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ANALYSIS TO THE POLICY OF DELAYING THE EXECUTION OF THOSE SENTECED TO DEATH IS A VIOLATION OF HUMAN RIGHTS

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ABSTRACT

Human rights are basic rights of the human being that exist and are a gift of Almighty God. Human rights are also natural rights that therefore cannot be revoked by other human beings. Indonesia is one of the countries that still apply the death penalty in its positive law where the unlawful acts are considered an extraordinary crime that endangers the lives of the nation and the State. The discourse of Indonesia as a country that has the philosophy of Pancasila until now can cause pro and con problems, because there are still many among legal experts and human rights activists as well as the public who question it because of differences and views, among others. The statement of the problem in this scientific paper is "How is the policy related to the death penalty in human rights seen from the current positive legal regulations?" The method used in this study is a normative juridical method. Seeing so many convicts with sentenced to death who have not been executed, it can be said that the State has committed human rights crimes (against convicts with sentenced to death), because they have served the sentence for the 2nd (second) time, namely the Imprisonment and Death Penalty. The implementation of Restorative Justice is possible to be executed as a legal breakthrough, where it becomes a solution to avoid human rights violations that can occur within the time of the delay of the death penalty. The National Commission for Human Rights (the Komnas HAM) as a representative of the Government is expected to be more aggressive in protection efforts.

Keywords: human rights; dead execusion delay; legal breakthrough

INTRODUCTION

Law can be felt and realized in the simplest form, namely laws and regulations. In a more complicated form, the manifestation form of law is controlled by several legal principles, doctrines, theories, or philosophies, which are universally recognized by the legal system. The independence and freedom of a person contain many aspects. One of the aspects is the right of a person to be treated fairly, non-discriminatory, and based on the law, especially if the person is suspected of committing an act of violation or crime. This means that the deprivation or restriction of the independence and freedom of movement of a person suspected of committing a crime, from the point of view of the Criminal Law, which may be in the form of arrest, detention, and sentencing, can be justified if it is based on the applicable laws and regulations, which have existed before legal action was imposed on him.[1]

The development of society has also resulted in the birth of various acts that are considered detrimental to the public interest and are then designated as crimes. The criminalization process also gives rise to demands of positioning criminal law in a position that is actually getting stronger so that criminal law functions as a secondary criminal law. The existence of a secondary criminal law is basically universal and accepted in many countries even in countries with a common law system.[2] In addition, in terms of legal substance, as a

[1] Muhaimin, "Penetapan Tersangka Tidak Ada Batas Waktu," *Penelitian Hukum De Jure* 20, no. 2 (2020): 277, https://ejournal.balitbangham.go.id/index.php/dejure/article/view/1165/pdf_1.

[2] Yoserwan, "Fungsi Sekunder Hukum Pidana Dalam Penanggulangan Tindak Pidana Perpajakan," *Penelitian Hukum De Jure* 20, no. 2 (2020): 171, https://ejournal.balitbangham.go.id/index.php/dejure/article/view/979/pdf_1.

country that still adheres to the civil law system or the continental European system (although some laws and regulations have also adopted the common law system or the Anglo-Saxon system), it is said that law is written regulations while unwritten regulations are not considered as law. This system affects the legal system in Indonesia, namely: the principle of legality in the Criminal Code. Article 1 Paragraph 1 of the Criminal Code states the principle of legality; *Nullum Dilectum Nula Poena Sine Previalege* …… "there is no criminal act that can be punished if there are no rules governing it". In the currently existing condition, there is no criminal laws and regulations that explicitly regulates a corporation (legal entity) is able to be punished. So that whether or not an act is subject to legal sanctions can be determined when the act has been regulated in the laws and regulations.[3]

Reconstruction can be interpreted as a process of rebuilding or reorganizing something.[4] Return as before; rearrangement (reimagining).[5] According to B.N. Marbun, reconstruction is the return of something to its original place; rearrangement or reimagining of existing materials and rearranging as they were or to the original condition.[6] James P. Chaplin states that reconstruction is the interpretation of psycho-analytical data in such a way, to explain personal development that has occurred, along with the meaning of the material that currently exists for the individual concerned.[7]

Decisions on the death penalty imposed by the court for certain crimes raise pros and cons between those who agree and those who disagree with the imposition of the death penalty.[8] By not questioning the legality of the death penalty, in this study, the discourse on the death penalty will be raised again. In general, there are two philosophical theories regarding punishment, namely the retributive theory and the relative theory (utilitarian). Adam Smith, Emanuel Kant, and Hegel are philosophers who adhere to the retributive theory.[9] It was further explained that the natural law concept of Grotius and Pufendorf emphasizes punishment as a restoration or recovery of losses that have been suffered in a balanced and commensurate manner.[10] Hegel argues:[11] "*Punishment is the fight of criminal, it is an act of his own will. The violation if right has been proclaimed by the criminal as his own right. His crime is the negation of right, punishment is the negation of his negation, and, consequently, an affirmation of right satiated and (arced upon the criminal by himself).*"

Human rights (HAM) are basic rights owned by human being that exist and are a gift from God Almighty. Human rights are also natural rights that therefore cannot be revoked by other human beings as living beings. Human rights are believed to have a universal value which means that they do not recognize the boundaries of space and time.[12] Human rights values are freedom, equality, autonomy, and security. More than that, the core value of human rights is human dignity.[13]

Indonesia is one of the countries that still applies the imposition of death penalty in its positive law. This is proven by recognizing the legality of the death penalty through several articles contained in laws that are still in use, such as in the Criminal Code, Law Number 5 of 1997 concerning Psychotropics, Law Number 35 of 2009 concerning Narcotics, Law Number 20 of 2001 concerning Amendments to Law Number 31 of 1999 concerning Eradication of Criminal Acts of Corruption, Law Number 26 of 2000 concerning Human Rights Courts, Law Number 35 of 2014 concerning Amendments to Law Number 23 of 2002 concerning Child Protection, and Law Number 15 of 2003 concerning Stipulation of Government Regulation in Lieu of Law Number 1 of 2002 concerning Eradication of Criminal Acts

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3 Marulak Pardede, "Aspek Hukum Pemberantasan Tindak Pidana Korupsi Oleh Korporasi Dalam Bidang Perpajakan," *Penelitian Hukum De Jure* 20, no. 3 (2020): 337, https://ejournal.balitbangham.go.id/index.php/dejure/article/view/1280/pdf.

4 Bryan A. Garner, *Black Law Dictionary* (Indiana: Harvad Law, 2017). hal. 269

5 Noun, "Definisi Rekonstruksi," *artikata.com*.

6 B.N. Marbun, *Kamus Politik* (Jakarta: Pustaka Sinar Harapan, 1996). hal. 469

7 James P. Chaplin, *Kamus Lengkap Psikologi* (Jakarta: Raja Grafindo Persada, 2018). hal. 421

8 Alexander Lay Todung Mulya Lubis, *Kontroversi Hukuman Mati: Perbedaan Pendapat Hakim Konstitusi* (Jakarta: Sinar Grafika, 2009). hal. 225

9 Ibid. hal. 284

10 Ibid. hal. 285

11 Ibid. hal. 285

12 Muladi, *Hak Asasi Manusia* (Bandung: Refika Aditama, 2015). hal. 70

13 Artidjo Alkostar, *Pidato Douglas W Cassel, Hukum HAM Internasional, Fakultas Hukum Universitas Northwestern (NU) 17 September 2001 Terpetik Dalam Artidjo Alkostar* (Yogyakarta, 2004). hal. 1

of Terrorism into Law. All of these actions are considered as extraordinary crimes that endanger the life of the nation and state.[14]

To respect the death penalty in Indonesia as a country that has a Pancasila philosophy, it is until now a discourse that can cause pro and con problems because there are still many legal experts and human rights activists as well as the public who question it. This is due, among other things, to differences and views.[15] For groups that reject the death penalty, the death penalty is considered contrary to human rights.[16]

The Tanjung Priok case at the first level gave rise to two views regarding the bloody incident in September 1984. First, it was proven that there were serious human rights violations, namely crimes against humanity in the form of killings and persecutions that were carried out widely and systematically and the existence of policies to commit a crime.

Second, there is no evidence of crimes against humanity because the events that occurred were only clashes, and were not a crime plot, as alleged. At the appeal level, the party who examined the cases of the defendants who were found guilty stated that the events that occurred were not classified as crimes against humanity because there was no policy to commit attacks. The action taken was an act of spontaneity.

In the Abepura case, in the first level, all defendants were acquitted because there was no evidence of crimes against humanity as charged. Crimes against humanity have not been proven because the actions taken by the police at that time have been carried out in accordance with procedures, namely attacks and pursuits against a group of people were carried out according to procedures, with the aim of taking safeguards to avoid greater excesses, and civilian victims as a result of the attack were not caused by a deliberate act.

Based on the decisions in the three cases above, the biggest weakness is that the crimes committed in a systematic and widespread manner have not been exposed, including evidence of the existence of elements of state policy. Almost all decisions in human rights courts fail to prove that the crimes committed are part of state policy.

Even the East Timor case, which until the end of the trial was able to show that there were serious human rights violations in the form of crimes against humanity, was ultimately only able to prove that these crimes were committed by a group of people and had nothing to do with state policy at that time.

Referring to these provisions, the Government may be demanded to immediately implement the Law, and if not, the prosecutors and the implementation of the Law may be punished. So that the convict with sentenced to death does not have to serve the sentence for the 3rd (third) time, Penal Mediation or Restorative Justice as stipulated in Article 76 paragraph (1) is carried out by the Government, in order to reduce the occupancy level of correctional institutions.

Therefore, the disharmony caused must be restored with a punishment commensurate with the actions of the perpetrators.[17] The death penalty is seen as the restoration of the nature and dignity of humans being who have been disturbed or damaged by crimes. In Hegel's language, punishment is the restoration of the rights to life and freedom as human rights. Based on this consideration, adherents of the retributive theory, punishment must be imposed according to the damage that has been caused, even with the death penalty.

From the foregoing description and explanation, it is necessary to formulate the problem in this scientific paper, namely, "How is the policy related to delaying the execution of the death penalty in in the perspective of human rights in terms of current regulations of positive law?"

RESEARCH METHOD

The method used in this research is a normative juridical method. In normative juridical research, the use of a statute approach is a definite thing. It is said to be definite because, in legal logic,

[14] Rosa Kumalasari, "Kebijakan Pidana Mati Dalam Perspektif HAM," *Jurnal Literasi Hukum* 2, no. 1 (2018): 14.

[15] Atet Sumanto, "Kontradiksi Hukuman Mati di Inonesia Dipangang dari Aspek Hak Asasi Manusia, Agama dan Ahli Hukum,"," *Perspektif* 9, no. 3 (2004): 197.

[16] M. Abdul Kholiq, "Kontroversi Hukuman Mati Dan Kebijakan Regulasinya Dalam RUU KUHP (Studi Komparatif Menurut Hukum Islam)," *Jurnal Hukum IUS QUIA IUSTUM* 14, no. 2 (2007): 186.

[17] Dwija Priyatno, *Sistem Pelaksanaan Pidana Penjara di Indonesia* (Bandung: Rafika Aditama, 2009). hal. 22

normative legal research is based on research conducted on existing legal materials. Even though, for example, the research was conducted because it saw a legal vacuum, however the legal vacuum could only be identified because there are already legal norms that require further regulation in positive law.[18] In the context of this research, the approach was taken to the legal norms contained in several laws and regulations such as Law Number 39 of 1999 concerning Human Rights and other laws and regulations such as the 1945 Constitution of the Republic of Indonesia, Law No. 1 of 1946 concerning Criminal Law Regulations, Presidential Decree Number 2 of 1964 concerning Procedures for Implementing Death Penalty Sentenced by Courts in General and Military Courts as promulgated in Law through Law No. 5 of 1969, Circular Letter of Supreme Court of the Republic of Indonesia (SEMA) Number 7 of 2014 concerning Submission of Requests for Judicial Review in Criminal Cases, and Law Number 5 of 2010 concerning Amendments to Law Number 22 of 2002 concerning Clemency.

DISCUSSION AND ANALYSIS

A. Death Penalty and Human Rights

To understand more deeply about the existence of the death penalty in Indonesia, the researcher will first discuss in detail the meaning of the death penalty, including the following:

1. In the Great Dictionary of the Indonesian Language, it is defined as: "Punishment carried out by killing (shooting, hanging) the guilty person".
2. In the Indonesian Encyclopedia, it is interpreted as stated in the Indonesian criminal law as "the most severe principal punishment". Usually by hanging; shot to death. In the United States it is done with electric chair. In Mexico it is done with gas chamber. In France at the time of the Revolution with guillotine".
3. In the Dictionary of Criminal Terms, it is defined as: "A punishment imposed on a person which is in the form of taking a life based on a court decision which has a permanent legal force".
4. In the Islamic Encyclopedia, it is defined as: "Qishas in Islamic law gives the same treatment to the perpetrator of a crime as he did it (to the victim)".

The death penalty has the status of a principal punishment; it is a type of punishment that contains pros and cons. At the international level, this type of punishment is prohibited from being imposed on the convict. The United Nations encourages the abolition of this type of punishment based on the Declaration of Human Rights which was adopted on December 10, 1948, by guaranteeing the right to life and protection against torture. Likewise, the guarantee of the right to life is contained in Article 6 of the International Covenant on Civil and Political Rights which was adopted in 1966 and ratified by Law Number 12 of 2005 concerning Ratification of the International Covenant on Civil and Political Rights.[19] Prior to that, Indonesia had ratified the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, hereinafter referred to as the Committee against Torture (CAT) and was ratified by Law No. 5 of 1998 concerning Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. The Indonesian criminal law system tries to separate the death penalty from the category of principal punishment, by regulating it as an alternative punishment. The death penalty is no longer the first principal punishment but becomes a special punishment.[20]

According to former judge, Benyamin Mangkoedilaga, and former member of the House of Representatives, Farida Syamsi Chandaria,[21] criminal law can still be applied to anticipate crimes that are very cruel and deserve the death penalty. It would be better if there was a provision for the death penalty, even though its implementation had to be very selective. Because the death penalty can actually be used to anticipate a very cruel crime. The death penalty is also a part

[18] Piter Mahmud Marzuki, *Penelitian Hukum* (Jakarta: Kencana, 2007). hal. 35

[19] Eva Achjani Zulfa, "Menakar Kembali Keberadaan Pidana Mati (Suatu Pergeseran Paradigma Pemidanaan Di Indonesia)," *Lex Jurnalica* 4, no. 2 (2007): 93.

[20] Amelia Arief, "Problematika Penjatuhan Hukum Pidana Mati Dalam Perspektif HAM Dan Hukum Pidana," *Jurnal Kosmik Hukum* 19, no. 1 (2019): 92.

[21] Untung Sri Hardjanto Robby Septiawan Permana Putra, R.B. Sularto, "Problem Konstitusional Eksistensi Pelaksanaan Pidana Mati Di Indonesia," *Diponegoro Law Journal* 5, no. 3 (2016): 18.

of shock therapy for criminals. As is the case, drug trafficking, sexual harassment, and other crimes that are already very worrying. This led to the re-enactment of the death penalty in Indonesia.

In principle, the implementation of restorative justice is based on efforts to realize justice. As it is known that justice is basically subjective which is seen as something that makes oneself happy and cannot be forced on others. It could be fair according to the perpetrator, but unfair according to the victim. Likewise, an assessment may be fair according to the judge, but it is not necessarily fair according to the community (public).

The demand for the application of restorative justice in the settlement of criminal cases in the realm of the court is of concern to be strengthened through policies in the Supreme Court. The policy is formulated in a policy regulation (*beleidsregel*) in the form of a Decree of the Director General for General Courts of the Supreme Court of the Republic of Indonesia Number 1691/DJU/SK/PS.00/12/2020 concerning the Enforcement of Guidelines for the Implementation of Restorative Justice. The restorative justice approach in handling criminal cases at the Supreme Court has also been mentioned previously in the Memorandum of Understanding of the Chairman of the Supreme Court of the Republic of Indonesia, the Minister of Law and Human Rights of the Republic of Indonesia, the Attorney General of the Republic of Indonesia, and the Head of the Indonesian National Police regarding the Implementation of the Adjustment of Boundaries of Minor Crimes and Amount of Fines, Rapid Inspection Program, and the Application of Restorative Justice. The memorandum of understanding is a follow-up to the enactment of Regulation of the Supreme Court Number 2 of 2012 concerning Adjustment of Boundaries of Minor Crimes and Amount of Fines in the Criminal Code issued by the Supreme Court.

Guidelines for the application of restorative justice based on the decree of the Director General for the General Courts (*Dirjen Badilum*) are directives for judges in handling cases by paying attention to the principle of restorative justice which prioritizes a dialogue process involving perpetrators, victims, families of perpetrators/victims and other parties in order to create justice based on the results of a balanced agreement. The agreement reached is expected to create a restoration to the original state and restore good relations within the community. These objectives are fully contained in the background of the guidelines as follows:[22]

"Restorative justice is an alternative for resolving criminal cases which in the criminal justice procedure mechanism focuses on punishment which then is converted into a dialogue and mediation process that involves the perpetrator, the victim, families of the perpetrator and victim, and other related parties to jointly reach an agreement on the settlement of the criminal case that is fair and balanced for both the victim and the perpetrator by prioritizing the restoration to the original state, and restoring the pattern of good relations in society."

The death penalty data released by Amnesty International recorded 96 death sentences from January to October 2020, 83 of them for the use and distribution of illegal drugs. The Indonesian government also stated in a press statement during the commemoration of World Day Against the Death Penalty on October 10, 2020, that there were 538 convicts with sentenced to death that awaiting for the execution. The trend of death penalty sentences imposed by the Government of Indonesia from 2014 to October 2020 tends to increase, only in 2017 it experienced a decline. In fact, global death penalty sentences in the world have decreased. In 2018 there were 2,531 death sentences, while in 2019 there were 2,307 death sentences; as well as executions, in 2018 there were 690 executions, while in 2019 there were 675 executions.[23]

The rule of law platform in principle determines that every action or act of the government through the government apparatus is carried out based on the authority regulated by laws and regulations. Amendments to the 1945 Constitution indicate that changes made to a democratic state are carried out through certain stages. The policy of developing national law as a system is directed at the realization of a national

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[22] Mahkamah Agung RI, *Lampiran Keputusan Direktur Jenderal Badan Peradilan Umum Mahkamah Agung Republik Indonesia Nomor 1691/DJU/SK/PS.00/12/2020 Tentang Pemberlakuan Pedoman Penerapan Keadilan Restoratif (Restorative Justice)* (Republik Indonesia, 2020).

[23] Usman Hamid, "Vonis Mati Meningkat, Indonesia Melawan Arus Global," *tirto.id*.

legal system that serves the national interest. One of the efforts to improve the legal system and politics is through restructuring the legal substance through reviewing and rearranging laws and regulations by taking into account general principles and the hierarchy of laws and regulations.[24]

In addition to requiring legal certainty and justice, legal settlements must also have expediency value. Expediency value must be an important indicator in law enforcement and settlement, namely the benefit for the perpetrators and more importantly the benefit for the community in general. So far, the focus of law enforcement is more on legal certainty but overlooking other legal goals, namely justice and benefit.[25] Seeing so many convicts with sentenced to death who have not yet been executed, it can be said that the State has committed human rights crimes (against the convicts with sentenced to death), because the convicts have served punishment for 2 (two) times, namely imprisonment and the death penalty.

B. Regulatory Policy

The legal condition in Indonesia, which is currently believed to approach its lowest point, has received extraordinary attention from the domestic and international community. The law enforcement process, in particular, is often seen as discriminatory, inconsistent, and prioritizes the interests of certain groups.[26]

In the legal practice in Indonesia, often law enforcers have carried out their duties in accordance with the existing rules, in the sense of formal rules. For cases of corruption, for example, according to applicable law, prosecutors have carried out preliminary investigations, full investigations, and prosecutions in courts. Lawyers have carried out their functions to defend and maintain the rights of suspects. And judges have heard both parties, so the courts' decisions are given. All relevant legal rules have been considered and implemented. All juridical formalities and procedures have been followed. However, why are there still many people who are dissatisfied with such law enforcement? And why is it still said that law enforcement in Indonesia is considered to be very low and has reached its lowest point? This is the problem, namely the problem of not fulfilling the value of justice, especially social justice. Judges do not really explore the values that live in a society on the grounds that they are bound by formal legal rules which are actually rigid and even deviate in some respects.

The provisions of the criminal procedure law (Article 50- Article 56 of Criminal Procedure Code) are intended to protect suspects and defendants from arbitrary actions by law enforcement officers and courts. On the other hand, the criminal procedure law authorizes law enforcement officers to take actions that can reduce the human rights of people. In the exercise of this authority, law enforcement officers often exercise the authority improperly. The practice of criminal justice that prioritizes violence so that citizens' human rights are deprived is a form of the State's failure in realizing a rule of law. [27]

Criminal acts that are punishable by death by the Criminal Code are:

a. Treason, assassinating the Head of State (Article 104). Article 104, treason with the intention of assassinating the President or vice-president, or with the intention of depriving them of their independence or rendering them incapable of governing is punishable by death or imprisonment for life or imprisonment for a certain period of time, a maximum of twenty years.
b. Enticing or inciting other countries to attack Indonesia (Article 111 paragraph 2).
c. Protecting or helping enemies who are fighting against Indonesia (Article 124 paragraph 3).
d. Assassinating the Head of a Friendly Country (Article 140 paragraph 3).

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[24] Danang Risdiarto, "Kebijakan dan Strategi Pembangunan Hukum Nasional Dalam Memperkuat Ketahanan Nasional," *Penelitian Hukum De Jure* 17, no. 2 (2017): 178, https://ejournal.balitbangham.go.id/index.php/dejure/article/view/135/pdf.

[25] Muhaimin, "Restoratif Justice Dalam Penyelesaian Tindak Pidana Ringan," *Penelitian Hukum De Jure* 19, no. 2 (2019): 188, https://ejournal.balitbangham.go.id/index.php/dejure/article/view/648/pdf.

[26] Harkristuti Harkisnowo, "Rekonstruksi Konsep Pemidanaan: Suatu Gugatan Terhadap Proses Legislasi dan Pemidanaan di Indonesia," *KHN Newsletter* (Jakarta, 2003). hal. 28

[27] Mosgan Situmorang, "Kedudukan Hakim Komisaris Dalam RUU Hukum Acara Pidana," *Penelitian Hukum De Jure* 18, no. 4 (2018): 434, https://ejournal.balitbangham.go.id/index.php/dejure/article/view/545/pdf.

e. Premeditated murder (Article 140 paragraph 3 and Article 340).
f. Theft with violence by two or more people at night by breaking a house resulting in serious injury or death (Article 365 paragraph 4).
g. Piracy at sea, by the sea, on the beach, in the river so that someone dies, (Article 444).
h. Encouraging rebellion or riots of workers against state defense companies during the war (Article 124 bis).
i. During war cheating in handing over goods needed by the army (Article 127 and Article 129).
j. Extortion with violence (Article 368 paragraph 2).

In the draft of the Criminal Code (RKUHP) which was issued in 2019[28] in Article 67, the specific punishment as referred to in Article 64 letter c is the death penalty which is always threatened with alternatives. Then in Article 98 that "The death penalty is threatened as an alternative as a last resort to prevent criminal acts from being committed and protect the community." Followed by Article 99 which makes it clear that the implementation of the death penalty is, among others, (1) the death penalty can be executed after application for clemency for the convict is rejected by the President. (2) The death penalty as referred to in paragraph (1) is not executed in public. (3) The death penalty is executed by shooting the convict to death by a firing squad or by other means specified in the law. (4) The execution of the death penalty against pregnant women, women who are breastfeeding their babies, or people who are mentally ill is delayed until the woman gives birth, the woman is no longer breastfeeding her baby, or the mentally ill person recovers. While the concrete explanation is contained in the next article, namely Article 100: (1) A judge may impose a death penalty with a probationary period of 10 (ten) years if:

a. the defendant shows remorse and hopes for improvement;
b. the role of the defendant in the crime is not very important; or
c. there are mitigating reasons.

(2) The death penalty with a probationary period as referred to in paragraph (1) must be included in the court decision. (3) The probationary period of 10 (ten) years begins 1 (one) day after the court's decision has permanent legal force. (4) If the convict during the probationary period as referred to in paragraph (1) shows a commendable attitude and action, the death penalty can be changed to life imprisonment by a Presidential Decree after obtaining consideration from the Supreme Court. (5) If the convict during the probationary period as referred to in paragraph (1) does not show commendable attitudes and actions and there is no hope for improvement, the death penalty can be executed on the orders of the Attorney General. Then in Article 101 if the application for clemency of the death penalty convict is rejected and the death penalty is not executed for 10 (ten) years since the clemency is rejected not because the convict has fled, the death penalty can be changed to life imprisonment by a Presidential Decree.

Article 28I of the 1945 Constitution of the Republic Indonesia (UUD 1945) mandates that the right to life, the right not to be tortured, the right to freedom of thought and conscience, the right to have 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 on the basis of retroactive law are human rights that cannot be reduced under any circumstances. The death penalty is connected to human rights, which are closely related to the right to life which is included in the category that cannot be reduced under any circumstances or known as non-derogable rights. This is different from the opinion of the Constitutional Court in Decision No. 2-3/PUU-V/2007 which considers that respecting human rights including the right to life as regulated in Article 28I cannot be exempted from and must also comply with the provisions of Article 28J paragraph (2) which states: "In exercising their rights and freedoms, everyone is obliged to comply with the restrictions stipulated by law…". Two things are different between Article 28 paragraph (1) which states that it cannot be reduced in any form (reduction), with the provisions of Article 28J paragraph (2) which states that there are restrictions. The concept of reduction and the concept of limitation are different matters.[29] A

[28] DPR RI, "Rancangan Undang-Undang 2019 KITAB UNDANG-UNDANG HUKUM PIDANA," *hukumonline.com*, diakses Februari 21, 2022, https://www.hukumonline.com/pusatdata/detail/17797/rancangan-undang-undang-2019#!

[29] Rully Herdita Ramadhani Mei Susanto Ajie Ramdan,

convict, even though his independence has been lost in a correctional institution, still has rights as a citizen and these rights have been guaranteed by the state as contained in the 1945 Constitution of the Republic of Indonesia Article 28G paragraph (1) which states: "Everyone has the right to protection for himself, family, honor, dignity, and property under his control, and has the right to a sense of security and protection from the threat of fear to do or not to do something which is a human right".[30]

By looking at the death penalty as a form of heinouspunishmentthatdoesnotprovideadeterrent effect to future criminals, this punishment also provides mental and physical torture to convicts, and this punishment also violates the right to life as regulated in the Universal Declaration of Human Rights (UDHR) and the International Covenant on Civil and Political Rights or commonly abbreviated as ICCPR which aim to strengthen the basic principles of human rights in the civil and political fields contained in the UDHR so that they become legally binding provisions and their elaboration includes other points related. Within the framework of national law, the right to life is also regulated in the Indonesian Constitution. This provision is reaffirmed in Article 4 of Law No. 39 of 1999 concerning Human Rights such as the right to live, the right not to be tortured, the right to personal freedom, thought and conscience, the right to religion, the right not to be enslaved, the right to be recognized as a person and equal before the law, and the right not to be prosecuted based on the legal basis that applies retroactively. These are human rights that cannot be reduced under any circumstances and by anyone.[31] In this regard, the application of the death penalty actually still contains controversy in the community, in relation to human rights. The UN General Assembly has adopted a non-binding resolution calling for a global moratorium on the death penalty, namely Optional Protocol II of the International Covenant on Civil and Political Rights because the death penalty is considered contrary to the norms contained in the UDHR and the ICCPR and hinders the promotion of the fulfillment of the right to life and ultimately prohibits the use of the death penalty in the relevant countries.[32]

It is further explained in positive law in Indonesia that the imposition of the death penalty is the most important part of the criminal justice process, and the implementation of the death penalty by the State is through court decisions, so it is important for the State to take the convict's right to life which is a human right that cannot be limited (non-derogable). Therefore, its implementation must pay attention to the human rights of the convict. Furthermore, in the Indonesian Criminal Code (KUHP), the criminal system (*stelsel*) is regulated in Article 10 of the Criminal Code, which states that there are 2 types of punishment, namely: (1) Principal Punishment, which consists of (a) death penalty, (b) imprisonment, (c) confinement, and (d) fine; (2) Additional Punishment, which consists of (a) revocation of certain rights, (b) confiscation of certain goods, (c) announcement of judge's decision; (3) Undisclosed Penitentiar, based on Law Number 20 of 1946 concerning Undisclosed Penitentiary.[33]

This is not only the execution itself which is the cruelest, inhuman, and degrading form of punishment, but the death row phenomenon can also be categorized as part of a cruel and inhuman punishment which is part of the torture. This was conveyed by Juan E. Mendez (UN Special Rapporteur on Torture, and Other Cruel, Inhuman and Degrading Treatment or Punishment for the period 2010-2016) that the long time in waiting for executions, along with the (bad) conditions that accompany it, is a violation of the prohibition against torture itself.[34]

In Law Number 39 of 1999 concerning Human Rights, Article 76 paragraph (1) states as follows: "To achieve its objectives, the National Committee of Human Rights carries out the

"Kebijakan Pidana Mati Dalam RKUP Ditinjau Dalam Aspek Politik Hukum Dan HAM," *Jurnal Arena Hukum* 11, no. 2 (2018): 602.

30 Penny Naluria Utami, "Keadilan Bagi Narapidana di Lembaga Pemasyarakatan," *Penelitian Hukum De Jure* 17, no. 382 (2017), https://ejournal.balitbangham.go.id/index.php/dejure/article/view/231/pdf.

31 Topik, "Tren Vonis Hukuman Mati di Indonesia Terus Meningkat," *amnesty.id*.

32 Ikhwanuddin, "Tinjauan Yuridis Tentang Penjatuhan Hukuman Mati Terhadap Perantara Jual Beli Narkotika Yang Disertai Dengan Pencucian Uang (Studi Putusan Nomor 594/PID.SUS/2015?PN.TJB)," *Jurnal Prointegegrita* 2, no. 1 (2018): 50.

33 Arief, "Problematika Penjatuhan Hukum Pidana Mati Dalam Perspektif HAM Dan Hukum Pidana." hal. 92

34 Topik, "Tren Vonis Hukuman Mati di Indonesia Terus Meningkat." Hal. 1

functions of assessment, research, counseling, monitoring, and mediation on Human Rights". The provisions of Article 76 paragraph (1) should be carried out by the National Committee of Human Rights on convicts with sentenced to death who have not been executed. If this provision is not implemented, then based on the provisions of Article 1 paragraph (6) of this Law, the Government, together with the House of Representatives and higher officials in implementing the mandate of the Law, can be sued.

The provisions in Article 1 paragraph (6) state as follows: "Human rights violations are every act of a person or group of people including state apparatus and so on…" Referring to these provisions, the Government can be demanded to immediately implement the Law, and otherwise, the pre-prosecutor and the implementation of the law may be punished. In order that the convict with sentenced to death does not have to serve the sentence for the 3rd (third) time, Penal Mediation or Restorative Justice as stipulated in Article 76 paragraph (1) is carried out by the Government, with the aims to reduce the occupancy level of correctional institutions.

Meanwhile, according to Koesparmono Irsan[35] (GRANAT), the existence of the death penalty is a choice of punishment for the person concerned. Therefore, laws and regulations have regulated the punishment according to the actions. The imposition of the death penalty on a person due to his actions basically has no impact or correlation with the crime itself, considering that the death penalty is the legal choice of the person concerned.

In the history of human civilization, misguided justice has always occurred.[36] In Indonesia, there is often misguided justice, one of the reasons is the arrogance and militaristic nature of law enforcement officers, especially the Indonesian National Police when investigating criminal cases.[37] Based on a study of documentation on court decisions in Indonesia, there are at least 6 murder defendants who have been sentenced, and then the convicts have served prison terms. However, after new evidence was reviewed by the Supreme Court through a judicial review, it turned out that the convicts were not the perpetrators of the murder, namely Sengkon and Karta, Risman Lakoro, and Rostin Mahaji, Imam Hambali, and David. In the case of the death penalty imposed on Tibo and his friends, the Advocate Team once accused the judge of conducting misguided justice, because the defendants were innocent in the Poso riot case.[38] Misguided justice also occurs in America with 2.3% to 5% of convicts.[39]

From a legal perspective, in order to anticipate the adverse effects of misguided justice for convicts with sentenced to death in the form of errors in the execution of convicts with sentenced to death, there needs to be a legal provision that regulates the minimum time for delaying the execution of the death penalty so that the convict can apply for judicial review several times against the court's decision. The delay is very important for the protection of human rights (both convicts and the public) because it can provide an opportunity for all parties to rethink and look for new evidence to change the death penalty decision, and ensure that the death penalty sentence is fair.

Officials, who due to their mistakes, omissions, or negligence cause the state to have to pay compensation, may be subject to action in accordance with applicable regulations. In accordance with the principle of justice, it is carried out quickly, simply, and at a low cost and in accordance with the principle of guaranteeing legal certainty for the convicted parties. So that officials/law enforcement officers do not act arbitrarily in terms of acting, because all actions must be accounted for, both to victims or their families, society, and the State. The imposition of sanctions on officials/law enforcement officers who commit procedural errors makes the public aware for law enforcers to be careful and more professional in exercising their authority. Law enforcers who violate the law are seen as the same

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[35] Ahmad Syahrun, "Eksistensi Pidan Mati Dalam Penegakan Hukum di Indonesia ditinjau dari Aspek Hak Asasi Manusia (HAM)" (UIN Alauddin Makassar, 2013).

[36] Nina Pane Budiarto Adnan Buyung Nasution, Ramadhan Karta Hadimadja, *Pergaulan Tanpa Henti* (Jakarta: Aksara Karunia, 2004). hal. 359

[37] Nur Muhammad Wahyu Kuncoro, *69 Kasus Hukum Mengguncang Indonesia* (Jakarta: Raih Asa Sukses, 2012).

[38] Dkk M. Tito Karnavian, *Indonesian Top Secret: Membongkar Konflik Poso* (Jakarta: Gramedia Pusaka Utama, 2008). hal. 221

[39] Na Jiang, *Wrongful Convictions in China: Comparative and Empirical Perspectives,* (Berlin: Springer-Verlag, 2016). hal. 27

as people who violate the law, equality before the law. This makes learning and creates prevention efforts to prevent law enforcement officers from implementing the law in a deviant manner and makes law enforcement officers to be careful and comply with applicable legal procedures to ensure that the rights of the defendant are fulfilled.[40]

Based on this thought, this study aims to find a juridical and empirical justification for the need to delay the execution of convicts with sentenced to death in order to anticipate the adverse effects of a misguided justice and to find the form of legal product used to regulate the minimum period provision for delaying the execution of the convicts with sentenced to death. The results of this study can be used by the Indonesian government as a basis for consideration of the formation of legal norms regarding the delay of executions of convicts with sentenced to death.

Based on the Criminal Procedure Code, with regard to the last resort of convicts with sentenced to death to examine the truth of the contents of court decisions which have permanent legal force, it has been explicitly regulated in Indonesian criminal procedure law, namely the application for judicial review. Meanwhile, legal efforts are in the form of clemency from the President, not an attempt to examine the contents of the court's decision, but are only an attempt by the convict with sentenced to death to ask for forgiveness from the president so that the sentence is removed or commuted, because the convict with sentenced to death has admitted guilt.

Based on the two conflicting views on the need to immediately implement the death penalty and stop the execution of the death row convict, from a legal point of view, there is a need for a middle way solution, namely the delay of the execution of the convict with sentenced to death within a certain period of time through legal norms. The function of this delay is to provide an opportunity for convicts with sentenced to death to find new evidence that can be used as a basis for changing the type of death penalty through judicial review. Based on this norm, the state (in this case the government) will be able to ensure that criminal justice has been carried out honestly, all legal remedies for the convicts with sentenced to death have been passed, so that if there must be an execution of the death row convict, the convict will not become a victim of misguided justice. The researcher's idea is in line with the state's goal, namely to protect the entire Indonesian nation, and the contents of the decision of the Constitutional Court of the Republic of Indonesia, namely the right of the convict to apply for a judicial review more than once, as well as the purpose of the criminal procedure, namely to find the material truth. If the state does not provide sufficient time and the convict with sentenced to death is already executed even though there is a misguided justice, it will have a very bad impact, among others, for convicts with sentenced to death (because their right to life has been taken arbitrarily by the state), for the families of convicts with sentenced to death (because they have lost their loved family members), for the state (because it will reduce trust and authority in the face of the national and international community), law enforcers (a doubt in the professionalism of law enforcers), and for the Indonesian people (because of fear and disharmony).

To ensure legal certainty of the delay of the execution of convicts with sentenced to death, a valid legal product is needed, namely in the form of laws and regulations. The form of laws and regulations in Indonesia has been regulated in a standard manner, including the content of the material regulated in it and the respective hierarchies. In order for the provisions of the laws and regulations to be formed to have binding power, they must be made by the competent authority, made based on the technique of drafting laws and regulations, the regulated provisions do not exceed the authority possessed by the legislators, and their contents do not conflict with regulations that hierarchically exist above the legal products that are made, and their principles do not conflict with the values of Pancasila.

The definition of the delay of execution of convicts with sentenced to death is the granting of a certain period of time by the state to convicts with sentenced to death who commit murder before undergoing execution. The period of time is 5 years from the date of the court decision which has permanent legal force. During the delay of the execution of the death row convict, the judge must

[40] Yuliyanto, "Problematika Tata Cara Eksekusi Ganti Kerugian Dalam Perkara Pidana," *Penelitian Hukum De Jure* 19, no. 3 (2019): 355–356, https://ejournal.balitbangham.go.id/index.php/dejure/article/view/693/pdf_1.

ensure that the convict with sentenced to death is kept in prison and receives proper treatment as a prisoner in accordance with laws and regulations. If within 5 years there is no decision on extraordinary legal remedies that can change the death penalty decision, then the convict with sentenced to death can be executed by the Prosecutor's Office. Therefore, it can be understood that the policy of delaying the execution of convicts with sentenced to death in this context does not intend to change the type of death penalty to another type of punishment, for example, imprisonment for life or 20 years, but only delays the execution and if it has met a certain period of time, the convict can be executed.

The reasons for justification that the researcher uses in the idea of delaying the execution of convicts with sentenced to death are as follows:

1. Yuridicial Justification

The delay of the execution of convicts with sentenced to death in the implementation of the decision of the Constitutional Court of the Republic of Indonesia so that the convicts with sentenced to death can apply for judicial review more than once for the sake of achieving material justice. Based on the Decision of the Constitutional Court of the Republic of Indonesia Number 34/PUUXI/2013, each convict can apply for judicial review more than once. This decision also applies to convicts with sentenced to death because what is stated in the Constitutional Court's decision is "every convict", and convicts with sentenced to death are included in the category of a convict. The condition for applying for judicial review is if the convict has new evidence that has never been disclosed in court. The application for judicial review for more than once is based on the consideration that an extraordinary legal remedy in the form of judicial review is historically and philosophically a legal remedy that was born to protect the interests of the convict in order to find justice and material truth so that the discovery of justice cannot be limited by time or the provisions of formalities as regulated in the Criminal Procedure Code, namely that judicial review can only be applied for once. It is possible that after the convict applies for judicial review and it is rejected, then a substantial new situation (*novum*) is found so that it can be used for the next judicial review application. The Constitutional Court also believes that justice is a very basic human need and is more basic than legal certainty. Institutionally, the existence of the Constitutional Court in making these decisions is not in doubt because its existence is regulated by the Constitution, and its operation is regulated by law so that its decisions are final and binding, and the Constitutional Court is a 'court of law', which has the function of adjudicating the legal system and the justice system.[41]

However, after the Constitutional Court's decision gave convicts an opportunity to apply for judicial review for more than once, the Supreme Court of the Republic of Indonesia issued Circular Letter of the Supreme Court of the Republic of Indonesia (SEMA) Number 7 of 2014 concerning the Submission of Requests for Judicial Review in Criminal Cases, which stated that judicial review can only be applied for once.

For these two provisions, the Supreme Court Justices who were included in the Criminal Chamber held a plenary meeting in 2015 and agreed that judicial review can be carried out 2 times. This agreement was made so that there is a certainty, that judicial review is not only done once (because it may ignore justice), and judicial review is more than 1 time (because it does not contain legal certainty).[42]

Based on the Constitutional Court's decision and the contents of the agreement between the Supreme Court Justices of the Criminal Chamber, the researcher understands that judicial review of a convict with sentenced to death can be applied for twice, but it has not been regulated when the last time judicial review shall be carried out. In the provisions of Indonesian criminal law, it has not been regulated regarding the time for the second judicial review, whether the judicial review must be carried out before the clemency application or after the clemency application. According to the existing provisions, the judicial review must be carried out before the application for clemency, while the clemency shall be carried out within a period for a maximum of 1 year from the date of

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[41] Jimly Asshiddiqie, "Kedudukan Mahkamah Konstitusi dalam Struktur Ketatanegaraan Indonesia," *mkri.id*, last modified 2015, diakses Februari 7, 2022, https://www.mkri.id/index.php?page=web.Berita&id=11779.

[42] Lilis Khalisotussurur, "Peninjauan Kembali Boleh Dua Kali untuk Keadaan Tertentu," *gressnews*, last modified 2015, diakses Februari 7, 2022, https://www.gresnews.com/berita/hukum/100573-peninjauan-kembali-boleh-dua-kali-untuk-keadaan-tertentu/.

the decision that already has permanent legal force (Article 7 paragraph (2) of Law No. 5 of 2010).

The word pardon/clemency comes from the Latin Pardonare, which is translated into English, namely Pardon. According to the Black's Law Dictionary Sixth Edition, compiled by Henry Campbell Black. M.A. in 1990, it was written that Pardon: is an executive action that mitigates or sets aside punishment for a crime. An act of grace from governing power which mitigates the punishment the law demands for the offense and restores the right and privileges forfeited on account of the offense. Clemency is regulated in Law No. 22 of 2002 which has been amended by Law No. 5 of 2010. According to Article 1 of Law No. 22 of 2002, what is meant by clemency is forgiveness in the form of changes, mitigations, reductions, or abolition of the implementation of punishment to convicts granted by the President. In addition to extraordinary legal remedies, to avoid the implementation of the death penalty, convicts through their attorneys often apply for clemency to the President to amend the death penalty decision. In the Draft Criminal Code (RKUHP), it is stated that the death penalty will automatically become a life sentence if it has been ten years after the decision to reject the clemency is issued by the President and the prosecutor has not carried out the execution of the death penalty. The right to apply for clemency is notified to the convict by the judge or the presiding judge of the trial who decides the case at the first level. If at the time the court's decision is issued the convict is not present, the convict's rights are notified in writing by the clerk of the court that decides the case at the first level, appeal or cassation. The sentence for which clemency can be applied for is a death penalty, life imprisonment, or imprisonment for a minimum of 2 years. It should be noted that the application for clemency can only be submitted once, in order to provide legal certainty in the implementation of the application for clemency and to avoid discriminatory arrangements.[43]

2. Empirical Justification

The waiting period for convicts with sentenced to death can be used by the government to consider to immediately carrying out executions or changing the type of death penalty through presidential clemency.

1. Immediately Execute the Convicts with Sentenced to Death

If the government believes that the death penalty is appropriate for the convict and the 5-year delay period has passed, then the government needs to immediately carry out the execution. The researcher based this on the following 2 reasons.

a. The death penalty is a legal type of punishment in Indonesia. The researcher's juridical reason that if the delay period is over then the convict will still be executed is as follows. The human right to life is the most basic human right in Indonesia, it can only be limited by law. Normatively, the death penalty in Indonesia does not conflict with the 1945 Constitution of the Republic of Indonesia because according to Article 28 letter J, human rights can be limited by law and it turns out that the death penalty provisions are already regulated in the Law, namely the type of death penalty is regulated in Article 10 of Law No. 1 of 1946 concerning the Criminal Law Regulations, and the execution of convicts with sentenced to death is based on Presidential Decree Number 2 of 1964 concerning Procedures for Implementing Death Penalty Sentenced by Courts in General and Military Courts which was promulgated in Law through Law No. 5 of 1969. All crimes punishable by death are regulated in the Law.

In addition to this norm, the Indonesian Constitutional Court, as the only court authorized to examine the contents of the Law against the Constitution, has confirmed in its decisions 3 times that the type and implementation of the death penalty in Indonesia do not conflict with the constitution, namely when examining the 2007 lawsuit (lawsuit on legality of the death penalty for narcotics crime), in 2008 (lawsuit concerning the regulation of the use of firing squad to execute death convicts), and in 2012 (lawsuit regarding qualification that the crime of theft with violence resulting

[43] Willy Wibowo Sujatmiko, "Urgensi Pembentukan Regulasi Grasi, Amnesti, Abolisi dan Rehabilitasi," *Penelitian Hukum De Jure* 21, no. 1 (2021): 95–96, https://ejournal.balitbangham.go.id/index.php/dejure/article/view/1589/pdf.

in death is not included in the category of serious crimes whose perpetrators deserve to be sentenced to death as regulated in the ICCPR). The Constitutional Court considers that the death penalty does not conflict with Pancasila and the 1945 Constitution as well as several international agreements. The reason is that the right to life as regulated in Article 28 paragraph (2) of the 1945 Constitution is an exception to Article 28A and Article 281 paragraph (1) of the 1945 Constitution. The provisions in the Law and the Constitutional Court's decision are the legal basis that the death penalty is still valid and is still being maintained in Indonesia. In 2017, all factions in the House of Representatives of the Republic of Indonesia have agreed to maintain the death penalty but the imposition must always be careful, and the execution shall be tightened.[44]

b. The death penalty has an adequate crime prevention effect. Based on the results of the study, there is a real effect of the death penalty on the eradication of crime in several countries. Saudi Arabia, like the one that enforces Islamic criminal law which regulates the death penalty (and this law is implemented), turns out to have a low crime rate. Based on data from the United Nations Office on Drugs and Crime in 2012, the murder crime rate in Saudi Arabia was only 1.0 per 100,000,000 people. This is much different from the fact in countries that do not enforce the death penalty, for example Finland (2.2 per 100,000,000 people); Belgium (1.7 per 100,000,000 people); and Russia (10.2 per 100,000,000 people).[45]

2. Immediately Grant Clemency to Change the Type of Death Penalty

If the government is hesitant to carry out the execution of the convicts with sentenced to death, it is better to immediately change the type of death penalty by granting clemency by the President. Based on the results of the study, it turns out that when a convict with sentenced to death waits in prison and the period is too long, the execution time is not clear, the placement in a special isolation room, poor prison conditions, lack of educational and recreational activities, all of these will result in mental trauma and severe physical suffering for the convicts with sentenced to death.[46]

CONCLUSION

The delay of the execution of convicts with sentenced to death is needed to anticipate the impact of the justice that is not in accordance with the objectives of the justice, namely finding the material truth. The minimum period is 5 years from the date of the court's decision which already has permanent legal force. This period of time is sufficient to provide an opportunity for convicts with sentenced to death to apply for a judicial review, and this period of time is sufficient for the government to think about justice for the convicts with sentenced to death.

SUGGESTION

The government must carry out executions of convicts with sentenced to death if their legal rights have been sought and rejected by the government. If this is not done, the government has committed a crime against humanity and the government must make changes to several regulations that still regulate the death penalty. Then the role of the Human Rights Commission is very necessary for assisting during the waiting period for execution of convicts with sentenced to death by carrying out various options as the implementation of the convict's human rights.

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[44] Andi Saputra, "Eksekusi Mati Gembong Narkoba Akan Dipersulit, DPR Bisa Koyak Kedaulatan Hukum," *detiknews*, last modified 2016, diakses Februari 7, 2022, https://news.detik.com/berita/d-3176427/eksekusi-mati-gembong-narkoba-akan-dipersulit-dpr-bisa-koyak-kedaulatan-hukum.

[45] Roby Arya Brata, "Pro Kontra Hukuman Mati (Bagi Pelaku Kejahatan Narkoba)," *setkab.id*, last modified 2015, diakses Februari 7, 2022, https://setkab.go.id/pro-kontra-hukuman-mati-bagi-pelaku-kejahatan-narkoba/.

[46] Ban Ki-Moon, "Berpaling Dari Hukuman Mati: Kajian Dari Asia Tenggara," *fdokumen.com*, last modified 2013, diakses Februari 7, 2022, https://fdokumen.com/document/berpaling-dari-hukuman-mati-indonesiamoving-permasalahan-opini-publik.html.

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