Decision No. 2-3/PUU-V/2007 [2007] (Indonesian Constitutional Court)

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Introduction

After the fall of President Suharto's authoritarian 'New Order' regime in 1998, Indonesia's legal and political systems underwent a seismic process of reform (the '*reformasi* era').[1] In less than four years, the *1945 Constitution of the Republic of Indonesia* ('*Constitution*')[2] was amended no less than four times, including the introduction of a set of human rights clauses in chapter XA that transformed Indonesia's disparate constitutional human rights protections into a comprehensive human rights framework.[3] The introduction of a constitutional human rights regime placed Indonesia in a somewhat unique and visionary position in a region that has been internationally notorious for its suspicion of 'Western' style rights regimes and where few countries have committed to either the core international human rights conventions or comprehensive internal human rights laws.[4] As a consequence, the work of Indonesia's fledgling Constitutional Court has been, and will continue to be, of interest to many within the region as a body of human rights jurisprudence offering unique insights into the ways in which human rights may be interpreted and applied within the Asia Pacific and Southeast Asian contexts.

The court's decisions have already been of more than passing significance to Australia, with two judgments having particular resonance. The first of these was the Constitutional Court's decision in 2004 regarding the constitutionality of the prosecutions of the Bali Bombers.[5] The second important decision for Australia, and the

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1 See T Lindsay, 'The trajectory of law reform in Indonesia: a short overview of legal systems and change in Indonesia' in T Lindsay (ed), *Indonesia Law and Society* (2nd ed) (2008).

2 Various translations of the Indonesian Constitution are available online. For an official translation of the Constitution including all amendments, see *Indonesian Constitution* (2008) Indonesian Embassy at Buenos Aires <www.indonesianembassy.org.ar/Novedades/constitution1.htm> accessed 12 July 2008. For the original, without amendments, as well as the text of all amendments, see *Indonesian Constitution*, (2008) Indonesian Embassy at Ottowa <www.indonesia-ottawa.org/> accessed 12 July 2008.

3 See J Herbert, 'The legal framework of human rights in Indonesia' in T Lindsay (ed), *Indonesia Law and Society* (2nd ed) (2008).

4 Of course, Australia is one of the countries that have thus far failed to put in place any comprehensive human rights regime.

5 For a translation of this decision (*Petition No. 013/PUU-I/2003* [2004] (Indonesia Constitutional Court) see *Decision No. 013/PUU-I/2003* (Indonesian Constitutional Court), <www.mahkamahkonstitusi.go.id/> (2004) accessed 12 July 2008. For a discussion of that decision, see S Butt & D Hansell, 'The Masykur Abdul Kadir Case: Indonesian Constitutional Court Decision No. 013/PUU-I/2003' (2004) 6(2) *Australian Journal of Asian Law* 176.

subject of the present note, was the court's decision in 2007 to uphold the constitutionality of the death penalty in the context of an appeal made by Andrew Chan, Myuran Sukumaran and Scott Rush, three of the Bali Nine who had been caught smuggling heroin into Bali in 2005.[6]

In the process of reaching its judgment in that decision, the judges heard a panoply of expert evidence and traversed philosophy, sociology, history and religion in addition to Islamic, secular Indonesian and international law. In this context it is impossible to cover all the issues raised by the case, and as a consequence this case note will focus on the ways in which the judgment reflects a cultural and regional perspective on international human rights law, including the light it throws on the 'Asian values' debate concerning human rights. This note will consider in particular how the court approached the balance between the rights of the individual and the rights of society, and the influence of religion on various aspects of the judgment. The note will also discuss the utilisation and interpretation of international law by the court, the judges having approached the task of constitutional interpretation in a framework that conceived of the human rights aspects of Indonesia's *Constitution* in a global rather than merely national context.

1. Background

A. The Bali Nine

On 17 April 2005, nine young Australians, all in their late teens or twenties, were arrested in Bali and charged with trafficking commercial quantities of heroin,[7] an offence that may be punished by the death penalty under Indonesian law.[8] At their original trials, the seven 'drug mules', Matthew Norman, Si Yi Chen, Tan Duc Thanh Nguyen, Renae Lawrence, Scott Rush, Michael Czugaj and Martin Stephens were sentenced to life imprisonment.[9] The remaining two, the 'ringleaders', Andrew Chan and Myuran Sukumaran, were both sentenced to death by firing squad.

A first set of appeals resulted in the life sentences originally imposed on Lawrence, Nguyen, Chen, and Norman being reduced to twenty year sentences, while life sentences for Czugaj and Stephens were upheld. However, in a subsequent appeal, during which prosecutors sought to have the original life sentences reinstated, the court unexpectedly increased the sentences of Rush, Nguyen, Chen and Norman to death.

6 The Constitutional Court's decision is available in an official English version from the court's website, upon which the present note relies. See *Decision No. 2-3/PUU-V/2007* [2007] (Indonesian Constitutional Court) <www.mahkamahkonstitusi.go.id/> accessed 12 July 2008. However, it is a limited and imperfect translation. The full decision in Bahasa Indonesia stretches to 471 pages, while the English translation is a mere 168 pages. Thus, this note is, necessarily, limited to addressing the court's broad decision and reasoning. Unfortunately, the unwieldiness of the translation does not lend itself to closer analysis. However, hopefully the most important issues will be fully discussed herein.

7 *Nine Aussies arrested in Bali* (2005) <www.news.com.au/story/0,23599,22321847-31317,00.html> accessed 12 July 2008.

8 See *Law of the Republic of Indonesia: Law No. 22 of 1997 on Narcotics* (2003) National Narcotics Board — Republic of Indonesia <www.aseansec.org/> accessed 12 July 2008.

9 For a timeline of the arrests, prosecutions and sentencing of the nine see *Bali Nine* (2008) <www.news.com.au/feature/0,23612,31317,00.html> accessed 12 July 2008.

The imposition of the death penalty for these four had come at an unexpectedly late stage of the appeal process, and at a high level of the Indonesian court hierarchy, leaving few options open for challenging it. With limited rights of appeal available, Rush chose to join with Chan and Sukumaran in their attempt to challenge the constitutionality of the death penalty in Indonesia before Indonesia's Constitutional Court, a petition that ultimately failed for the reasons discussed in this note.

Meanwhile, Norman, Chen and Nguyen sought to have their sentences reviewed and, in 2008, had life sentences reinstated.[10] It is still possible for Rush, Chan and Sukumaran to have their sentences reviewed. In the face of the revised sentences for Norman, Chen and Nguyen, lawyers are particularly hopeful that Rush will also have his death sentence reduced to life, as Rush is now the only 'drug mule' facing the death sentence.

B. The Indonesian Legal System and Human Rights

The Indonesian legal system is a fascinating product of a diversity of influences, including vestiges of the era of Dutch colonialism, *adat* (customary laws), Shari'ah law, as well as international legal standards that have had particular influence in the *reformasi* era.[11] Since 1945 this syncretic legal system has been underpinned by the '*pancasila*', a set of five principles, which broadly translate into the belief in God, humanitarianism, Indonesian unity, representative democracy and social justice. These together are an attempt to enforce a unified, national character onto a heterogenous population.[12] Under Suharto, *pancasila* was considered the ultimate source of law; under the legal order post *reformasi* it was enfolded into the *Constitution*, which continues to play an integral part in its interpretation[13]

The *pancasila* always carried humanitarian overtones and the *Constitution* included various human rights. However, a comprehensive human rights regime did not exist in Indonesia until the *reformasi* occurred, human rights being one of the 'three pillars' upon which the process of reform was based (the other two being democratisation, and the rule of law).[14] The articles introduced into the *Constitution* during this period are contained in the new chapter XA, arts 28A-J. The ones that are particularly relevant in the present case are arts 28A, I and J.

Article 28A of the *Constitution* states that 'every person shall have the right to live and to defend his/her life and living.' Article 28I states that:

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10 *Bali three win execution appeal* (2008) BBC News <http://news.bbc.co.uk/2/hi/asia-pacific/7280824.stm> accessed 6 July 2008.

11 T Lindsay & M A Santosa, 'The trajectory of law reform in Indonesia: a short overview of legal systems and change in Indonesia' in T Lindsay (ed), *Indonesia Law and Society* (2nd ed, 2008) at 456. Indonesia requires adoption of international covenants into internal laws before it can ratify conventions: P Eldridge, 'Human Rights in Post-Suharto Indonesia' (2003) 9 *Brown Journal of World Affairs* 127 at 131.

12 See N H Wirajuda, 'The Democratic Response' (2003) 9 *Brown Journal of World Affairs* 15 at 17.

13 For a discussion of the fundamental nature of *pancasila* in the Indonesian legal order see D Bourchier, 'Positivism and romanticism in Indonesian legal thought' in T Lindsay (ed), *Indonesia Law and Society* (2nd ed) (2008). As to the role of *pancasila* in the reformed legal system, see Eldridge, above n11 at 130.

14 Wirajuda, above n12 at 18.

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

Article 28J states that:

> (1) Every person shall have the duty to respect the human rights of others in the orderly life of the community, nation and state.
> (2) In exercising his/her rights and freedoms, every person shall have the duty to accept the restrictions established by law for the sole purposes of guaranteeing the recognition and respect of the rights and freedoms of others and of satisfying just demands based upon considerations of morality, religious values, security and public order in a democratic society.

It is immediately apparent from the formulation of art 28J that Indonesian human rights law conceptualises human rights in the context of a 'balance' between rights and duties, and this fact shaped the court's decision on a number of levels.

2. The Decision

The Constitutional Court made two major findings in its decision, which were handed down 30 October 2007. Firstly, that the three Australian petitioners did not have standing before it to review the constitutionality of Indonesian laws, and secondly, that the imposition of the death penalty for narcotics offences was not in breach of the Indonesian Constitution. Four judges dissented: Harjono J on the issue of standing, Roestandi J on the death penalty issue, and Marzuki and Siahaan JJ on both issues. The majority decision and the four dissenting opinions provide a fascinating window into crucial issues surrounding the implementation and interpretation of human rights in Southeast Asia, and perhaps even more interestingly, in the context of a legal system highly influenced by Indonesia's large Islamic majority.

In relation to standing, the legal debate surrounded art 51(1) of the Constitutional Court Law, which provides that only Indonesian citizens have a right to mount a constitutional challenge before the court. In addition to arguments concerning the constitutionality of that article, the petitioners also argued that under the correct interpretation of the article, a foreigner could have standing provided they petitioned the court as part of a group that included Indonesian citizens. The court rejected this argument as a matter of statutory interpretation, and did not really consider the constitutional issue.[15] However, the dissenting judges considered the issue more broadly. While dissenters Harjono and Roestandi JJ were generally reluctant to conclude that a foreigner should have the standing to challenge any law,[16] all three dissenting judges ultimately opined that art 51(1) should be read down to allow foreigners to have standing to challenge the inclusion of the death penalty in the Narcotics Law. Harjono J was concerned that where a law applied to both foreigners and citizens, preventing foreigners

15 *Decision No. 2-3/PUU-V/2007* [2007] at 10.

16 *Decision No. 2-3/PUU-V/2007* [2007] at 113–114 (Harjono J), 134 (Roestandi J).

from challenging such a law would lead to delays in determining said law's constitutionality.[17] Dissenters Marzuki and Roestandi JJ took a more international, human rights-based approach, determining that the limitation should be read down on the basis that every person should have equal rights before the law irrespective of their nationality (although challenges to some laws, such as those concerning voting, would by nature be inaccessible to foreigners). They supported this argument by asserting that the right to life was accorded to every person equally.[18]

After determining that Rush, Chan and Sukumaran had no standing before it, the Constitutional Court went on to decide the main issue regarding the constitutionality of the death penalty. This was possible because the lawyers for the Australian petitioners had foreseen the standing issues and deliberately included two Indonesian women, Edith Yunita Sianturi and Rani Andiani (Melisa Aprilia), as joint petitioners. Considering evidence as to the intentions of the framers, as well as submissions regarding international and foreign law, the court came to the conclusion that the right to life in the *Constitution* did not prohibit the taking of life in accordance with the law, provided that the sentence was imposed pursuant to the law, after a fair trial and only for the most serious of crimes. The three judges who dissented on this point concluded, on the basis of their interpretation of the *Constitution* and in light of international law and practice that the right to life was non-derogable. The reasoning of both the majority and the dissenting judges was complex and diverse and some of the more important themes arising from their judgments are discussed below.

A. Balancing Society Against the Individual

The balance between individual human rights and the wellbeing of society is an issue that has often characterised debate regarding human rights law in Asia. This issue was at the forefront of the majority decision. It contrasts the asserted right to life of those sentenced against both the rights of the victims as individuals and the rights of 'society as victim'. The system of human rights protection in Indonesia is 'deeply affected by issues of poverty, culture, religion, national stability and order',[19] and the importance of these issues is reflected in the judgment's consideration of whether the state should be able to impose death on an individual. These issues also seemed particularly important in the court's assessment of whether narcotics crimes should be punishable by death.

The court's concern with the wellbeing of Indonesian society was particularly apparent when the court considered the petitioners' argument that the proper aim of criminal sanctions is rehabilitation. The court countered this argument with the point that every crime is an attack on the 'social harmony of society' and thus creates a 'wound', or 'illness', in society.[20] The court considered that while most criminal sanctions are almost inevitably tinged with retribution, the correct perspective on such sanctions was to see them as an effort to restore the disturbed social harmony caused by the relevant

17 *Decision No. 2-3/PUU-V/2007* [2007] at 114 (Harjono J).

18 *Decision No. 2-3/PUU-V/2007* [2007] at 126–128, (Marzuki J) 133–138 (Roestandi J).

19 Eldridge, above n11 at 128.

20 *Decision No. 2-3/PUU-V/2007* [2007] at 73.

crimes.[21] This approach was reflected in the evidence of the experts. Dr Didik Endro Purwo Laksonon, an expert in penal law from the Universitas Airlangga Surabaya, concluded that the provisions of arts 28A and I(1) of the *Constitution* did, as a matter of grammar, prohibit capital punishment. However, he argued that the intention of these provisions did not extend to protecting 'the criminal who has threatened the right to life possessed by the state, the society, and the individuals who have fallen victim to the narcotics criminal acts'.[22]

This tension also arose in the evidence regarding the seriousness of narcotics crimes. Dr M Arief Amrullah, a penal law expert from Universitas Negeri Jember, described narcotics crimes as 'crimes against social development and prosperity',[23] while the National Narcotics Agency gave evidence that '[n]arcotics and/dangerous substances can eliminate the right to the freedom of thought and conscience, religion and the right not to be enslaved'.[24]

The court's discussion of these issues in relation to human rights and capital punishment suggests that the court believed that human rights law should be limited, at least in part, to the extent that it can serve the needs of society, as it is conceptualised in Indonesian culture and history.

B. *The Role of Religion*

Religion has a central place in Indonesian law and society, and it was submitted to the court that due to *pancasila* it was impossible to separate the interpretation of the law and the *Constitution* from religious perspectives.[25] While Islamic law has an enormous influence on Indonesian law, 'Islam is not the state religion nor is it the constitution of the state' and other religions — Buddhism, Hinduism and Christianity — have an influence on Indonesian law.[26]

The court acknowledged that the nation's position regarding human rights, as contained in the *Human Rights Charter*, and the right to life in particular, was derived from 'religious teachings, universal moral values and supreme values of nation's culture'.[27] The court, acknowledging that it has the 'greatest Muslim population in the world', had particular reference to the *Cairo Declaration of Islamic Rights*, art 8(a) of which states that 'Life is God's blessing and the right to life is guaranteed for every mankind. It is a duty of individual, society, and states to protect this right from any violation and not to take life except based on Sharia Law'.[28] The experts also recognised the sanctity of human life, as identified in Islamic beliefs.

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21 *Decision No. 2-3/PUU-V/2007* [2007] at 76–77.

22 *Decision No. 2-3/PUU-V/2007* [2007] at 43.

23 *Decision No. 2-3/PUU-V/2007* [2007] at 45.

24 *Decision No. 2-3/PUU-V/2007* [2007] at 24.

25 *Decision No. 2-3/PUU-V/2007* [2007] at 49–50. Despite the religious overtones, *pancasila* is not a religious ideology but a nationalist ideology, and in fact, was perceived by Muslims and Christians to be a threat to their faith; see Eldridge, above n11 at 129. Eldridge also discusses the malleability of *pancasila* as a justification for different points of view.

26 Wirajuda, above n12 at 19.

27 *Decision No. 2-3/PUU-V/2007* [2007] at 83.

28 *Decision No. 2-3/PUU-V/2007* [2007] at 84-85.

However, both the court and most of the experts were able to reconcile the sanctity of life with capital punishment. One method by which the court achieved this was to consider the 'just and fair' limitations imposed on capital punishment, for instance, the prerequisite of a just and fair trial. Another method was to transpose responsibility from the State as the 'executor' to the offending individual, emphasising that the death penalty results from the decision of an individual rather than the policy of the State. This was clear in the evidence of Dr Mahmud Mulyadi, who acknowledged life as a gift from God, but reasoned that when a person chooses to engage in acts that are punishable by death, 'how he/she dies has been personally chosen by himself/herself in full awareness'.[29]

One of the most interesting discussions of the relationship between state law and Shari'ah Law is contained in the dissenting opinion of Roestandi J. Recognising the fact that Shari'ah permits capital punishment, he nonetheless acknowledges that there is a difference between religious norms as 'internal', related to motivation and intention and positive law as 'external', regulating physical behaviour only.[30] In particular, he acknowledges that Indonesian society is pluralistic, and has reached consensus in the *pancasila* and the *Constitution*, which represents the highest positive law.[31] As such, there is no contradiction between Shari'ah allowing capital punishment and the secular prohibiting it.

C. International Law

International human rights law played a key part in the decision, having without doubt been one of the 'waves' that has recently swept over Indonesia's legal system. The ratification by Indonesia of the *International Covenant on Civil and Political Rights* ('*ICCPR*') on 23 February 2006[32] was the culmination of a long process of internal human rights reforms, beginning under the five year National Plan of Action on Human Rights that had been created in the last few months of Suharto's regime.[33] The wording of the rights in chapter XA mirrors international legal documents, particularly the Universal Declaration on Human Rights.

The court considered that while the interpretation of the *Constitution* was the primary issue of the case, it should nonetheless state its position as to whether the death penalty was also contrary to Indonesia's international legal obligations.[34] It should be noted, however, that international legal questions were not quarantined from the court's constitutional reasoning, the legality of exceptions to the right to life under international law shaping their discussion at all times. Roestandi J, in his dissenting opinion, suggested that the proper approach to constitutional interpretation was that international instruments should be used to 'enrich our reasoning horizon in interpreting the constitution',[35] an approach that seemed to be taken by the majority as well.

29 *Decision No. 2-3/PUU-V/2007* [2007] at 50.

30 *Decision No. 2-3/PUU-V/2007* [2007] at 120 (Roestandi J).

31 *Decision No. 2-3/PUU-V/2007* [2007] at 121 (Roestandi J).

32 *International Covenant on Civil and Political Rights* (adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 19 December 1966 (entry into force 23 March 1976, in accordance with article 49). For a list of ratifications, see Office of the High Commissioner (2008) <www2.ohchr.org/English/bodies/ratifiation/4.htm> accessed 12 July 2008.

33 On the creation and implementation of that plan, see Eldridge, above n11 at 131.

34 *Decision No. 2-3/PUU-V/2007* [2007] at 78–79.

In particular, a key part of the court's finding that the right to life is not absolute was its discussion of the various exceptions to the right contained in international covenants. These included: the exceptions contained in art 6(2) of the *ICCPR*, arts 76(3) (relating to the execution of pregnant women and women with dependant infants) and 77(5) (relating to the execution of children) of the *Additional Protocol I to the 1949 Geneva Conventions*,[36] art 6(4) (relating to the execution of children, pregnant women and mothers of young children) of the *Additional Protocol II to the 1949 Geneva Conventions*,[37] art 80 of the *Rome Statute of the International Criminal Court* (which provides that the *Rome Statute* shall not affect the application by states of penalties prescribed by their national law),[38] art 2(2) of the *European Convention for the Protection of Human Rights and Fundamental Freedoms* (which permits deaths caused by self defence, in the course of lawful arrest, or to lawfully quell a riot or insurrection),[39] the *American Convention on Human Rights, Protocol No 6 to the Convention of the Protection of Human Rights and Fundamental Freedoms Concerning the Abolition of the Death Penalty*[40] (which permits the death penalty in time or war and imminent threat of war).[41] The court thus concluded that these instruments preserved capital punishment, albeit subject to limitations, and consequently it could not be said that the abolition of capital punishment had become a legal norm universally accepted by the international community.[42]

The court then addressed the argument that Indonesia should, consistent with international trends, abolish the death penalty. The court's position was that the legal value of this argument was reliant on proof that Indonesia was in breach of an international legal covenant, specifically the *ICCPR*, by retaining the death penalty.[43] The court acknowledged that while the 'spirit' of the *ICCPR* supported the abolition of capital punishment, art 6(2) nonetheless provided for the retention of capital punishment for the 'most serious crimes'.[44]

35 *Decision No. 2-3/PUU-V/2007* [2007] at 78–79.

36 *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I)* (adopted on 8 June 1977 by the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law applicable in Armed Conflicts, adopted on 8 June 1977 and entry into force 7 December 1979).

37 *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II)* (adopted on 8 June 1977 by the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law applicable in Armed Conflicts, adopted on 8 June 1977 and entry into force 7 December 1979, in accordance with Article 23).

38 *Rome Statute of the International Criminal Court* (entry into force 1 July 2002).

39 *Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocol No. 11,* CETS No: 005 (treaty open for signature by the member States of the Council of Europe, opened for signature in Rome on 4 November 1950, entry into force 3 September 1953).

40 *Protocol No. 6 to the Convention for the Protection of Human Rights and Fundamental Freedoms concerning the abolition of the death penalty, as amended by Protocol No. 11* (opened for signature in Strasbourg on 28 April 1983, headings of articles added and text amended according to the provisions of Protocol No. 11 (ETS 155) as from its entry into force on 1 November 1998).

41 *Decision No. 2-3/PUU-V/2007* [2007] at 86.

42 *Decision No. 2-3/PUU-V/2007* [2007] at 91.

43 *Decision No. 2-3/PUU-V/2007* [2007] at 91–2.

44 *Decision No. 2-3/PUU-V/2007* [2007] at 91–92.

In assessing whether the narcotics crimes punishable by death constitute the most serious crimes, the court held that this requirement must be read in association with the international requirement that the punishment must be in accordance with the 'law in force at the time of the commission of the crime, both national and international'.[45] The law in place, according to the court, was both Indonesia's Narcotics Law and the *UN Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances 1988* ('*UN Drugs Convention*'),[46] which Indonesia ratified in its law Number 7 Year 1997 and which the Narcotics Law was intended to implement.[47] The court noted in particular art 3(6) of the *UN Drugs Convention*, which required the state parties exercise 'discretionary legal powers … relating to prosecution … to maximise the effectiveness of law enforcement measures in respect of those offences, and with due regard to the need to deter the commission of such offences'.[48] It referred also to art 24, permitting parties to adopt more severe measures where considered desirable or necessary.[49] The court concluded that the provisions of Indonesia's Narcotics Law are in fact the 'manifestation of the national implementation of Indonesia's international law obligations based on international covenants'.[50] The court referred back to the preamble of the *UN Drugs Convention* as support for the fact that narcotics crimes are the most serious crimes, reckoning narcotics as comparable to genocide and crimes against humanity insofar as all adversely affect the 'economic, cultural and political foundation of society and cause a danger of incalculable gravity'.[51]

The court was of the opinion that Indonesia's participation in the *UN Drugs Convention*, which mandated strict national measures for the eradication of narcotics crimes, has higher effect than the opinion of the 'Human Rights Commission'[52] (they appear to mean the Human Rights Committee (HRC)) that drug abuse does not fit within the category of the most serious crimes. In coming to this conclusion, the court relied on the hierarchy established by art 38(1) of the *Statute of the International Court of Justice*.[53] Of course, this conclusion is problematic for a number of reasons, including that it neglects the opinion of the HRC, which is contained in General Comment 6 (adopted in 1982) and in a number of state party reports,[54] and which directly interprets 'most serious crimes' in the context of the *ICCPR* and human rights law, while the *UN Drugs Convention* refers to the seriousness of narcotics crimes in a general and perambulatory manner.

45 *Decision No. 2-3/PUU-V/2007* [2007] at 96.

46 *UN Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances 1988* (adopted in Vienna on 20 December 1988, entry into force 11 November 1990).

47 *Decision No. 2-3/PUU-V/2007* [2007] at 96.

48 *Decision No. 2-3/PUU-V/2007* [2007] at 96–97.

49 *Decision No. 2-3/PUU-V/2007* [2007] at 103.

50 *Decision No. 2-3/PUU-V/2007* [2007] at 99–100.

51 *Decision No. 2-3/PUU-V/2007* [2007] at 101.

52 *Decision No. 2-3/PUU-V/2007* [2007] at 103.

53 *Decision No. 2-3/PUU-V/2007* [2007] at 103.

54 See A 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' (2007) *University of New South Wales Law Research Series* 44, at [100]–[119].

Conclusion

The court concluded with the opinion that in reforming the criminal law, a number of matters should be carefully considered:

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

(b) capital punishment shall be imposed with a probation period of ten years; if the convicts indicate good behaviour, it may be changed into a life imprisonment or 20 years;

(c) capital punishment shall not be imposed on underage children; and

(d) the execution of capital punishment on pregnant women and mentally-ill persons shall be postponed until the pregnant women deliver their babies and the mentally-ill convicts recover their sanity.[55]

It is the second of these that has caused the most interest among the lawyers representing those members of the Bali Nine who are still on death row. It appears, despite strong dissents, that Indonesia will be retaining the death penalty for narcotics crimes for the moment. However, despite its firm conclusion (and its rather categorical rejection of the arguments concerning the utility of rehabilitation), it appears that the court recognised that in this issue, the finality and the harshness of capital punishment warranted some degree of mitigation.

The judgment is fascinating for the way it balances local principles and concerns with the international human rights system. It seems that the court was determined to prove that it could both responsibly fulfil its role in the international legal system, (contrasting Indonesia's system with those in Singapore and Malaysia)[56] without bowing to Western abolitionists and Indonesia's ex-colonial powers. As Professor Ronald Z. Titahelu of the Universitas Pattimura, Ambon stated in his evidence, 'the value of independence does not merely comprise political independence, but also the independence to determine one's own values and laws, including to set one free from the provision of capital punishment inherited from the colonial government the objective of which was indeed to preserve power'.[57]

This judgment shows that the adoption of human rights in the Asia Pacific region will not necessarily lead to expected or predictable outcomes. It also demonstrates that international human rights law, like others introduced in Southeast Asia by colonisers and immigrants, has both 'succeeded in that [it has] found fertile soil and taken root',[58] and 'failed in that [it has] not escaped being used for localised purposes or becoming modified in their practical application'.[59]

55 *Decision No. 2-3/PUU-V/2007* [2007] at 108.

56 *Decision No. 2-3/PUU-V/2007* [2007] at 105.

57 *Decision No. 2-3/PUU-V/2007* [2007] at 62, 55.

58 A Harding, 'Global Doctrine and Local Knowledge: Law in South East Asia' (2002) 51 *International and Comparative Law Quarterly* 35 at 45.

59 Ibid.