005), have examined the death penalty from a constitutional and comparative perspective, but there remains a gap in integrating Constitutional Court jurisprudence with evolving international human rights standards and a comprehensive proportionality analysis. This study aims to fill this gap. (Indonesia, 1945)

The research gap underlying this study lies at the intersection of constitutional law, international human rights law, and criminal policy. Although (Lubis, 2018) examined the human rights dimensions of the death penalty in Indonesia, and (Hood, 2015) produced a global comparative analysis, no study has systematically applied a proportionality framework to Indonesian Constitutional Court decisions based on General Comment No. 36 of the UN Human Rights (Committee, 2018) and recent data from (Amnesty International, 2024). (Anwar, 2022) study on the death penalty and human rights from an international legal perspective and its implementation in Indonesia provides a starting point but does not systematically analyze Constitutional Court decisions. (Ardilla, N. dan Prasetyo, 2021) also examined criminal law policy in addressing drug crimes, but their focus was limited to normative critiques of the death penalty without linking it to international human rights standards on proportionality. Furthermore, the existing literature has not sufficiently examined the social justice implications of the imposition of the death penalty in drug cases, particularly its disproportionate impact on poor con artists who act as couriers (Lembaga Bantuan Hukum Masyarakat, 2020) Promising studies from neighboring countries, including the experiences of Singapore (Gallahue, 2012) and the Philippines following the abolition of the death penalty, offer comparative insights that have not yet been integrated into Indonesian legal studies. (Prasetyo, T & Barkatullah, 2012) in their study of legal philosophy emphasize the importance of a just and consequential approach to sentencing, which serves as the normative foundation for this study. This study fills this gap by integrating doctrine, analysis, Constitutional Court decisions, and normative evaluations using international human rights standards and proportionality theory. (Sahetapy, 2007). This study aims to:

1. Analyze and explain the Constitutional Court's legal reasoning—including its *ratio decidendi*—in deciding the constitutionality of the death penalty for drug crimes
2. Examine the international human rights perspective on the application of the death penalty, including interpretations of international human rights instruments and the views of UN treaty bodies
3. Evaluate whether the death penalty for drug crimes meets the principle of proportionality, including aspects of effectiveness, fairness, and consistency with modern criminal law principles. The significance of this study is three-dimensional. Theoretically,

this study contributes to the discourse on proportionality in criminal law and the harmonization of national laws with international human rights standards. (Kuswardani, 2019) emphasizes that the principle of proportionality is an important component of criminal punishment that must be consistently tested against court decisions, while (Widodo, 2018) argues that criminal policy reform in Indonesia must be in line with universal human values. Practically, this study provides input for legislative reform by the Indonesian House of Representatives (DPR RI) in revising the Narcotics Law, guidance for legal practitioners defending drug defendants, and a basis for developing judicial policy in the Supreme Court. (Latif, 2014) stated that the optimal functioning of the Constitutional Court relies heavily on comprehensive academic studies as considerations. Socially, this research promotes public understanding of the human rights dimensions of the death penalty and the availability of more humane alternative punishments, as recommended by (Arief, 2014) and (Schabas, 2002) (Indonesia, 2009). Article 113 paragraph (2), Article 114 paragraph (2), Article 116 paragraph (2), Article 118 paragraph (2), Article 119 paragraph (2), Article 121 paragraph (2), and Article 133 paragraph (1) of the Narcotics Law impose the death penalty for drug offenders under certain circumstances. This provision has been challenged several times in the Constitutional Court by applicants, most of whom are death row inmates in narcotics cases.

Indonesia's legislative policy on the threat of the death penalty for drug crimes is based on the argument that narcotics constitute an extraordinary crime that threatens the nation's existence. Data from the National Narcotics Agency (BNN) shows that the prevalence of drug abuse in Indonesia continues to increase, with the majority of victims being young people of productive age. In the state's view, the threat of the death penalty is necessary as a deterrent to prevent drug crimes, which have a significant impact (Harkrisnowo, 2005).

The Constitutional Court in various decisions, including Decision Number 2-3/PUU-V/2007, Decision Number 7/PUU-VI/2008, and Decision Number 58-59-60-63/PUU-II/2004, has provided in-depth considerations regarding the constitutionality of the death penalty. (Mahkamah Konstitusi, 2004) In its ruling, the Constitutional Court emphasized that the death penalty does not conflict with the 1945 Constitution as long as it is applied under certain circumstances and as a last resort (*ultimum remedium*). This Constitutional Court approach seeks to align the interests of protecting society with human rights principles. ((ICJR), 2017)

In the context of international human rights, there is a strong abolitionist bias against the death penalty. The International Covenant on Civil and Political Rights (ICCPR), ratified by Indonesia through Law No. 12 of 2005, recognizes the inherent right to life in Article 6

and urges states to limit the use of the death penalty. (United Nations, 1966)(Indonesia, 2005). The UN Human Rights Committee in its General Comment No. 36 emphasized that the death penalty can only be applied for the "most serious crimes", which is defined as being limited to crimes involving the intentional loss of life.(Committee, 2018)

The context of this research is shaped by the intensification of the global debate on the death penalty for drug crimes. Indonesia, as a state party to the International Covenant on Civil and Political Rights (ICCPR), ratified through Law No. 12 of 2005, is bound by Article 6 of the ICCPR, which limits the death penalty to the "most serious crimes." (Committee, 2018) emphasized that this threshold requires the presence of an element of intentional killing—a criterion not met by drug crimes. The UN Special Rapporteur on Extrajudicial Executions, Christof Heyns, in his 2012 report, unequivocally stated that the application of the death penalty for drug crimes violates international law (Heyns, 2012). Meanwhile, Amnesty International's 2024 report documented that 112 countries had completely abolished the death penalty, reflecting a global paradigm shift (Amnesty International, 2024). (Penal Reform International, 2020), in its report on the death penalty for drug crimes globally, emphasized that the use of this punishment continues to decline and is increasingly criticized by the international community as a violation of human rights. Data from the (United Nations Office on Drugs and Crime, 2021) in its World Drug Report shows that approaches prioritizing rehabilitation and prevention have proven more effective in reducing the prevalence of drug abuse than the threat of the death penalty. In the ASEAN region, the Philippines abolished the death penalty in 2006, and Thailand has implemented a de facto moratorium since 2018 (Gallahue, 2012). These developments underscore the urgency and timeliness of re-evaluating Indonesia's legal framework.(Hood, 2015).

The social justice dimension further complicates the application of the death penalty in drug cases in Indonesia. Empirical data from the Community Legal Aid Institute (2020) reveals that the majority of those sentenced to death in drug cases are couriers or low-level offenders from low socioeconomic backgrounds with limited access to quality legal representation. (Suherman, 2020) asserts that human rights protection in the criminal justice process in Indonesia still faces serious structural barriers, particularly for vulnerable groups who cannot access adequate legal representation. (Hamzah, A. & Rahayu, 2015), in their comprehensive study of the death penalty in Indonesia, highlight that inequalities in the application of the death penalty have long existed and have not been systematically addressed. Conversely, major drug dealers and kingpins with financial resources and access to skilled lawyers often escape the death penalty, reflecting a serious pattern of selective prosecution and selective punishment. (Bedner, A., & Vel, 2010) emphasize that access to justice is a fundamental component of a democratic legal system, and this disparity directly

influences judicial decisions. These systemic inequalities raise fundamental questions about the fairness, legitimacy, and constitutionality of the death penalty as applied in practice. The National Commission on Human Rights (Komisi Nasional Hak Asasi Manusia Republik Indonesia, 2019) has repeatedly recommended a moratorium on executions, citing the ineffectiveness of the death penalty and the risk of irreparable judicial errors. These circumstances collectively create an urgency for research that not only evaluates the Constitutional Court's legal framework but also assesses whether Indonesia's death penalty regime for drug crimes is sustainable under international human rights law and the principle of proportionality. (Lembaga Bantuan Hukum Masyarakat, 2020) This discrepancy raises serious questions about the fairness and proportionality of the application of the death penalty.

### **Formulation of the Problem**

Based on the above background, this study formulates the following research questions:

1. What are the Constitutional Court's considerations in deciding the constitutionality of the death penalty for drug crimes?
2. What is the international human rights perspective on the application of the death penalty for drug crimes?
3. Does the death penalty for drug crimes meet the principle of proportionality from a human rights perspective?

### **Research Purposes**

This research aims to:

1. Analyze and explain the Constitutional Court's legal considerations in deciding the constitutionality of the death penalty for drug crimes, including the ratio decidendi and legal arguments used.
2. Examine the international human rights perspective on the application of the death penalty for drug crimes, including interpretations of international human rights instruments and the views of international human rights institutions.
3. Evaluate whether the death penalty for drug crimes meets the principle of proportionality from a human rights perspective, including an analysis of its effectiveness, fairness, and consistency with modern criminal law principles.

### **Benefits of Research**

**Theoretical Benefits:** This research is expected to contribute to the development of criminal law and human rights law, particularly in the discourse on the death penalty and proportionality of punishment. The results can serve as an academic reference for further research related to the constitutionality of the death penalty, the application of the principle

of proportionality in criminal law, and the harmonization of national law with international human rights standards.

**Practical Benefits:** Practically, this research is expected to provide input to policymakers (the House of Representatives and the Government) in formulating more humane criminal law policies in accordance with international human rights standards. For legal practitioners, this research can be a consideration in providing legal defense for defendants in drug cases. For the wider community, this research can increase understanding of the complexity of the death penalty issue and the importance of protecting human rights.

### **Methodology**

This research uses a normative legal research method (legal research) which examines law as a written norm created and announced by authorized institutions or officials. (Marzuki, 2016). Normative legal research focuses on the study of legal principles, legal systematics, legal synchronization, legal history, and comparative law.

In the context of this research, a normative juridical approach is used to analyze Indonesian positive legal norms, particularly those related to the death penalty for drug crimes, and examine them from the perspective of the constitution and international human rights instruments. This research also analyzes Constitutional Court decisions as legally binding products and part of the Indonesian legal system.

### **Result and Discussion**

#### **A. The Constitutional Court's Considerations in Deciding on the Constitutionality of the Death Penalty for Drug Crimes**

The Constitutional Court has heard several judicial review petitions for laws related to the death penalty for drug crimes. Key decisions include Decision No. 2-3/PUU-V/2007 concerning the judicial review of the Narcotics Law (Law No. 22 of 1997) and several decisions concerning the judicial review of Law No. 35 of 2009. These decisions demonstrate the Constitutional Court's consistency in upholding the constitutionality of the death penalty, subject to certain conditions.

In Decision No. 2-3/PUU-V/2007, the Constitutional Court provided fundamental considerations regarding the death penalty. (Mahkamah Konstitusi, 2007). The Constitutional Court stated that the right to life as guaranteed in Article 28A and Article 28I paragraph (1) of the 1945 Constitution is not an absolute right without exception. The Court is of the opinion that although the right to life is a fundamental human right, the 1945 Constitution itself opens up the possibility of restrictions on human rights through law, as regulated in Article 28J paragraph (2) of the 1945 Constitution.

Article 28J paragraph (2) of the 1945 Constitution states: "In exercising his or her rights and freedoms, every person must submit to restrictions established by law solely

to guarantee recognition and respect for the rights and freedoms of others and to meet just demands in accordance with considerations of morality, religious values, security, and public order in a democratic society." (Indonesia, 1945). Based on this provision, the Constitutional Court affirmed that restrictions on human rights, including the right to life, are permissible as long as they are carried out through law and for a legitimate purpose.

This Constitutional Court argument has sparked debate among academics and legal practitioners. On the one hand, some accept that the right to life is not absolute and can be limited under certain circumstances. On the other hand, others argue that the right to life should be interpreted as a right that cannot be diminished and cannot be limited under any circumstances, as stated in Article 28I paragraph (1) of the 1945 Constitution, which places the right to life among the rights that cannot be diminished under any circumstances. (Harkrisnowo, 2005).

The Constitutional Court, in various decisions, has recognized that drug crimes are extraordinary crimes that threaten the life of the nation. This consideration is based on the fact that narcotics have a massive and multidimensional impact, not only on individual users but also on families, communities, and the nation as a whole. As stated by (Hiariej, 2016), Drug crimes not only threaten individual users but also undermine the future of the younger generation and national stability.

The Constitutional Court's characterization of narcotics as an extraordinary crime forms the basis of its argument justifying the imposition of the death penalty. In its deliberations, the Constitutional Court stated that extraordinary crimes require extraordinary treatment and sanctions. In this context, the death penalty is seen as a necessary instrument to provide a deterrent effect and protect the greater good, namely the lives of future generations from the threat of narcotics.

However, the Constitutional Court also imposed important limitations on the application of the death penalty. In its deliberations, the Constitutional Court emphasized that the death penalty should be applied as an *ultimum remedium*, not as a *primum remedium*. (Mahkamah Konstitusi, 2007). This means that the death penalty can only be imposed as a last resort after considering all mitigating and aggravating factors for the defendant. This aligns with the principle of proportionality in criminal law, which requires a balance between the act committed and the sanction imposed.

According to the Constitutional Court, the concept of *ultimum remedium* has several practical implications. First, judges must thoroughly consider other sentencing alternatives before imposing the death penalty. Second, there must be a thorough consideration of the defendant's role in drug crimes—whether as the mastermind, dealer, distributor, or simply a courier. Third, the defendant's personal factors, such as socioeconomic background, education level, and motivation for committing the crime, must be taken into account. (ICJR, 2017)

The Court also emphasized the importance of guaranteeing procedural rights in the application of the death penalty. Every defendant has the right to a fair trial, effective

legal assistance, and adequate legal remedies. As stated by Lubis (2018, 156-162), the protection of these procedural rights constitutes the minimum guarantee that must be met in every application of the death penalty.

The procedural guarantees emphasized by the Constitutional Court include: (1) The right to be accompanied by legal counsel from the investigation through to trial; (2) The right to receive clear information regarding the charges; (3) The right to present and examine witnesses; (4) The right to appeal and cassation; (5) The right to file a judicial review; (6) The right to submit a request for clemency to the President. All of these procedural guarantees are intended to minimize the risk of error or judicial error in the application of the death penalty (Mahkamah Konstitusi, 2007).

The Constitutional Court's considerations also touched on the philosophical dimension of criminal punishment. The Constitutional Court recognized that the purpose of criminal punishment is not only retributive (retribution) but also preventive (prevention) and educational (education). In the context of the death penalty, the preventive aspect is a primary consideration. The Constitutional Court is of the opinion that the threat of the death penalty can have a deterrent effect not only on the perpetrator but also on other potential perpetrators (general deterrence). (Mahkamah Konstitusi, 2007)

However, this argument regarding the deterrent effect of the death penalty has been criticized by various groups. Empirical research shows no conclusive evidence that the death penalty has a greater deterrent effect than long-term imprisonment. Even in countries that still implement the death penalty for drug crimes, drug crime rates have not decreased significantly. (Hood, 2015).

In subsequent developments, the Constitutional Court also considered the waiting period for execution (death penalty). The Constitutional Court acknowledged that excessively long waiting periods can cause extraordinary psychological suffering for death row inmates, which could be categorized as cruel and inhumane treatment. However, the Constitutional Court did not provide a clear time limit on the constitutionally acceptable waiting period. This lack of a time limit creates legal uncertainty and potentially violates death row inmates' right to legal certainty. (Lubis, 2018).

## **B. International Human Rights Perspectives on the Death Penalty in Drug Crimes**

From the perspective of international human rights law, there is a strong trend towards the abolition of the death penalty, particularly for crimes other than the "most serious crimes." Article 6(2) of the ICCPR states that in countries that have not abolished the death penalty, it may only be imposed for the most serious crimes. (United Nations, 1966).

The phrase "most serious crimes" in Article 6(2) of the ICCPR has been the subject of evolving interpretations. The UN Human Rights Committee, in its General Comment No. 36 of 2018, provided an authoritative interpretation of this concept. The Committee

emphasized that this phrase must be interpreted strictly and limited to crimes involving intentional killing (Committee, 2018).

This interpretation has important implications for the application of the death penalty for drug crimes. According to the UN Human Rights Committee's interpretation, drug crimes, while serious and far-reaching, cannot be categorized as "the most serious crimes" because they do not directly and intentionally result in the loss of life. While drug abuse can result in death, the causal link between drug trafficking and the death of a user is indirect and involves various other factors such as dosage, the user's health condition, and the quality of the drug. (Committee, 2018)

The UN Special Rapporteur on Extrajudicial, Arbitrary or Summary Executions, Christof Heyns, in his 2012 report firmly stated that the application of the death penalty for drug crimes violates international law. (Heyns, 2012). The report emphasized that drug crimes, however serious, do not meet the threshold of "most serious crimes" as required by the ICCPR. Heyns also criticized the argument that drug crimes can be categorized as extraordinary crimes that justify the imposition of the death penalty.

Within the ASEAN regional context, there are varying approaches to the death penalty for drug crimes. Some countries, such as Singapore, Malaysia, and Indonesia, still implement the death penalty, citing its deterrent effect. Singapore, for example, implements a mandatory death penalty for drug trafficking above a certain amount, without considering mitigating circumstances. (Gallahue, 2012)

However, as Hood and Hoyle (2015, 329-371) point out, there is no convincing empirical evidence that the death penalty has a greater deterrent effect than long-term imprisonment. Comparative research across countries shows that abolishing the death penalty does not lead to an increase in drug crimes. In fact, some countries that have abolished the death penalty have actually succeeded in reducing drug crimes through a more holistic approach that includes prevention, rehabilitation, and effective law enforcement.

Amnesty International notes in its annual report that global trends show a significant decline in the use of the death penalty. (Amnesty International, 2024). By 2023, more than two-thirds of the world's countries had abolished the death penalty in law or practice. Of the world's 198 countries, 112 had abolished the death penalty for all crimes, 9 had abolished it only for ordinary crimes, and 23 were de facto abolitionists (having not carried out any executions in the past 10 years).

The organization also campaigns for the abolition of the death penalty for all crimes, including drug offenses, arguing that the death penalty violates the right to life and the right to be free from cruel, inhuman, or degrading punishment or treatment as guaranteed by Article 3 of the Universal Declaration of Human Rights and Article 7 of the International Convention on Human Rights (ICCPR). (Amnesty International, 2024). Amnesty International has also documented numerous cases of judicial misconduct resulting in the execution of innocent people or those denied a fair trial.

The former UN Special Rapporteur on Torture argued that the death penalty itself can be categorized as a form of cruel, inhuman, and degrading treatment or punishment, particularly considering the "death row phenomenon" experienced by death row inmates awaiting execution for an indefinite period. This phenomenon refers to the extreme psychological suffering experienced by death row inmates due to the uncertainty of when their execution will take place, the isolated conditions in the death row cell, and the stress of facing impending death (Nowak, 2005)

The Second Optional Protocol to the International Convention on the Abolition of the Death Penalty (Abolition of the Death Penalty), adopted in 1989, is the international instrument that specifically addresses the abolition of the death penalty. (Nations, 1989). To date, this protocol has been ratified by 90 countries. Indonesia has not ratified this protocol, reflecting the continued use of the death penalty in the Indonesian legal system.

Within the context of international human rights mechanisms, Indonesia, as a state party to the ICCPR, is obligated to periodically report to the UN Human Rights Committee on its implementation of this treaty. On numerous occasions, the UN Human Rights Committee has issued concluding observations recommending that Indonesia consider a moratorium on the death penalty as a step towards its complete abolition. The Committee has also expressed concern about the application of the death penalty for drug crimes that do not meet the threshold of "most serious crimes." (Committee, 2013)

From a regional perspective, the ASEAN Intergovernmental Commission on Human Rights (AICHR) has not taken a firm position on the death penalty. However, several ASEAN countries have taken progressive steps. The Philippines abolished the death penalty in 2006. Cambodia abolished it in 1989. Thailand, while retaining the death penalty under its law, has imposed a de facto moratorium on its use since 2018. These developments demonstrate a regional trend toward abolition, albeit at varying speeds. (Gallahue, 2012)

### **C. Analysis of the Proportionality of the Death Penalty in Drug Crimes**

The principle of proportionality is one of the fundamental principles of modern criminal law. This principle requires a reasonable balance between the interests protected and those sacrificed, between the harm suffered by the victim and the punishment imposed on the perpetrator. (Arief, 2014). In the context of the death penalty for drug crimes, the crucial question is whether depriving someone of the right to life is a proportionate response to the crime of drug trafficking or production.

The principle of proportionality in criminal law has several dimensions. First, abstract proportionality, which relates to the appropriateness of the punishment imposed by law to the seriousness of the crime. Second, concrete proportionality, which relates to the judge's determination of the sentence in a particular case, taking into account all aggravating and mitigating circumstances. Third, proportionality in implementation, which relates to the sentence imposed, which must not be more severe than the sentence imposed (Arief, 2014).

From a criminal theory perspective, there are several objectives of criminal punishment known in criminal law: retribution, prevention (deterrence), rehabilitation, and protection of society (Packer, 1968) In "The Limits of Criminal Sanctions," he argues that an ideal sentencing system should consider all these aspects in a balanced manner. In the case of the death penalty for drug offenses, the rehabilitation aspect cannot be fully met due to the final and irrevocable nature of the sentence.

The theory of retribution, based on the principle of "an eye for an eye, a tooth for a tooth," states that the punishment should be proportionate to the crime committed. However, in the context of drug crimes, determining the "equivalence" between the act and the death penalty is difficult. Drug crimes, while serious, do not directly result in the loss of life like murder. Therefore, depriving drug offenders of their right to life could be considered excessive or disproportionate retribution (Sahetapy, 2007).

(Arief, 2014) In his study of Indonesian criminal law policy, he emphasized the importance of a humanist approach to sentencing. He argued that the punishment imposed should respect the human dignity of the offender and provide an opportunity for self-improvement. The death penalty, in this view, contradicts the rehabilitative and restorative philosophies of sentencing. The rehabilitative approach views offenders as individuals who can be reformed and returned to society as productive members.

From a human rights perspective, the proportionality test for restrictions on fundamental rights must meet several criteria: (1) there is a clear legal basis (legality), (2) the purpose of the restriction is to protect a legitimate interest (legitimate purpose), (3) the restriction is necessary in a democratic society (necessity), and (4) there is no less restrictive alternative (least restrictive means). (Schabas, 2002). In the context of the death penalty for drug use, this last criterion becomes particularly relevant: is life imprisonment or a long-term prison sentence insufficient to achieve the goal of punishment?

Analysis of the least restrictive means criterion shows that there are various alternative sentencing methods that can achieve the same goal as the death penalty without compromising the right to life. Life imprisonment without parole, for example, can provide protection to society by ensuring that offenders are not likely to reoffend. A long-term prison sentence combined with a rehabilitation program can help offenders improve their behavior. Severe financial sanctions can have an economic deterrent effect. (Schabas, 2002).

The Indonesian National Commission on Human Rights (Komnas HAM) has several times recommended a moratorium and ultimately the abolition of the death penalty. (Komisi Nasional Hak Asasi Manusia Republik Indonesia, 2019). According to the National Commission on Human Rights, the death penalty is ineffective as a deterrent to crime, and the risk of miscarriages of justice leading to the execution of innocent people is intolerable. This risk of miscarriage of justice is particularly significant given that Indonesia's criminal justice system still faces numerous challenges, such as limited resources, corruption, and suboptimal law enforcement.

Furthermore, in practice, the application of the death penalty for drug crimes in Indonesia raises various social justice issues. Data from the Community Legal Aid Institute shows that the majority of those sentenced to death for drug cases are couriers or low-level offenders, often from disadvantaged socioeconomic groups. (Lembaga Bantuan Hukum Masyarakat, 2020). An analysis of the profiles of death row inmates shows that most have low levels of education, come from low-income families, and are often involved in drug crimes due to economic pressure or manipulation by syndicates.

Meanwhile, major drug dealers or masterminds with financial resources and access to qualified legal counsel are often able to avoid the death penalty or even escape justice. This imbalance reflects what is known as "selective prosecution" and "selective sentencing," where the death penalty tends to be imposed disproportionately on marginalized groups. This raises serious questions about the fairness and proportionality of the death penalty. (Lembaga Bantuan Hukum Masyarakat, 2020).

This phenomenon is also related to the concept of "access to justice." Defendants from disadvantaged groups often lack access to quality legal assistance. Although Indonesia has a free legal aid system, the quality and capacity of legal aid institutions remain limited. As a result, poor defendants tend to receive less than optimal legal representation, which can lead to harsher sentences, including the death penalty. (Lubis, 2018).

From a comparative law perspective, several countries that previously implemented the death penalty for drug crimes have reversed their policies. The Philippines abolished the death penalty for all crimes in 2006. Cambodia abolished the death penalty in 1989. (Gallahue, 2012). These countries demonstrate that drug crimes can be addressed through alternative approaches that better respect human rights without compromising the effectiveness of law enforcement. Their experiences demonstrate that a comprehensive approach encompassing prevention, rehabilitation, effective law enforcement, and international cooperation can be more effective in addressing drug crimes than relying solely on the threat of the death penalty.

## Conclusion

This study analyzes the constitutionality, international human rights dimensions, and proportionality of the death penalty for drug crimes in Indonesia based on Constitutional Court jurisprudence, international human rights instruments, and comparative legal analysis. The following three main conclusions, along with their implications and recommendations, are presented:

1. The Constitutional Court has consistently upheld the constitutionality of the death penalty in the Narcotics Law by qualifying drug crimes as an extraordinary threat to the state, and using the limitation clause in Article 28J paragraph (2) of the 1945 Constitution of the Republic of Indonesia as justification for restricting the right to life. However, the

Court requires its application as a last resort accompanied by guarantees of full procedural rights for the accused (Mahkamah Konstitusi Republik Indonesia, 2012) An important implication of this finding is that courts in Indonesia are constitutionally required—not merely encouraged—to exhaust all alternative sentencing options before imposing the death penalty. (Latif, 2014) emphasizes that the final and binding decisions of the Constitutional Court should be the primary guideline for all judicial institutions in the Indonesian legal system. The ratio decidendi of the Constitutional Court's decisions also implies that any execution carried out without strict adherence to procedural guarantees is fundamentally unconstitutional. (Kuswardani, 2019) warns that the principle of proportionality in sentencing is often inconsistently applied by first-instance courts, necessitating stricter judicial oversight. Further research should empirically test whether first instance courts actually apply the *ultimum remedium* standard in practice, given that the gap between the Constitutional Court's doctrinal framework and its implementation constitutes a significant accountability deficit.

2. From an international human rights law perspective, the application of the death penalty for drug offenses in Indonesia is inconsistent with Indonesia's treaty obligations under the ICCPR. General Comment No. 36 of the UN Human Rights (Committee, 2018) authoritatively interprets that the “most serious crimes” are limited to offenses involving intentional homicide—a threshold that drug offenses categorically do not meet, given the indirect causal link between drug trafficking and the death of a user. (Heyns, 2012) reached a similar conclusion. (Cassese, 2005) asserted that under international law, restrictions on the right to life can only be justified if they meet very strict conditions that cannot be interpreted broadly by states parties. (Anwar, 2022) in his study on the death penalty and human rights from an international law perspective concluded that Indonesia needs to gradually align its national laws with ICCPR standards to avoid international liability. (Penal Reform International, 2020) documented that countries retaining the death penalty for drug crimes are increasingly isolated diplomatically and facing increasing pressure from UN human rights bodies. A critical implication for Indonesia is that continuing to execute drug convicts would leave the country vulnerable to international accountability mechanisms and unfavorable recommendations from the UN Human Rights Committee's Concluding Observations. Practically, these findings encourage Indonesia to align its Narcotics Law with ICCPR standards. Future research should examine the process and feasibility of Indonesia ratifying the Second Optional Protocol to the ICCPR on the abolition of the death penalty, along with the domestic political conditions that would enable such reform.
3. Proportionality analysis shows that the death penalty for drug crimes fails to meet the four criteria necessary to justify the restriction of fundamental rights, namely: legality

(the existing legal basis is still debated in the context of ICCPR standards), legitimate aim (the deterrent effect argument is not supported by sufficient empirical evidence according to (Hood, 2015), necessity (long-term imprisonment can achieve the goal of equal protection), and least restrictive means (life imprisonment is a viable alternative). (United Nations Office on Drugs and Crime, 2021) in its World Drug Report confirms that there is no significant correlation between the application of the death penalty and reductions in drug crime rates in countries that still maintain it. (Zyl Smit, D. Van & Ashworth, 2004) emphasize that disproportionate punishment constitutes an unjustifiable violation of human rights, regardless of the underlying policy objectives. The death penalty is irreversible, eliminates the possibility of rehabilitation, and is applied with systematic bias against defendants from poor and marginalized groups. (Ardilla, N. dan Prasetyo, 2021) note that criminal law policy addressing drug crimes in Indonesia needs to be directed towards a more humanistic and evidence-based approach. A critical implication of these findings is that Indonesia's legislative framework produces outcomes that are unconstitutional under international legal standards and unjust in practice. Practical recommendations are proposed: The Supreme Court should issue binding guidelines requiring judges to conduct a formal proportionality assessment before imposing the death penalty; the Indonesian House of Representatives should amend the Narcotics Law by replacing the death penalty with life imprisonment with harsher minimum sentences for aggravated cases (Widodo, 2018); and the government should expand the legal aid budget to address structural inequalities in sentencing as identified by (Suherman, 2020) and (Bedner, A., & Vel, 2010). Further research is needed to examine the correlation between drug crime rates and death penalty abolition in the ASEAN context, as well as socio-legal studies on the experiences of death row inmates in Indonesia, to strengthen the evidence base for legal reform.

Based on the above conclusions, several suggestions can be put forward:

1. The Indonesian government should consider imposing a moratorium on executions, particularly for drug crimes, as a first step toward its total abolition. This moratorium would provide Indonesia with the opportunity to evaluate the effectiveness of the death penalty, review cases of death row inmates to ensure there have been no miscarriages of justice, and align national criminal law policies with international human rights standards. This is in line with international trends and Indonesia's commitment to protecting human rights as a state party to the ICCPR.
2. The Indonesian House of Representatives (DPR RI) needs to revise the Narcotics Law by abolishing the death penalty and replacing it with a maximum penalty of life imprisonment. This revision should be accompanied by strengthened prevention efforts

through anti-narcotics education, rehabilitation for addicts and victims of drug abuse, and comprehensive eradication of drug networks targeting major dealers and international syndicates. A holistic approach encompassing prevention, rehabilitation, and effective law enforcement has proven more successful in reducing drug crime than relying solely on the threat of the death penalty.

3. The Supreme Court and lower courts need to consistently apply the principle of *ultimum remedium* in imposing the death penalty, carefully considering all mitigating factors. Judges must carefully consider the perpetrator's role in the drug network (whether as mastermind, dealer, or courier), socioeconomic background, education level, motivation for committing the crime, and potential for rehabilitation. The Supreme Court also needs to issue clear technical guidelines on the application of *ultimum remedium* to ensure consistency of decisions across all courts.
4. Public awareness and education are needed regarding the human rights perspective on the death penalty, as well as more humane and effective alternative punishments for drug crimes. This education is crucial to changing public perception, which still tends to support the death penalty without understanding the complexity of the issue and the available alternatives. Human rights institutions, academics, and civil society organizations need to play an active role in the public discourse on the death penalty.
5. The Indonesian government needs to strengthen the legal aid system to ensure that all defendants, especially those from disadvantaged economic groups, have access to quality legal representation. This is crucial to reducing disparities in sentencing and ensuring procedural fairness for all defendants. Strengthening the capacity of legal aid institutions, increasing the legal aid budget, and developing quality standards for legal aid services are concrete steps that need to be taken to realize access to justice for all citizens.

## References

- (ICJR), the institute for criminal justice reform. (2017). *Pemetaan Putusan Mahkamah Konstitusi Terkait Hukuman Mati*.
- Amnesty International. (2024). *Death sentences and Executions 2023*. Amnesty International Publications.
- Anwar, Y. (2022). Hukuman Mati dan Hak Asasi Manusia: Perspektif Hukum Internasional dan Implementasinya di Indonesia. *Jurnal Konstitusi*, 1–28.
- Ardilla, N. dan Prasetyo, H. (2021). Kebijakan Hukum Pidana dalam Penanggulangan Tindak Pidana Narkotika: Analisis Kritis terhadap Pidana Mati. *Jurnal Hukum IUS QUIA IUSTUM*, 301–322.
- Arief, B. N. (2014). *Bunga Rampai kebijakan Hukum Pidana: Perkembangan Penyusunan Konsep KUHP Baru*.
- Bedner, A., & Vel, J. A. C. (2010). An Analytical Framework for Empirical Research on

- Access to Justice. *Hague Journal on the Rule of Law*, 177–201.
- Cassese, A. (2005). *International Law*.
- Committee, U. N. H. R. (2013). *Concluding Observations on the Initial Report of Indonesia*.
- Committee, U. N. H. R. (2018). *General Comment No.36 on Article 6 of the International Covenant on Civil and Political Rights, on the Right to Life*.
- Gallahue, P. dan R. L. (2012). The Death Penalty for Drug Offences: Global Overview 2012. *International Harm Reduction Association*, 1–76.
- Hamzah, A. & Rahayu, S. (2015). *Pidana Mati di Indonesia: Dulu, Kini, dan Masa Depan*.
- Harkrisnowo, H. (2005). Hukuman Mati dalam Perspektif HAM dan Sistem Peradilan Pidana. *Jurnal Hukum Dan Pembangunan*, 3, 289–305.
- Heyns, C. (2012). Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions: Use of the Death Penalty for Drug-Related Offences. *United Nations General Assembly*.
- Hiariej, E. O. . (2016). *Prinsip-Prinsip Hukum Pidana*.
- Hood, roger dan carolyn hoyle. (2015). The Death Penalty: A worldwide Perspective. In *Oxford University Press*.
- Indonesia. (1945). *Undang-Undang Dasar Negara Republik Indonesia*.
- Indonesia. (2005). *Undang-Undang Nomor 12 Tahun 2005 tentang Pengesahan International Covenant on Civil and Political Rights (Kovenan Internasional tentang Hak-Hak Sipil dan Politik)*.
- Indonesia. (2009). *Undang-Undang Nomor 35 Tahun 2009 tentang Narkotika Lembaran Negara Republik Indonesia Nomor 143*.
- Komisi Nasional Hak Asasi Manusia Republik Indonesia. (2019). *Rekomendasi Komnas HAM tentang Hukuman Mati di Indonesia*.
- Kuswardani. (2019). Prinsip Proporsionalitas dalam Pemidanaan: Kajian Kritis terhadap Putusan Mahkamah Agung dalam Perkara Narkotika. *Jurnal Hukum Pidana Dan Kriminologi*, 45–68.
- Latif, A. (2014). *Fungsi mahkamah Konstitusi: Upaya Mewujudkan Negara Hukum Demokrasi*.
- Lembaga Bantuan Hukum Masyarakat. (2020). *Potret Hukuman Mati di Indonesia: Analisis Putusan Pengadilan dalam Kasus Narkotika*.
- Lubis, T. M. (2018). *Hukuman Mati di Indonesia: Sebuah Perspektif HAM*.
- Mahkamah Konstitusi. (2004). *Putusan Nomor 58-59-60-63/PUU-II/2004 Tentang Pengujian Undang-Undang nomor 26 tahun 2000 tentang Pengadilan Hak Asasi Manusia terhadap Undang-Undang Dasar 1945*.
- Mahkamah Konstitusi. (2007). *Putusan Nomor 7/PUU-VI/2007 Tentang Pengujian Undang-Undang Nomor 22 Tahun 1997 tentang Narkotika terhadap Undang-Undang Dasar Negara Republik Indonesia Tahun 1945*.
- Mahkamah Konstitusi Republik Indonesia. (2012). *Putusan Nomor 15/PUU-X/2012 tentang Pengujian Undang-undang Nomor 35 Tahun 2009 tentang Narkotika terhadap UUD*

NRI 1945.

Marzuki, P. M. (2016). *Penelitian Hukum*.

Nations, U. (1989). *Second Optional Protocol to the International Covenant on Civil and Political Right, Aiming at the Abolition of the Death Penalty*.

Nowak, M. (2005). *Covenant on Civil and Political Rights: CCPR Commentary*.

Packer, herbert L. (1968). *The Limits of the Criminal Sanction*.

Penal Reform International. (2020). *Death Penalty for Drug Offences. Penal Reform International Publications*.

Prasetyo, T & Barkatullah, A. . (2012). *Filsafat, teori, dan Ilmu Hukum: Pemikiran Menuju Masyarakat yang Berkeadilan dan Bermantabat*.

Sahetapy, J. E. (2007). *Ancaman Pidana Mati Terhadap Pembunuh Berencana. Jurnal Hukum Dan Keadilan, 2, 142–158*.

Schabas, W. A. (2002). *The Abolition of the Death Penalty in Ynternational law*.

Suherman, E. (2020). *Perlindungan Hak Asasi Manusia dalam Proses Peradilan Pidana di Indonesia. Jurnal Hukum Positif, 89–112*.

united nations. (1966). *International Covernant on Civil and Political Rights*.

United Nations Office on Drugs and Crime. (2021). *World Drug Report 2021. United Nations Publications*.

Widodo, J. P. (2018). *Pembaruan Hukum Pidana: Suatu Kajian Terhadap Kemungkinan Reformasi Kebijakan Pidana di Indonesia. Jurnal Legislasi Indonesia, 423–440*.

Zyl Smit, D. Van & Ashworth, A. (2004). *Disproportionate Sentences as Human Rights Violations. 541–560*.