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Forgiveness of Judges: Local Wisdom in the Concept of National Criminal Law

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Abstract

Hukum pidana sebagai suatu instrumen penjaga ketertiban masyarakat, memiliki dua fungsi, yakni fungsi umum mengatur hidup dalam bermasyarakat atau menyelenggarakan tata dalam masyarakat dan fungsi khusus sebagai pelindung kepentingan hukum terhadap perbuatan yang hendak memperkosanya dengan sanksi berupa pidana yang sifatnya tajam. Secara konseptual, pemaafan hakim merupakan bentuk dari modifikasi atas kepastian hukum yang bersifat kaku, menuju kepastian hukum yang bersifat fleksibel. Hal ini berangkat dari beberapa perkara vang sebenarnya telah memenuhi rumusan delik tindak pidana, namun perbuatannya tidak layak untuk dijatuhkan pemidanaan. Oleh karena itu konsep hukum pidana nasional dalam hal ini RKUHP membuat suatu baru bermuatan kearifan lokal rumusan vang mengatur dimungkinkannya pemaafan hakim terhadap beberapa perkara yang tidak layak dijatuhkan pemidanaan. Tulisan ini berfokus pada konsep pemaafan hakim tidak bisa dilepaskan dari nilai kearifan lokal, termasuk nilai-nilai agama dan kearifan hukum yang hidup di tengah masyarakat.

Keywords: RKUHP; Kearifan Lokal; Pemaafan Hakim

Criminal law, as an instrument of guarding public order, has two functions. The first one is as general function to regulate life and to organize procedures in society. The second one is as particular function to



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protect legal interests from crime by giving criminal punishment as sanctions for the perpetrators. Conceptually, forgiveness of the judge emerges to modify rigid legal certainty towards flexible legal certainty. This departs from several cases that have actually fulfilled the formulation of criminal offenses, but their actions are not feasible to be sentenced. Therefore, in the concept of the National criminal law, the Draft of Criminal Code (RKUHP) makes a new formula containing local wisdoms that regulate the possibility of forgiveness of the judge to several cases that are improperly being convicted. This paper focuses on the concept of forgiveness of the judge that cannot be separated from the local wisdom values, including religious values and legal wisdoms living in society.

Keywords: RKUHP; Local Wisdom; Forgiveness of Judges

Introduction

Crime is always seen as a deviant act that damages the social order values. The existence of crime makes the life order to be disorganized, insecure and uncomfortable. Criminal behavior is a form of 'deviant behavior' which is always present and inherent in society (Sadli 1976: 56). There is no clean society from evil as well as there is no religion that justifies crime.

Criminal behaviors committed by someone are wrong both in juridical dimension as human actions that are contrary to the law and in the sociological dimension that violate the values living in society. (Anwar and Adang 2008: 206). Sudarto states that evil deeds are the objects of criminal law (Sudarto 1990: 38).

In addition, Van Hamel states that criminal law is the entire basis and rules adopted by the state as obligation to enforce the law by prohibiting what is contrary to law (onrecht) and giving a misery to those who violate the prohibition (Sudarto 1990: 38).

Criminal law, as an instrument to maintain the public order, has two functions, namely the general and specific functions. Its general function is to regulate social life or to administer governance in society. On the other hand, in its particular function, it is to protect legal interests from crime by giving criminal punishment as sanctions for the criminals (Sudarto 1990: 38).



In this case, criminal law is deliberately designed to impose suffering as an effort to maintain the norms in law as well as the norms that live in society. So, enforcing criminal law should be used as the last effort when sanctions of other branches of law do not work. Mainly, criminal law must be used proportionally and according to its place, considering that criminal law also has a subsidiary function that should be used if other efforts are inadequate.

The instruments order of law enforcement system, both criminal law and criminal procedure law in Indonesia, regulates the formal procedures that must be passed in resolving a criminal case through a judicial institution (litigation). Through this judiciary, justice must be enforced for the sake of the state to settle a criminal case.

The criminal law enforcement system in Indonesia requires that crime is essentially independent from people's will. So, in general, criminal law provisions remain violated despite the consent of the injured party. This is certainly different from the civil law system and living law that applies in societies, because in a crime, the victim forgiveness and the perpetrator apology cannot cancel the trial process.

There are some cases that have attracted public attention regarding the issue of relationship between criminal law and minor crime. One of those is the Minah case. She is an elderly grandmother who was convicted because of being accused of stealing three cacao fruits. During the trial process, sense of humanity has emerged from the Chief Judge, the Public Prosecutor, and even visitors from society.

Other case comes from Sidoarjo, East Java. A teacher from Raden Rahmad Middle School, Balongbendo District, Sidoarjo, Muhammad Samhudi (46) underwent a trial suit at the Sidoarjo District Court on Thursday (07/14/2016). He was brought to justice after being reported for pinching his student. The Public Prosecutor demanded that he be sentenced to six months in prison with one year probation. In the demand read by Andrianis as a prosecutor, Samhudi was considered guilty and violated article 80 paragraph (1) of the Child Protection Act. The defendant was sentenced to a six-month prison term with one year probation.



In normative provisions as well as in religious and customary views in the society, persecuting, stealing and even killing are forms of bad deeds that will get sanctions for those who commit them. These crimes are formal offenses that emphasize actions, not results or material offenses. It is actually common when someone who commits a crime will get sanctions. However, the problem is whether sending all the guilty people to prison is the main purpose for the existing criminal law?

Local Wisdom as a Foundation for the Concept of National Criminal Law

Van Vollenhoven has described diversity of the Indonesian original living laws, but he shows a regular pattern that differs from western legal patterns. Living law is one of the aspects of Indonesian cultures that is embodied from the socio-cultural values of people who have grown through the centuries processes, long before the national law has been codified. (Salahudin 2008: 135)

The source of living law is customs related to social traditions. But not all customs are law. There is a difference between ordinary customs and living law. Only customs with sanction have legal nature and are called living law. Its sanctions emerge from public reactions. These reactions are implemented by the general public authorities. They will impose both sanctions and sentence verdicts on violators of living (adat) rules.

Living law or customs itself is formed by the society to regulate social life order, so that people can live peacefully, be safeguarded from all security disturbances and be avoided from evil acts. Likewise, the national criminal code is aimed to protect public interests, their rights, safety of life, and also to maintain order and security in society. Protecting the public interests can be realized when there are provisions to govern as well as law enforcers to carry it out. If so, varied justice with various content and circumstance will be realized basing on society and its era.

As seen in the customs of agricultural communities, there is a longstanding tradition, namely "Ngasap". It is that some farm workers will take the leftover rice or unused grain from the harvest. The problem is



whether people who took the leftover from the harvest are categorized as thieves. In this case, both criminal law and living law in society show different dimensions in understanding and deciding to a legal behavior.

People will consider those insignificant cases that have been decided by the criminal law enforcers as lame and unfair, so that the criminal law will be considered rigid and absolute. As Barda Nawawi Arief has stated, justification for a crime is not only just based on the existing criminal offense, mistakes or criminal liability, but also on the purpose of punishment.

By putting the purpose of punishment as one of the reasons for justifying a crime, the law provides a place for living norms in society as a background for the idea of 'judges' forgiveness' (rechterlijk pardon). It can be applied for some cases with low level of danger and light criminal behaviors. It means that the judge can apologize and does not impose these behaviors, even though the other two elements which are criminal behaviors and wrongdoing or criminal liability have been proven (Arief 2011: 12)

The judges' forgiveness is a new idea presented in the reform of criminal law. It is currently still limited to be formulated in Article 56 paragraph (2) of the 2015 RKUHP and it becomes a part of the criminal guidelines. The article says:

"The lightness of the act, personal condition of the perpetrator, or the state when the act was committed or what happened next, can be used as a basis for consideration not to impose a crime by considering some justice and humanity aspects".

Although textually, the article does not explicitly mention the forgiveness of the judge, but in the paragraph, it is explained that Article 56 paragraph (2) contains the principle of pardons rechardement (forgiveness of the judge). Barda Nawawi Arief stated that with the accepted idea of judges' forgiveness, the Draft Criminal Code (RKUHP) actually should not become a rigid model, instead of containing a flexible balance of ideas (Arief 2011: 12).

The reform of national legal system, especially in criminal law, is a part of the great agenda of the national legal politics. The meaning and nature of



criminal law reform are closely related to the background and urgency of criminal law reform itself. It can be seen from socio-political, sociophilosophical, socio-cultural aspects, and various aspects of policy (especially social, criminal and law enforcement policy). Thus, the reform of criminal law system essentially implies an effort to reorient and to reform criminal law in accordance with the values of socio-political, sociophilosophical and socio-cultural centers of Indonesian people in which underlie social, criminal and law enforcement policies in Indonesia (Arief 2011: 12).

Law development, especially in the reform of criminal law, should not only build the legal institutions, but also include the substance development of legal products which are the result of a legal system in the form of criminal and cultural legal regulations, namely attitudes and values that affect the implementation of the legal system (Rahardjo 1980: 84-86).

One of the recommendations of the VIII National Law Development Seminar in 2003 in Kuta, Denpasar, Bali, was to make religious teachings as a source of motivation, inspiration and a creative evaluation in developing legal people with good morals, so that concrete efforts must be developed in the content of national legal development policies that can:

- a. Strengthen the foundations of religious culture in society;
- b. Facilitate the development of diversity in society with the progress of nation;
- c. Prevent social conflicts between religious communities and increase harmony between nations.

Recommendations for conducting studies and excavating the law that lives in the society, which is sourced from the values of religious, traditional or living laws, become the main points during international congresses in the field of criminal law and criminology. Seeing this development, the draft of RKUHP reform does not release aspects of religious values and norms that live in society (local wisdom), including the idea of judges' forgiveness (rechterlijk pardon).

This idea is functioned as a judicial correction of the legal principle to prevent criminal prosecution that is not justified to protect society and to



rehabilitate the offender. This correction arises because the formulas or conventional models of Dutch Penal Code are considerably rigid. The basis to justify a criminal offense in the Criminal Code only rests on criminal behaviors (objective conditions) and mistakes (subjective conditions), so that criminal behavior is seen as an absolute consequence that must exist. According to the formula of Criminal Code, it was felt awkward and unfair when both conditions of criminal behaviors and mistakes were proven, while the perpetrator was "forgiven" by the victim.

This principle of legality and culpability becomes a fundamental principle in criminal law. However, the Criminal Code Concept (RKUHP) does not view the two principles as rigid and absolute conditions. In certain cases, the RKUHP also gives the possibility to apply the principle of "strict liability", "vicarious liability" and judges' forgiveness (rechterlijk pardon) as a form of flexibility and elasticity of the RKUHP.

Currently, in the process of imposing criminal behavior of the perpetrator, the criminal justice system in Indonesia have just recognized the justice system (litigation), where each crime can only be processed in the court institution. This judiciary is an institution that exercises judicial power for people seeking justice. For this reason, judge becomes the final effort to the process of seeking justice as well as to play such an important role to establish the law fairly (in concreto).

The process of imposing a sentence for perpetrators is through a court process decided by a judge. The given sentence depends on the crime committed. Criminal punishment as regulated in Article 10 of the Criminal Code, consists of:

- a. Criminal Principal
 - 1. Criminal death
 - 2. Criminal Prison
 - 3. Confinement
 - 4. Fines
- b. Additional Crimes
 - 1. Revocation of certain rights



- 2. Confiscation of certain items
- 3. Announcement of the judge's decision

The Draft Law of the Criminal Code of 2015 regulates the types of criminal acts, including but not limited to principal, death penalty and additional crimes. The main criminal law consists of:

a. Criminal jail

- b. Criminal closing
- c. Criminal Supervision
- d. Criminal fines, and
- e. Criminal social work.

Whereas additional crimes consist of:

- a. Revocation of certain rights
- b. Expropriation of certain items / or bills
- c. Announcement of judge's decision
- d. Payment of compensation, and
- e. Fulfillment of local customary obligations or obligations according to the penalties that live in the community

These provisions of Article 10 of the Criminal Code are intended to harmonize the Article 5 of Law No. 48 of 2009 concerning Judicial Power, which is stated: "Judges and constitutional judges must explore, follow and understand the legal values and a sense of justice that lives in society". Surely, in deciding a case, the judge must refer to the applicable law. But in the context of Indonesian society, he is not a law funnel but rather a funnel of propriety, justice, public interest, and public order. In this context, necessity of the judge to consider the living values in society must be understood, so that his verdict is in accordance with the law and the sense of social justice.

Forgiveness is a form of deliverance from mistakes. Here, the perpetrator is not sentenced and will not get punishment. Such provisions basically exist in the conditional criminal code (voorwaardelijkeweroordeling) regulated in Article 14a-14f of the Criminal



Code. This conditional punishment is also referred to by some circles as a criminal trial, or there is also termed a contractual punishment, a conditional punishment or also a date of punishment (Lamintang 2010: 133). Article 14a-14f is an insert article which was only integrated with the Criminal Code in 1927 through Staatsblad 1926 No. 251 Jo. 486 (R. Susilo 1991: 40).

Muladi argues that by formulating conditional crime in the Criminal Code, it becomes evidence that today's criminal law contains positive values, such as human values and re-socialization of the perpetrator's criminal behaviors (Muladi 2008: 62). According to Adami Chazawi, although it is called a conditional criminal, it does not mean criminal (strafsoort) as written in Article 10 of the Criminal Code. But it is more as a system of imposing certain crimes where in the verdict it is stated that criminal sentences do not need to be carried out, but with provisions to fulfill certain conditions (Chaznawi 2010: 54).

Furthermore, R. Soesilo emphasized that when a defendant has been imposed the conditional criminal sentence, he would be convicted, but he does not need to carry out the punishment, unless he committed another crime or violated the determined requirement of the judge during the probation period (R. Susilo 1991: 40).

The provision of conditional crime seems to be a kind of forgiveness of the judge. Although the article 14a-14f of the Criminal Code cannot be called a form of pure forgiveness of the judge (rechterlijk pardon), the provision essentially intends to improve the convicted person to be a better person and the society can re-accept him without the need for a judge to put him in prison through his verdict.

Based on the current justice system mechanism of Criminal Procedure Code, the panel of judges will decide a case with only 3 (three) possible verdicts, namely:

- a. Criminal conviction;
- b. Acquittal verdict;
- c. The release verdict from all lawsuits.



Acquittal verdict means that the defendant get free sentenced or he is declared free from lawsuits (Harahap 2006: 347). Pursuant to Article 191 paragraph (1) of the Criminal Procedure Code, the verdict is free when the court argues that the defendant's guilt has not been legally and convincingly proven during the trial hearing, (Government of Indonesia KUHAP). Therefore, an acquittal verdict is taken due to the principle of unfulfilled evidence based on the law.

On the other hand, based on to the Criminal Procedure Code, the verdict is released from all lawsuits when the court argues that the defendant guilty is proven, but the act is not a kind of criminal offenses, so the defendant is acquitted of all lawsuits. In other words, what was decided to the defendant is sufficiently proven legally and convincingly, but his acts are innocent and do not against the law or there is a reason for forgiveness (Hamzah 2008: 286-287).

Regarding these three possible choices of judge verdict, a problem emerges when the panel of judge views that the criminal behavior committed does not have to be handed down punishment even though the defendant was proven guilty as stated in article 183 of the Criminal Procedure Code. If the Panel of Judges only bases on these three possibilities, how the Judge can pass a verdict without conviction.

Referring to the case of Anne Pasquio in France on March 5, 2001 (Saputro 2016: 28: 1: 69), the implementation of the idea of judge forgiveness can be described clearly. In this case, Anna Pasquio has 3 (three) children, one of whom was a 10-year-old suffering from acute autism. Based on her observation, her child condition is increasingly critical. Anna saw how tortured her child was with his illness. Therefore, based on affection Anna Pasquio decided to kill her child by pushing her child from the pier into the water.

This case became the hot issue and got much attention from many people in France. The public prosecutor actually has realized that her criminal behavior was indeed carried out due to her affection to her child. However, there was no reason for the public prosecutor to stop the investigation and prosecution, because all elements of crime have been fulfilled. Moreover, it seemed impossible to be resolved through settlement



of court because her crime was not the minor one and her age was not old enough, so it did not meet the requirement of not being prosecuted.

If this happens in Indonesia, assuming that the Draft of Criminal Procedure Code (KUHAP) has been ratified, it still cannot answer this problem. In fact, the Criminal Procedure Code already has some screenings for these cases, namely:

- a. Article 42 paragraph (2) and (3) of the Criminal Procedure Code Draft is about the authority of public prosecutor to stop the prosecution for the sake of public interest as well as certain reasons; and
- b. Article 111 paragraph (1) of the Criminal Procedure Code Draft is about the authority of Predecessor Judge to determine whether a case is worthy to be prosecuted in court.

Regarding the first screening, is it possible not to process the Anne Pasquio's case to the trial, but only be processed at the prosecution? When referring to Article 42 paragraph (2) jo. Paragraph (3) says that:

(2) Public prosecutors have authority to stop prosecution for the sake of public interest as well as for certain reasons.

(3) The authority of public prosecutor as referred to paragraph (2) may be implemented when:

- a. The criminal offenses are of a minor nature;
- b. The criminal behaviors carried out are threatened with imprisonment for a maximum of four years;
- c. The criminal behaviors carried out are only threatened with a fine;
- d. The age of the suspect is above seventy years old when committing a crime;
- e. Losses have been compensated.

While the legal facts of Anne's case that could not meet the requirements to be stopped by the public prosecutor are namely:

- a. The threatened crime was murder that does not include a minor crime (more than 4 years). In addition, the criminal threat was not only fines, but also imprisonment;
- b. The age of Anne did not reach 70 years;



c. There is no loss in crime, because her criminal behavior was related to crime against life and body.

With these descriptions, it is very unlikely for the Public Prosecutor to stop a prosecution, because there are absolutely no conditions can be fulfilled for the implementation of Article 42 paragraph (2) of the Criminal Procedure Code. In other words, if the similar case happens in Indonesia, the situation will be the same as in France, surely the case will be continued by the public prosecutor.

Furthermore, regarding the second screening, the authority of Predecessor Judge becomes very difficult to be stopped. This is because Anne's criminal behavior actually has fulfilled the element of a criminal offense even she admitted her crime. Therefore, as viewed from the minimal evidence, it would be difficult for the Predecessor Judge to dismiss this case. Therefore, there is no screening for this case unless continuing to punish the perpetrator even with the slightest punishment.

The hardest burden to get justice based on the norms in society lies in the judge himself. SatjiptoRahardjo once said that judges in Indonesia should be required to understand and internalize the norms of Pancasila in society. Indeed, they are required to have broad and deep knowledge about these norms of justice (Rahardjo 2006: 227). They become the main interpreter and make Pancasila to be concrete.

Judges have to make a legal discovery (rechtsvinding) when they find particular cases outside the formal provisions. Legal discovery by judges is usually interpreted as a process of establishing law that is called the ijtihad method (legal discovery / istinbath law) in the concept of Usul Fiqh. So their responsibility is not considered as a mechanism and routine as such, but they should become a contention arena between different views on the objectives and legal certainty (Ludiana 2015: 105).

The idea of judge forgiveness was also done by Umar bin Khattab to the perpetrators who committed theft to meet the needs of his family, even though in the Qur'an Allah prohibits and threats stealing in surah Al-Ma'idah verse 38;



"As for the thief, both male and female, cut off their hands. It is the reward of their own deeds, an exemplary punishment from Allah. Allah is Mighty, Wise."

An example of Umar's could be the basis for Ulil Amri or the judge to decide a case fairly. He decided after considering personal condition of the thief and the situation of the compulsion of family needs when he committed the theft. Moreover, he repented earnestly after having committed stealing. Finally, with these considerations, Umar bin Khattab preferred to forgive the thief by releasing him from punishment.

In the context of imposing sanctions, the prophet Muhammad advised:

"Avoid hudud as much as you can. If there is a solution, make it easy. Surely the Imam who is wrong in his forgiveness is better than the Imam who is wrong in imposing sanctions (uqubah) "(Al Maliki, 2002: 38).

However, it should be understood that in Islamic criminal law, even though the Qur'an gives apology for the perpetrators of murder and releases the perpetrators of theft from punishment of hudud (cutting hands), this case does not necessarily means that they release from any punishment for their wrong actions. For this reason, even though there is an apology, the Qur'an still strictly requires to provide another sanction for the wrongdoer by paying diyat or kaffarat as an alternative criminal substitute.

In Aceh, one the customs has well-known philosophy of uleu beu mate, ranteng bek patah, which means that snake must die while the branches do not break. These words imply that after there is a peace there should be no more problems. According to Soepomo, by referring to Soekanto's opinion, one of the underlying elements of the living law system is the strong nature of togetherness that covers the entire field of living law (Bakar 2010: XII: 23: 36).

Concretely, the settlement of customs (adat) is carried out with the principle of peace. On this basis, one of the efforts to resolve criminal cases in Acehnese customs is forgiveness. According to Djunaed, the apology brings back the victim's dignity which had previously fallen due to humiliation. With forgiveness, the perpetrators admit their mistakes and the victims feel appreciated for their dignity (Bakar 2010: 23: 36).



For this reason, the idea of apology from the judge cannot be separated from the values of religious wisdom and law wisdom that lives in society. The essence of forgiveness of the judge is actually to realize the regularity of life in society in accordance with the objectives of the law. However, it needs to be understood that the regulation of forgiveness of the judge is not only regulated in the Draft of Criminal Code (RKUHP), because it only contains material criminal law. Even previously, the provisions of forgiveness of the judge are not already known in the current Penal Code. Thus, the regulation of this idea must be harmonized with the other legal rules like the Draft of Criminal Procedure Code (RKUHAP). If there is no synchronization in the legal system, there could be confusion in its implementation.

In the Draft of Criminal Procedure Code (RKUHAP), the types of final verdict are divided into three groups, namely conviction, liberation, and acquittal verdicts; whereas in the case of the Rechterlijk Pardon, the elements of the crime are proven, but the conviction is not dropped. Here, it can be understood about what type of verdict is suitable to be handed down to the defendant who receives the rechterlijk pardon. Therefore, it is said that if the Draft of Criminal Code (RKUHP) regulates the forgiveness of the judge, while the Draft of Criminal Procedure Code (RKUHAP) does not regulate it yet, the conception of forgiveness of the judge will only be a blunt article that will not be used concretely by the panel of judges in court. If it refers to the regulation of Rechterlijk Pardon in Netherlands, the criminal judge can impose four forms of final verdicts, namely:

- a. Liberation Verdict;
- b. The Release Verdict from all lawsuits;
- c. Criminal Verdict;
- d. Verdict of Forgiveness of the judge (Saputro 2016: 73)

In addition, it was also stated, that the rechterlijk pardon could not be appealed because the verdict is final. Thus, the specificity of regulation shows that this kind of verdict has a different type from the other ones. Indeed, the reform of criminal law must be aligned and integrated with the other legal rules, so the articles can really be implemented fairly and humanely.



Conclusion

Based on the aforementioned explanation, it can be concluded that the concept of forgiveness of the judge will be possible to be implemented by the panel of judges if the Draft of the Criminal Procedure Code (RKUHAP) is synchronized with the regulation of the judge's forgiveness institution. Referring to the Draft of Criminal Code (RKUHP), it is said that the justification concept of the criminal offense is not only based on the criminal behaviors (objective conditions) and the mistakes (subjective conditions), but also on the criminal purpose or guidelines.

By considering the purposes and guidelines of criminalization, the judge still has authority to apologize and does not to impose a criminal sanction, even though the crime have been proven in certain conditions

Thus, it can be said that conceptually there has been a shift from the rigid and absolute model into the flexible and balanced model. [w]



Noted:

Article 183 of the Criminal Procedure Code reads: "A judge may not convict a person, if, with at least two legal pieces of evidence, he obtains confidence that a crime has actually taken place and that the accused is guilty of committing it."

See Article 2 of the 1945 Constitution concerning Amendments to Law Number 2 of 1986 concerning General Courts. In point (b) consider that the General Court is a court under the Supreme Court as an independent judicial authority, to administer justice in order to uphold law and justice.

The term voorwaardelijke veroordeling according to Utrecht is actually not quite right. Because veroordeling (punishment) means "determined (dropped) without any conditions". There are provisions regarding general conditions and specific conditions set related to the implementation of the sentence and not related to the sentence. See Utrecht, Series of Criminal Law Lecture II Series, (without publisher, 1961).

See Formulation of the Results of the VIII National Law Development Seminar, number II sub B.7, contained in the VIII National Law Development Seminar, Book I, BPHN Ministry of Law and Human Rights, 2003, p. 7. Quoted from Barda Nawawi Arief, Barda Nawawi Arief, Renewal of Criminal Law in the Context of the Criminal Code Bill, training / upgrading materials for Criminal Law and Criminology, organized by FH UGM Yogyakarta and Mahupiki, at UGM UGM Club Club, 23-27 February 2014



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