



REFORMULATION OF CRIMINAL LIABILITY CONCEPT IN CRIMINAL ACT

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### *Abstract*

*The successful action of eradicating corruption in Indonesia is influenced by the accuracy of formulating the Criminal liability concept of corruptors. Accuracy is needed in determining corruptor to convict those who take part in corruption cases so they can be responsible for their corruptions and be punished according to the regulation applied. This study used an empirical legal research methodology, composing into an article from several research reports. The current concept of criminal liability seems inadequate to arrest the doer that takes part in corruption which has been executed for his criminal responsibility. This indicates the discrimination in sentencing the corruptors. Different from regulation to charge doer in general crimes, a corruptor is charged based on the concept of individual responsibility, thus it is necessary to propose another responsibility which is developed based on Adat Law such as collectivity principle of responsibility.*

**Keywords:** *Criminal liability, Corruption, Law of Pancasila*

## **A. INTRODUCTION**

One of the actions done by the government of Indonesia to press the number of corruption cases is through Law No. 31 of 1999 that has been strengthened by Law No. 20 of 2001. The purpose of composing Law of Corruption can be found in the consideration of Law No. 31 of 1999 jo Law No. 20 of 2001 that:

Considers:

- a. that criminal acts of corruption create huge losses for state finance and state economy and do hinder national development, so it must be eradicated in order to realize the just and the prosperous society based on Pancasila and the 1945 Constitution.
- b. that criminal effect of corruption causes as well as creating losses to state finance and economy, can also hinder the growth of national development, which demands a high level of efficiency.<sup>1</sup>

Actual facts show that those purposes cannot be achieved thus it is needed to be strengthened by the formation of Corruption Eradication Commission (KPK) based on Law No. 30 of 2002 in order to increase the accuracy of corruption eradication. The considerations of Law No. 30 of 2002 are:

<sup>1</sup> Considerants of Law No. 31 of 1999.



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Pancasila and the Constitution of the Republic of Indonesia of 1945, the

eradication of criminal acts of corruption needs to be professional, intensive and

continuously improved, as the corruption itself has had dire consequences on the wealth and the economy of the nation, as well as it is hampering the national development;

- b. that government agencies who have handled corruption cases have not been functioning effectively in eradicating corruption;
- c. that according to article 43 of Law No. 31 of 1999 on the eradication of Criminal Acts of Corruption, as it is improved by Law No. 20 on Changes in Law No. 31 of 1999, there is a need for the formation of an independent Corruption Eradication Commission to fight against corruption in Indonesia;

The improvement of corruption eradication with a legal structure through the formation of KPK is also supported by Criminal Acts of Corruption Court based on Law No. 46 of 2009. The considerations to form Corruption Court are:

Considers:

- a. that the Republic of Indonesia is a country of law, which is intended to make the life of the community, the nation and the state of order, peace, and justice in order to achieve the country's goal as it is stated in the Preamble of the Constitution of the Republic of Indonesia in 1945;
- b. that corruption has caused damages in many affected communities, nations, and states so that the prevention and eradication of corruption need to be done continuously and sustainably and it demands an increments in the capacity of resources, such as in institutions, human resources, and others' resources, as well as it develops the awareness, attitudes, and behavior that society anti-corruption is institutionalised in national legal systems;
- c. that the Corruption Court in which the basis of its formation under Article 53 of Law Number 30 Year 2002 is concerning the Commission for Corruption Eradication, and based on the decision of the Constitutional Court declared contrary to the Constitution of the Republic of Indonesia Year 1945, so it is necessary to remain the Crime Court corruption with new legislation;

These facts show that the substance and new legal structure which are purposely made



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Recapitulation of criminal acts of corruption never decreases, but it increases. KPK has handled lots of corruption cases ranging from 61 preliminary investigation cases, 58 investigation cases, 46 prosecution cases, 41 in kracht cases and 53 execution cases by August 31st, 2016. The total corruption cases from 2014-2016 are 813 preliminary investigation cases, 526 investigation cases, 435 prosecution cases, 361 inkracht cases and 386 execution cases.

Actions	2004	2005	2006	2007	2008	2009	2010	2011	2012	2013	2014	2015	2016	Total
Preliminary investigation	23	29	36	70	70	67	54	78	77	81	80	87	61	813
Investigation	2	19	27	24	47	37	40	39	48	70	56	57	58	526
Prosecution	2	17	23	19	35	32	32	40	36	41	50	62	46	435
Inkracht	0	5	17	23	23	39	34	34	28	40	40	37	41	361
Execution	0	4	13	23	24	37	36	34	32	44	48	38	53	386

Indonesia stands in rank 88 with CPI score of 36. That score increases 2 points from 2014 that was in rank 107<sup>3</sup>. Indonesia Corruption Work (ICW) maps out the corruption cases in Indonesia from January to June in 2016. During that period, there were 210 cases were found and 500 people were prosecuted as defendants by 3 institutions of law enforcement<sup>4</sup>. “Law enforcer has increased the status of the investigation into the police investigation of 210 corruption cases that cause government loss for Rp. 890,5 billion and bribery case for Rp. 28 billion, SGD 1,6 million, and USD 72 thousand along the first semester of 2016”<sup>5</sup>.

One of the corruption cases that attracts public interest is corruption case of Ministry of Maritime and Fisheries Affairs. It charged Rokhmin Dahuri as a defendant due to illegal flows of the fund from Department of Maritime and Fisheries Affairs (DPK) to several

<sup>2</sup> “Korupsi di Indonesia Makin Akut dan Kronis”, [www.pikiran-rakyat.com](http://www.pikiran-rakyat.com), downloaded on Wednesday, November 2<sup>nd</sup>, 2016 at 11.05.  
<sup>3</sup> “Ini Daftar Peringkat Korupsi Dunia, Indonesia Urutan Berapa?”, [m.tempo.co](http://m.tempo.co), retrieved on Wednesday November 2<sup>nd</sup>, 2016 at 11.31.  
<sup>4</sup> “ICW: 500Orang Jadi Tersangka Kasus Korupsi Sepanjang Januari”, [news.detik.com](http://news.detik.com), retrieved on Wednesday November 2<sup>nd</sup>, 2016 at 11.36.  
<sup>5</sup> *Ibid.*



nation figures. However, those who take part in corruption cannot merely be charged as a  
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 Amien Rais claimed accepting some amount of money of Rp. 200 million directly  
 from Rokhmin Dahuri, the former Ministry of Maritime and Fisheries Affairs. While

Salahudin said that his campaign team might get some money for about Rp. 200 million. Ruki stated that Amien and Salahudin had been asked for an official statement to avoid in clarity. Corruption Eradication Commission (KPK) monitored the progress of this case of non-budgeter of DPK. The official statement was taken under an oath that can be used as legal evidence for further investigation. KPK will inventory the court facts which later will be compared to KPK data. "it can be determined who received the money, in case the receiver is a civil servant, then to him it can be applied Law No. 31 of 1999 or Gratification article and if it is not a civil servant, then KPK has no authority to prosecute the case since KPK can only handle the eradication of Corruption", said Ruki. Last Wednesday, former president of Partai Keadilan Sejahtera, Tifatul Sembiring met KPK head to ask for clarification on a list of recipients of DPK fund. It is said that one of PKS leader, Fahri Hamzah, was given that fund. PKS also claimed to receive money for Rp. 100 million in December 2003, and Rp. 200 million in March 2004. However, both Hidayat dan Tifatul denied it. They also asked the validity of the data since PKS has been vacuum since 2003. Separately, the Chief of Yayasan Blora Institute, Taufik Rahzen, insisted the law enforcers to expose and emerge the truth related to the flow of illegal fund of DKP to Blora Center that supports the presidential candidate, Susilo Bambang Yudhoyono in the election campaign on 2004.<sup>6</sup>

Until the present day, there is no one of those figures that is claimed officially receipt the money of corruption done by Rokhmin Dahuri, as the former Minister of Maritime and Fisheries Affairs and also charged as the convicted corruptor. Rokhmin Dahuri shall take responsibility alone as well as it is going through all punishment sentenced on him by the court. This fact perturbs society justice and leads to society demand to those that involved and got the benefit of DKP fund to be responsible and charged guilty.

One important question is why persons that take part or get the benefit of the illegal fund in corruption can't be charged as the responsibility for their crime. Whether the concept of criminal liability used in court<sup>7</sup> cannot reach that scope.

<sup>6</sup> "KPK akan Panggil Amien Rais, Penerima Dana Bisa Dijerat UU Korupsi", Kompas, May 31<sup>st</sup> 2007 retrieved from [www.iprowatch.org/?pilih=lihatberitaminggu](http://www.iprowatch.org/?pilih=lihatberitaminggu) February 22<sup>nd</sup> 2009 at 13.58.

<sup>7</sup> Problem on fault and criminal liability in many countries aren't arranged officially in Criminal Code, but it becomes the authority of judges to expand. "most of the legislation in criminal law has related to offences. General principles of criminal liability are largely still the judges". Chairul Huda, *Dari Tiada Pidana Tanpa*



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in the primary law in form of legislation (Perpu) and the secondary law of draft bill (RUU), previous research, and any related publications in law. In this part, the researcher also collected abundance of legal document related to research on *Adat* law from some regions of Indonesia. Data collection methodology covers the literature review in both printed and digital legal document. Data analysis includes grammatical interpretation, systematical interpretation, historic, systematic, functional, futuristic, and anticipatory.

## C. ANALYSIS AND DISCUSSION

### 1. The Development Of Criminal Liability Concept

Ideally, persons who involved prior to, along with or after the criminal acts of corruption shall be possible to take criminal liability. The only problem to apply this concept is the conventional belief of responsibility concept. The essential part of the general principle of criminal liability is “no crime without failure” or culpabilities principle or also known as humanity principle<sup>8</sup>. Criminal liability is largely related to the proven fault. A person commits a crime, only if society claims that action is despicable<sup>9</sup>. Fault can be also indicated as the “mental condition of someone with sane, will, and aware of his action to decide his will. This mental condition is owned by normal people”<sup>10</sup>.

Criminal liability concept is influenced by the development of thinking or called as indeterminism and determinism in the criminal legal system, both are related to criminal liability and criminal punishment.

Classic ideology with indeterminism suggests a person can determine his will freely though a certain degree which is influenced by other factors such as personal and environmental conditions. But basically, every human being has free will. In the opposite, a modern ideology with determinism claims that a person cannot in the least determine his will freely. Human’s will to do something is influenced by some factors such as personal and environmental factors. In determining his will, a person shall obey the causal law, causing factors that cannot be controlled. Even a personal factor is also followed by the heredity

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*Kesalahan, Menuju Kepada Tiada Pertanggungjawaban Pidana Tanpa Kesalahan*, Jakarta: Kencana Prenada Media, 2006, p. 3.

<sup>8</sup> Barda Nawawi Arief, *Perkembangan asas... Op.Cit.*

<sup>9</sup> Martiman Projohamijoyo, Martiman, *Memahami Dasar-Dasar Hukum Pidana Indonesia*. 2, PT. Pradnya Paramita, Jakarta, 1987, p.31.

<sup>10</sup> *Ibid.*, p.4.



factor later along with his life, the environmental factor will hold the most important  
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The development of criminal liability once concerned on doer's fault. A doer cannot be claimed guilty without crime found on his behalf. It means that the concept of "*Feit Materil*"<sup>12</sup> is recently left behind for a while. The definition of responsibility in the criminal code is based on the despicable view (*verwijtbaaheid*) towards the action done by the doer. The acceptance of that action will change the definition of fault into a normative fault.<sup>13</sup> In criminal code, this concept is called as the principle of "*Liability based on Fault*".

According to Pompe, a person can be convicted guilty if he commits doing an action. Fault can be also indicated as the "mental condition of someone with sane, will, and aware of his action to decide his will. This mental condition is owned by normal people".<sup>14</sup>

Criminal liability or fault imperially (*Schuld in niumezin*) covers three fields, namely:

a. The ability to take responsibility of the doer (*toerekenin, gsvathaarheid*).

b. Psychology relation between of the doer and his action:

1) Determined actions or

2) Negligent actions (*culpa, schul in enge zin*).

c. No excuse to remove criminal liability from the doer (*anasir toekenhaarheid*)<sup>15</sup>

The further development of criminal liability has generalized the new concept of liability without fault.<sup>16</sup> This concept is also called as Strict Liability doctrine, while severally liability is called as Vicarious Liability.

According to L.B Curson, Strict Liability doctrine is based on these following reasons:

a. Very essential to guarantee the obedience towards certain regulations for social welfare;

b. Verification towards *mens rea* will be tough for violations related to social welfare;

c. The high level of social threat caused by doer's action.<sup>17</sup>

In the other hand, vicarious liability is a criminal liability charged to a person upon another's fault or the criminal liability of one person for the wrongful acts of another. That

<sup>11</sup> Teguh Prasetyo and Abdul Barkatullah, *Politik hukum Pidana, (Kajian Kebijakan Kriminalisasi dan Dekriminalisasi*, Yogyakarta: Pustaka Pelajar, 2005, p.63-64.

<sup>12</sup> *Ibid*, p. 4.

<sup>13</sup> Made Shadi Astuti. *Op/Cit.*, p.19.

<sup>14</sup> *Ibid.*, p.32.

<sup>15</sup> *Ibid.*, 34-35.

<sup>16</sup> Chairul Huda *Op.Cit.* p.10.

<sup>17</sup> E, Saefullah Wiradipradja, *Tanggungjawab Pengangkut dalam Hukum Pengangkutan Udara Internasional dan Nasional*, Dissertation, 1989, p. 35.



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liability can be found in some cases related to actions done by others in the scope of work  
Comparison between "strict liability" and "vicarious ability" seems obvious in  
similarities and differences. The equation appears that either "strict liability crimes" or "vicarious liability" do not require the existence of a "mens rea or element of fault in the people who are prosecuted as a criminal. It is located on the "strict liability crimes". Criminal liability is directly charged to the culprit, whereas in "vicarious liability", criminal liability is in direct.<sup>19</sup>

In addition, the emergence of new phenomena that were touted by *indirect command liability* or command liability in a form of participant by omission, which is according to Muladi now is back to the discussion, especially regarding the limits of enforceability.<sup>20</sup> 21 In addition to the above-mentioned doctrine, it is also known as the so-called "*collective responsibility*" especially on the unwritten law in simple societies. The collective responsibility is almost similar with the understanding of "*vicarious liability*". It's only about the latter which is still for the individual.<sup>21</sup> In the development of the concept of criminal liability, if it is linked to the participation in the conducted crime, so this indicates that the development tendency is a responsible crime for someone who does not have to actually commit a criminal offense. Meanwhile, if the criminal liability is linked to the possibility of crime sanctions to those who are considered in a responsibility, to convict the person, it should not be factually committed a criminal act.

## **2. The Criminal Liability Which Is Based On The Concept of Pancasila For Perpetrators of Criminal Acts of Corruption**

The basis for the determination of criminal responsibility for the offender and the recipient in the proceeds of crime of corruption can be searched in the theoretical justifications. The criminal liability for the recipient in the proceeds of crime of corruption as a human nature in the customary law and as the original law based on Pancasila is a collective responsibility.

Collective responsibility is philosophically based on the concept of Pancasila Monodualism. The basic idea needs to be proven in this concept which is oriented to the idea/principle of balance that includes the monodualistic balance between the "public

<sup>18</sup> Muladi dan Dwidja Priyatno, *Coorporation Liability*, STIH Bandung, p. 88, See Romli Atmasasmita, *Comparative of Procedure*, Jakarta : Legal Aid Institute Foundation of Indonesia, 1989, p. 93.

<sup>19</sup> Ibid, p. 90.

<sup>20</sup> Dwija, Op.Cit., p. 11.

<sup>21</sup> Ibid., p. 91.



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The determination of criminal liability of the perpetrators was based on a consideration of the interests of the perpetrator's involvement in preparing, conducting, and after the deed is done. The development of the concept of criminal liability cannot be separated from the struggle of thought of the nature and the position of the Indonesian people. The discussion of nature and the position of Indonesian people must be linked to the philosophy of the nation of Indonesia, namely Pancasila as the first principle that believes in the only one supreme God, provides guidelines for us to realize the essential position of Indonesians as human being creatures of God Almighty. The God Almighty raises the awareness that human must be submissive and obedient to God Almighty. With regard to that, the obedience of every human surrenders all efforts as the provisions of God Almighty. Faithful and pious to the God Almighty in accordance with religion and belief for each other are according to just and civilized humanity. The determination of criminal to the perpetrators collectively before, during and after doing the act was based on the "values of divinity". Based on the value of dignity as a human being and as creatures of God Almighty, it will give an understanding that human is not allowed doing something freely as they want to. This understanding is called by "determinism". Based on the determinism concept, everything has a causal law that can be found in past, in present, or in the future. The causal law can happen in the individual interactions of society. Some points of view related to the determinism concept can be expressed that Theological Determinism is a thesis that God makes all the human decisions, both of those had known and had not known by the human itself.

The second principle, Just and Civilized Humanity, gives the guidelines in understanding to Indonesian dignity and human dignity, in which these all realize to the equality, equal rights and equality of obligations among fellow human beings.<sup>23</sup>

Principle of Just and Civilized Humanity consists of "human values" that can be used for the philosophical basis of the determination of criminal responsibility for the recipient in the proceeds of corruption. Human values give an understanding about the humans of Indonesia in the position of creatures who have free will. Such concept is already known as the indeterminism concept. The concept of free will was mentioned that human is a moral subject who has a responsibility for the events or circumstances morally, that received praise or being blamed morally for the events and certain conditions they did. According to the

<sup>22</sup> Barda Nawawi Arief, *Development of Indonesia Criminal Law*, Semarang: Master Library, 2008, p. 23.

<sup>23</sup> Pormadi, Loc.Cit.



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dominant view regarding the relationship between free will and moral responsibility, if the agent has free will, then the agent is not morally responsible for his actions. Based on Free Will concept, the criminal offenders were asked to the liability because of human as nature's actor and managed or legitimated agent of cooperation is a moral subject to the events and condition if the criminal offenders are praised or blamed morally for the events and conditions. On the contrary, if someone does not have free will, it is concerned to not be morally responsible for his actions.

Based on this basic idea, the offender either at before, during or after doing act collectively can be asked for the criminal liability if they have freedom to choose and then will do such act.

The human values can be elaborated through attitudes “acknowledge equality, equal rights, and equality of obligations between fellow human beings and love of their fellow human beings, as well as developing attitudes of tolerance”.<sup>25</sup> Equal rights and equality of obligations guide the Indonesian people in implementing the responsibility as individuals or society members. The grant of basic rights to the Indonesian shows when the position of Indonesian is becoming recognized personally. In otherwise, the grant of the basic obligation is a form of human recognition of Indonesian as a social creature. The implementation of human rights of Indonesian people was limited by the tolerant attitude. The attitude of tolerance is a tool of limits to the implementation of rights in order not to interfere with the rights of others. Developing of tolerant attitude is good as the basic of Indonesian in implementing the responsibility to help others, including to bear the burden of another person as part of the community.

The term "Tepo Seliro" (reciprocal tolerance), gives the sense to respect the rights of others and understand their obligations "keep the others feelings". Indonesian community gets to know the attitude of tolerance and bears the burden of another person which are called as principles of mutual aid or kinship. The concept of kinship is the concept of society in customary law. So to make it understood, it should trace the life of customary law communities. The soul of kinship, I Gusti Ketut Sutha in his writings, titled “The Soul Kinship In The Customary Law and Development” has been summarized as cited below. The soul of kinship contained in a social unity can be drawn between the magnitude of others which is “there are varieties of the basis of social unity binders such as love, mercy,

<sup>24</sup> Free Will, Loc. Wit.

<sup>25</sup> Barda Nawawi Arief,.. *Loc. Cit.*



com... on, sympathy and a strong sense of solidarity in teaching, loving, caring for inside  
 of...  
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 Based on the concept of reciprocal (tolerance) as the value's elaboration of humanity,

so the perpetrators who receive the proceeds of crime are able to hold for criminal responsibility. The receivers in the proceeds of crime who have benefited from the corruption of others should have the tolerance of responsibility in bearing the burden of another person (togetherness in the disapproval of society and accepting criminal sanctions) as the effects of acts. As well as the family (husband or wife, children, father and mother, brother and sister), it properly has the reciprocal tolerance on the suffering of offenders. The togetherness responsibility to the raises of disadvantages had been becoming legal issues for a long time. Related to the working relationship, the employees can be asked for the responsibilities of themselves, who have the advantages on employment works and if contrary, they also have to be responsible for disadvantages by themselves, just like in Arrestsusu HR February 14th 1916.<sup>27</sup>

Related to the family relationship, the heir as the benefits' receiver from devisor also have the debt burden to other parties. The participation of the heir in debt left by devisor can be found in the law of provision of inheritance, including the provisions that are related to the load's acceptance of corruption sanctions, as regulated in the Article 33 and 34 of legislation number 31 of 1991, that determines "In the event of the demise of the suspect during investigation, whereas it is evidence that existed without doubt losses suffered by the state, investigators shall hand over the resulting dossiers to the prosecutor/state's attorney or to the office that suffering the loss to enable the filing of a civil suit against the heir". The bounding of society members to others is basically based on the kinship relationship or work relationship. Related to them as the receivers of benefits or advantages of property, or others on the corruption by another, was also reciprocal in responsibility through sanctions charged by the givers.

This kind of thought can be used as the basis of asking for responsibility by the perpetrators who are accepting the proceeds of corruption that was conducted by one of the family members (husband or wife, father or mother, children, and siblings) as long as they are receiving the benefits or enjoying the corruption by one of their family members. This applies the same to them, that work relationship to the perpetrators of corruption can be asked for the criminal responsibility as long as they receive the benefits or enjoy the corruption by

<sup>26</sup> Darji Darmodiharjo, *Op. Cit.*, p.158

<sup>27</sup> Bambang Poernomo, *Criminal Law Principles*, Yogyakarta: Ghalia Indonesia, 1992, p. 153.



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The concept of collective responsibility can be a basis of the customary law of Indonesia. Several studies showed that in the case of the customs' violation, the completion will not only involve the prosecutor but also other people who have the relationship or other relationships. The involvement of others in family relationship, kinship or other society's unity are also for stipulated sanctions.<sup>28</sup>

#### D. CONCLUSION

The nature of the crime of corruption as the criminal congregation can be handled individually. A crime of corruption can be conducted singly, a crime of corruption is a series of action that is involved by many people before, during and after that act happened. As well as the use of proceeds of corruption, it is naturally enjoyed by more than one people. Based on the facts, the concept of responsibility which is in accordance with the natural crime of corruption is the collective responsibility. Collective responsibility is based on the values of Pancasila as the Basic Norm (Grundnorm) which have the normative basis in the customary law in Indonesia. For the future, the concept of collective responsibility can be one of the criminal liability that can be used to be asking for the criminal liability for the perpetrators of corruption.

<sup>28</sup> In the *Rejang* customary law, the initiative and readiness of family of the perpetrator to be responsible and to realize the fault are called as *Mulo Tepung* or *Menepung*. *Mulo Tepung* or *Menepung* is conducted by procedure and steps as follows: First, the perpetrator's family. After the accident that caused hurt to the victims, the acts should be soon informed to victims' family. Second, at the right moment, visit the victims' family by bringing boko iben (iben law), that is bokor betel, or called as mengipar sayap, menukat paruh, that declared the liability to treat the victim, and said to disagree to the offender, and sprinkled the setawar sedingin. Herlambang. All the development of customary deliberation Models "Kutei" in order to organize the criminal law of compilation in Rejang custom as the guidelines of discretion of law enforcer in the process of the criminal justice at Rejang Lebong Regency. 2003. Grant Competitiveness of DIKTI. In the Melayu custom of Bengkulu. Similar things were found see Herlambang, Edi Hermansyah, Edra satmaidi, Sussi Rhamadani. "Development of Customary Deliberation Models" agreement of Rajo Penghulu" in completing the violation of faults as the guidelines of using discretion by the law enforcer in process of the criminal justice at Bengkulu City", Reseach Report Grant Competitive DP3M, Dirjen Dikti, 2007.



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