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Juridical Analysis of the Rechterlijk Pardon Concept Implementation in Ordinary Criminal Act Associated with the Non-Retroactive Principle in Indonesian Criminal Law

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Abstract

At first, the regulation of the concept of rechterlijk pardon in the provisions of Indonesian criminal law was inspired by a similar arrangement in the provisions of criminal law in the Netherlands. Where the purpose of the inclusion of the concept is to avoid the rigidity that has long occurred in the practice of administering criminal law there. Such reasons are also the reasons behind the inclusion of the concept of rechterlijk pardon in the provisions of Indonesian criminal law. Although it has been more than thirty years since the concept was first discussed, until now the concept of rechterlijk pardon has only been regulated in the provisions of article 54 paragraph (2) of the Draft Criminal Code and article 70 of the Juvenile Criminal Justice System Law. However, in the practice of examining ordinary criminal cases, it turns out that there have been several district court decisions that apply the concept of rechterlijk pardon in the consideration of their decisions, including the verdict of criminal case number 1038/Pid.B/LH/ 2019/PN Pbr, criminal case verdict number 52/Pid.B/2020/PN LBB, criminal case record number 1/Pid.C/2021/PN Ttn, and criminal case verdict number 8/Pid.B/2022/PN Rtg. Even though it is known that the criminal law Indonesia adheres to a non-retroactive principle that prohibits the enactment of a statutory provision before the provision is passed. Therefore, in this article, we will discuss further about the implementation of the concept of rechterlijk pardon in each criminal case decision, which is connected with the non-retroactive principle that applies in the provisions of Indonesian criminal law.

Keywords: *Rechterlijk Pardon Concept; Ordinary Criminal Act; Non-Retroactive Principle*

1. Introduce

Initially, the implementation of criminal law in Indonesia was intended as a means to provide a deterrent effect to criminals. On the other hand, criminal law also tends to be used as a means of retaliation for criminal offenders as a consequence of their actions that have caused harm to other parties[1]. So it can be said that the implementation of such criminal law focuses more on the backward perspective.

[1] M. Hamdan, **Alasan Penghapusan Pidana Teori dan Studi Kasus**, Bandung: Reflika Aditama, 2012, hlm.54.

Along with the developments that continue to occur in society, the implementation of criminal law also continues to develop. So that the criminal law paradigm, which previously focused on retaliation for perpetrators, then underwent a change towards the implementation of criminal law that focused on the purpose of recovery and improvement of losses arising as a result of criminal acts that occurred. The recovery efforts in question are carried out by involving victims, perpetrators, and the community to find the best solution[2]. Starting from this paradigm shift in criminal law, then the Indonesian government began to formulate legal products that were considered relevant to this goal, one of which was to add the concept of rechterlijk pardon in the provisions of Indonesian criminal law.

In terms of language, it can be seen that the concept of rechterlijk pardon is a concept that originated in the Netherlands. This is because Indonesia has a close relationship with the Netherlands in various aspects of life, one of which is regarding the regulation of criminal law. With the regulation of the concept of rechterlijk pardon in the provisions of Indonesian criminal law, the judge will have the authority not to sentence the defendant even though the crimes and mistakes have been proven on himself and his actions.

The idea of including the concept of rechterlijk pardon in the provisions of Indonesian criminal law has been discussed since 1987. However, until now, the Draft Criminal Code has not been passed into the Criminal Code. However, based on the searches that have been carried out, it turns out that there are several ordinary criminal case verdicts that apply the concept of rechterlijk pardon in their consideration, including the verdict of criminal case number 1038/ Pid.B/LH/2019/PN Pbr, criminal case verdict number 52/Pid.B/2020/PN LBB, criminal case record number 1/Pid.C/2021/PN Ttn, as well as criminal case decision number 8/Pid.B/2022/PN Rtg. Although it is known that in ordinary criminal cases, the provisions of Indonesian criminal law adhere to a non-retroactive principle that states "Prohibition of a law retroactively applies" [3]. The point is that a new legislation can be applied to an ordinary criminal case when it has been passed into law. In the provisions of Indonesian criminal law, the principle of non-retroactive is regulated in article 1 paragraph (1) of the Criminal Code "No act can be punished, but rather on the strength of criminal provisions in the law, which existed earlier than the act"[4]. However, under certain conditions the principle of non-retroactiveness can be set aside as stipulated in article 1 paragraph (2) of the Criminal Code, "If there is a change in the legislation after the act has been committed, then the defendant applies the provisions most favorably to him"[5]. The provision can be enforced on the condition that the perpetrator's case has not been decided by the judge in the final judgment. In addition to these reasons, the non-retroactive principle can also be set aside in criminal cases related to human rights violations as stipulated in provision 43 paragraph (1) of Law of the Republic of Indonesia Number 26 of 2000 concerning Human Rights Courts "Gross violations of human rights that occurred before the promulgation of this Law, are examined and decided by ad hoc Human Rights Courts"[6] whose applicability is based on the explanation of article 4 of the Law of the Republic of Indonesia Number 39 of 1999 concerning Human Rights "The right not to be prosecuted on the basis of retroactive law can be excluded in the event of gross violations of human rights classified as crimes against humanity"[7].

Based on the problems in the background above, the writer is interested in conducting research in a thesis entitled "JURIDICAL ANALYSIS OF THE RECHTERLIJK PARDON CONCEPT IMPLEMENTATION IN ORDINARY CRIMINAL ACT ASSOCIATED WITH THE NON-RETROACTIVE PRINCIPLE IN INDONESIAN CRIMINAL LAW".

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[2] Heru Susetyo, **Sistem Pembinaan Narapidana Berdasarkan Prinsip Restorative Justice**, Jakarta, Badan Pembinaan Hukum Nasional Kementrian Hukum dan HAM, 2013, hlm. 16.

[3] Subarysah "Pelaksanaan Asas Hukum Retroaktif Terhadap Penegakan Hukum Pidana Dalam Rangka Efektivitas Pengembalian Keuangan Negara", Jurnal Soshum Insentif Vol 1, No 1 (2018): 60, diakses 04 April 2022, DOI:https://doi.org/10.36787/jsi.v1i1.34.

[4] A. Rayhan, **Undang-Undang KUHP dan KUHAP**, Jakarta: Citra Media Wacana, 2008, hlm. 13.

[5] Pasal 1 ayat (2) Kitab Undang-Undang Hukum Pidana.

[6] Pasal 43 ayat (1) Undang-Undang Republik Indonesia Nomor 26 Tahun 2000 tentang Pengadilan Hak Asasi Manusia, Lembaran Negara Republik Indonesia Tahun 2000 Nomor 208, Tambahan Lembaran Negara Republik Indonesia Nomor 4026.

[7] Penjelasan pasal 4 Undang-Undang Republik Indonesia Nomor 39 Tahun 1999 tentang Hak Asasi Manusia Lembaran Negara Republik Indonesia Tahun 1999 Nomor 165, Tambahan Lembaran Negara Republik Indonesia Nomor 3886.

2. Research Methods

The research used in this paper is normative legal research. Normative legal research is a process to find the rule of law, legal principles and legal doctrines in order to answer the legal issues faced so that new arguments, theories or concepts are obtained as descriptions in solving problems. Normative legal research is also known as doctrinal legal research. In this type of research, law is often conceptualized as what is written in legislation (law in book) or law is conceptualized as a rule or norm which is a benchmark for human behavior that is considered appropriate[8].

In this study, the authors analyze Juridical Analysis Of The Rechterlijk Pardon Concept Implementation In Ordinary Criminal Act Associated With The Non-Retroactive Principle In Indonesian Criminal Law.

3. Results and Discussion

3.1. History of Rechterlijk Pardon Concept Regulation in Indonesian Criminal Law Provisions

The concept of rechterlijk pardon can be said to be a new provision in Indonesian criminal law because the Criminal Code and the Criminal Procedure Code have not regulated the concept. This is because the idea of including the concept of rechterlijk pardon in the provisions of Indonesian criminal law only emerged after the Netherlands first included similar arrangements in the provisions of wetboek van Strafrecht in 1984. In Wetboek van Strafrecht, the concept of rechterlijk pardon is set out in article 9a "If the judge considers it appropriate in relation to the small meaning of an act, the personality of the offender or the circumstances at the time the deed was committed, as well as after the deed is committed, he determines in the judgment that no criminal or act shall be imposed"[9]. According to Prof. Nico Keizer, the inclusion of the concept of rechterlijk pardon in the provisions of Wetboek van Strafrecht is motivated by the reason that many defendants have proved guilty, but if sentenced, it will actually lead to injustice[10]. So it can be said that the regulation of the concept of rechterlijk pardon in the provisions of criminal law in the Netherlands, is aimed at minimizing the possibility of a collision between legal certainty and justice.

The discussion on the plan to include the concept of rechterlijk pardon in the Draft Criminal Code only began after the drafting team for the Draft Criminal Law was completed formed in 1987[11]. It begins with the inclusion of the rechterlijke pardon concept in article 52 paragraph (2) of the Draft Criminal Code tahun 1991[12]. Then in 2000 to 2002, the concept of rechterlijke pardon was regulated in article 51 paragraph (2) of the Draft Criminal Code and then changed to article 52 paragraph (2) in the Draft Criminal Code of 2004, and finally in 2005-2006, the concept of rechterlijke pardon was regulated in article 55 paragraph (2) of the Draft Criminal Code[13]. In subsequent developments, the concept of rechterlijke pardon is also regulated in the 2012 Draft Criminal Code, the 2018 Draft Criminal Code to the latest in the September 2019 version of the Criminal Code Draft. Where the concept of rechterlijke pardon is regulated in article 54 paragraph (2) whose editorial is as follows "The lightness of the act, the personal circumstances of the perpetrator, or the circumstances at the time of the Crime and what occurred later can be used as a basis for consideration not to impose a criminal sentence or not to impose

[8] Amiruddin dan Zainal Asakin, **Pengantar Metode Penelitian Hukum**, Jakarta: PT Raja Grafindo Persada, 2006, hlm. 118.
[9] Andi Hamzah, Perbandingan Hukum Pidana Beberapa Negara, Sinar Grafika, Jakarta, 2009. hlm. 18.
[10] Nico Keizer dan D. Schaffmeister, **Beberapa Catatan Tentang Rancangan Permulaan 1998 Buku I KUHP Baru Indonesia**, Belanda: Driebergen/valkenburg, 1990, hlm. 55.
[11] Moch. Dani Pratama Huzaini, mengenal konsep Rechterlijk Pardon pada RKUHP (online), https://www.hukumonline. com/stories/article/lt60d1d1c5447e0/mengenal-konsep-rechterlijke pardon-pada-rkuhp/, 2021.
[12] Barda Nawawi Arief, **Tujuan dan Pedoman Pemidanaan**, Semarang: Universitas Diponegoro, 2009, hlm. 17.
[13] Badan Pembinaan Hukum Nasional (BPHN), Naskah Akademik Rancangan Undang-Undang tentang Kitab Undang-Undang Hukum Pidana (KUHP), Jakarta, 2009, hlm. 81.

an action taking into account the aspects of justice and humanity"[14]. However, until now, the Draft Criminal Code has not been passed into the Criminal Code. However, the concept of rechterlijk pardon has apparently been regulated in one of the provisions of the special criminal law, namely the Law of the Republic of Indonesia Number 11 of 2012 concerning the Juvenile Criminal Justice System precisely in article 70 which states that "The lightness of the act, the personal state of the Child, or the circumstances at the time of the act or what happened later can be used as a basis for consideration for the judge not to impose a criminal sentence or impose an action taking into account aspects of justice and humanity"[15].

Therefore, if it is guided by the principle of non-retroactive and its exceptions to certain cases as previously outlined, then for now the concept of rechterlijk pardon can only be fully applied in child-only criminal cases and cannot be applied in ordinary criminal cases. Because in addition to the Draft Criminal Law has not been passed into the Criminal Code, it is also intended as an ordinary criminal case according to the provisions of Indonesian criminal law does not include serious offenses such as crimes against humanity that can be excluded from the application of non-retroactive principles.

3.2. Application of the Concept of Rechterlijk Pardon in Several Ordinary Criminal Cases in Indonesia Is Associated With The Non-Retroactive Principle

It was discussed earlier, that the application of the concept of rechterlijk pardon in a criminal case will give the authority for the judge not to impose a criminal charge or impose an action on the accused even though the crimes and errors have been proven on himself and his deeds. Furthermore, based on the searches that have been carried out, the author found several ordinary criminal cases that discussed the concept of rechterlijk pardon in the consideration of his judgment even though the concept was only regulated in the Draft Criminal Code. The cases in question include:

1. Criminal Case Number 1038/Pid.B/LH/2019/PN Pbr.

The perpetrator in criminal case number 1038/Pid.B/LH/2019/PN Pbr was charged by the public prosecutor with having committed an act that caused the passing of air quality standards, water quality standards, seawater quality standards, or standard criteria for environmental damage. However, during the evidentiary process at trial, it turned out that some of the elements in the indictment were incapable of being proved by the public prosecutor. Therefore the examining judge of the case made the concept of rechterlijk pardon as one of the basis for consideration for acquitting the defendant of all charges [16].

Based on the description, it can be seen that the inclusion of the concept of rechterlijk pardon in criminal case number 1038/Pid.B/LH/2019/PN Pbr is only intended as a supplementary consideration to impose a free judgment. Meanwhile, the main consideration is that there are several elements of the article in the public prosecution's indictment that are not proven. So it can be said that the public prosecutor failed to prove the guilt of the accused and finally the judge handed down a verdict of acquittal[17]. Therefore, although in criminal case number 1038/Pid.B/LH/2019/PN Pbr the judge considered the concept of rechterlijk pardon, but this consideration did not make the judge impose a different judgment from that stipulated in the provisions of the Criminal Procedure Code. So that the judgment of criminal case number 1038/Pid.B/LH/2019/PN Pbr does not conflict with the principle of non-retroactive.

[14] Pasal 54 ayat (2) Rancangan Undang-Undang Republik Indonesia Nomor ....Tahun....tentang Kitab Undang-Undang Hukum Pidana. Lembaran Negara Republik Indonesia Tahun ..... Nomor ..... Tambahan Lembaran Negara Republik Indonesia Nomor .....

[15] Pasal 70 Undang-Undang Republik Indonesia Nomor 11 Tahun 2012 tentang Sistem Peradilan Pidana Anak. Lembaran Negara Republik Indonesia Tahun 2012 Nomor 153 Tambahan Lembaran Negara Republik Indonesia Nomor 5332.

[16] Pertimbangan pada putusan Pengadilan Negeri Pekanbaru Nomor 1038/Pid.B/LH/2019/PN Pbr.

[17] Pasal 191 ayat (1) Undang-Undang Republik Indonesia Nomor 8 Tahun 1981 tentang Hukum Acara Pidana. Lembaran Negara Republik Indonesia Tahun …….. Nomor …… Tambahan Lembaran Negara Republik Indonesia Nomor ……..

2. Criminal Case Number 52/Pid.B/2020/PN LBB

In criminal case number 52/Pid.B/2020/PN LBB, the perpetrator was charged with theft under incriminating circumstances. Based on the results of the examination at trial, it is known that all elements of the article charged by the public prosecutor have been proved in the person and the conduct of the accused[18]. So based on this, the judge sentenced the defendant to one year's imprisonment[19].

In the course of the case, the judge had discussed the concept of rechterlijk pardon which was positioned as a form of granting pardon to the accused. However, since the judge was of the view that the defendant's actions caused damage that could not be fully recovered and the judge also hoped that the defendant could become a more responsible person, in the end the judge still sentenced the defendant to imprisonment even though he had considered the concept of rechterlijk pardon in his ruling.

Based on this explanation, it can be seen that the consideration of the concept of rechterlijk pardon in criminal case number 52 /Pid.B/2020/PN LBB did not come up with a new legal product because the final resulting decision remained in accordance with the provisions in the Criminal Procedure Code. So it can be concluded that the inclusion of the concept of rechterlijk pardon in criminal case number 52/Pid.B/2020/PN LBB did not cause the emergence of a dispute between the resulting judgment and the non-retroactive principle.

3. Criminal Case Number 1/Pid.C/2021/PN Ttn

The defendant in criminal case number 1/Pid.C/2021/PN Ttn, has been charged with minor abuse of the victim. Basedon the evidentiary process at trial it can be seen that criminal acts and wrong doings have been proved in the person and deeds of the accused. So the judge sentenced the sentence of imprisonment for one month, but the sentence does not need to be served unless before three months it turns out that the defendant committed the crime again[20].

In consideration of his decision, the judge discussed the concept of rechterlijk pardon. Nonetheless, the judge only positioned the concept of rechterlijk pardon as a form of pardon to the accused in the absence of concrete consequences related to the criminal sanctions imposed by the judge on the accused. So that the consideration of the concept of rechterlijk pardon in criminal case number 1/Pid.C/2021/PN Ttn also did not come to produce a new legal product. Thus the discussion of the concept of rechterlijk pardon in the judgment of criminal case number1/Pid.C/2021/PN Ttn does not contradict the principle of non-retroactive.

4. Criminal case number 8/Pid.B/2022/PN Rtg.

The defendant in this case was charged with the criminal act of persecution. Based on the evidentiary process at trial, it turned out that the criminal act had been proven on himself and his act. So the judge sentenced the defendant to six months' imprisonment but the sentence did not need to be served unless before ten months it turned out that the defendant committed the crime again [21].

In consideration of the decision, there is a discussion of the concept of rechterlijk pardon which is positioned as a form of pardon from the judge to the accused. However, the discussion did not produce new things that have not been regulated in the provisions of Indonesian criminal law. So the discussion of the concept of rechterlijk pardon in the judgment is also not contrary to the principle of non-retroactive.

[18] Pertimbangan pada putusan Pengadilan Negeri Lubuk Basung Nomor 52/Pid.B/2020/PN LBB.
[19] Pasal 193 ayat (1) Undang-Undang Republik Indonesia Nomor 8 Tahun 1981 tentang Hukum Acara Pidana. Lembaran Negara Republik Indonesia Tahun …….. Nomor …… Tambahan Lembaran Negara Republik Indonesia Nomor ……...
[20] Pertimbangan pada putusan Pengadilan Negeri Tapaktuan Nomor 1/Pid.C/2021/PN Ttn.
[21] Pertimbangan pada putusan Pengadilan Negeri Ruteng Nomor 8/Pid.B/2022/PN Rtg.

3.3. Application of the Rechterlijk Pardon Concept Which Is Contrary To Non-Retroactive Principle

The principle of non-retroactive in principle seeks to realize certainty for society by prohibiting the application of a legal provision that only takes effect after the act occurs. Therefore it can be said that a new act may be sanctioned under the provisions of a pre-existing law. However, from the analysis of the four criminal case verdicts previously outlined, it turns out that none of these cases are contrary to the principle of non-retroactive even though they have considered the concept of rechterlijk pardon which is newly regulated in the Draft Criminal Code. This can happen because basically the four judgments only consider the concept of rechterlijk pardon as an embodiment of the pardon given by the judge to the defendant. Meanwhile, the resulting verdict is still in accordance with the provisions of the current Indonesian criminal law. Such as a free verdict imposed because there are elements of the article that are not proven, criminal conviction as a consequence of the proven criminal acts and guilt of the defendant, as well as conditional sentences imposed because the criteria that have been determined in the Criminal Code have been met.

This is very different from the purpose of regulating the concept of rechterlijk pardon according to article 54 paragraph (2) of the Draft Criminal Code. Because the consequence of applying the concept of rechterlijk pardon in a criminal case under the provisions of the article is in the form of not imposing a criminal charge or not imposing an action on the accused even though the criminal and wrongdoing has been proved. Where these arrangements have not been regulated in the provisions of Indonesian criminal law that are currently in force. So that if the consequences of applying the concept of rechterlijk pardon in the form of not imposing a criminal conviction or not imposing an action on the accused are applied in ordinary criminal cases as in the four cases discussed earlier, then it is certain that the resulting judgment will be contrary to the principle of non-retroactive. Because the actions of the defendants had occurred first before the concept of rechterlijk pardon in the Draft Criminal Code was officially passed.

The application of the rechterlijk pardon concept as referred to in the provisions of article 54 paragraph (2) of the Draft Criminal Code can be seen in the consideration of children criminal case number 2 /Pid.Sus-Anak/2021/PN Rgt. In the case, a child has been charged with commit theft under aggravating circumstances. Furthermore, based on the evidentiary process at trial, it is true that criminal acts and mistakes have been proven in the child and his actions. Nonetheless, the examining judge of the case applied the concept of rechterlijk pardon in the case based on several considerations, including[22]:

1. The problems that occur between the child and the victim can be resolved in a familial manner. This is evidenced by an apology from the child to the victim and the victim states that he has forgiven the child which is then poured into a peace letter. Then the peace letter has been shown to the examining judge of the case and the judge has also ascertained the contents of the peace letter to the parties justified by the child and the victim;
2. The child expresses regrets his deeds and promises not to repeat his deeds again;
3. The victim pleads with the judge that the child is not punished;
4. When taking a unit of a motorcycle belonging to the victim, the child did not commit any destruction either to the taken motorcycle or to other items belonging to the victim. In addition, the motorbike taken by the child has been returned to the victim. So that the losses suffered by the victim have been fully recovered;
5. Based on the results of community research from BAPAS Pekanbaru, with register number 033/SA/1/2021, it is known that the child has no history of lawlessness. Then based on the results of the assessment using risk assessment instruments, it can also be seen that the possibility of child clients repeating criminal acts is relatively low;

[22] Pertimbangan pada putusan Pengadilan Negeri Rengat Nomor 2/Pid.Sus-Anak/2021/PN Rgt.

6. That apart from the reasons previously outlined, the judge was assured that the application of the concept of rechterlijk pardon in tHAT case was the most appropriate choice because the judge was guided by a restorative justice approach that focused more on recovery efforts not only for the victim, but also for the child which was realized through the involvement of the child, the victim and related parties to find the best solution.

Based on these considerations, in the end, the judge handed down a verdict in the form of not imposing a criminal conviction or not imposing an act on the child even though the crime and guilt had been proven on himself and his actions.

If such a judgment were applied to the four cases discussed earlier, it is certain that the judgment handed down would be contrary to the principle of non-retroactive. However, it is different from the child criminal case number 2/Pid.Sus-Anak/2021/PN Rgt. Where although the verdict in the case is different from the type of judgment that has been regulated in Law Number 8 of 1981 concerning the Criminal Procedure Law. However, because the case is a child's criminal case, in addition to being guided by the Criminal Code and Law Number 8 of 1981 concerning the Criminal Procedure Law, it is also guided by the Juvenile Criminal Justice System Law which has regulated the concept of rechterlijk pardon in article 70 "the lightness of the child's actions, personal circumstances, or circumstances at the time of the act or what happened later can be used as a basis for the judge's consideration not to impose criminal or wearing of acts taking into account the aspects of justice and humanity"[23]. So even though the child criminal case number 2/Pid.Sus-Anak/2021/PN Rgt has considered the concept of rechterlijk pardon and then applied the consequences of the concept in the judgment handed down, the resulting judgment will not be contrary to the principle of non-retroactive. Because the regulation of the concept of rechterlijk pardon has been regulated in the law of the juvenile justice system before the child in criminal case number 2/Pid.Sus-Anak/2021/PN Rgt committed his deeds

Conclusion

Based on the explanation previously submitted, it can be concluded that the application of the concept of rechterlijk pardon in ordinary criminal cases in Indonesia is still limited as a form of pardon by the judge to the defendant. In addition, considerations regarding the concept of rechterlijk pardon do not directly affect the final verdict produced. Thus, the final resulting decision will be in accordance with the provisions in the Criminal Code and Law Number 8 of 1981 concerning the Criminal Procedure Law so that it does not conflict with the principle of non-retroactive.

In contrast to the consequences of applying the concept of rechterlijk pardon according to article 54 paragraph (2) of the Draft Criminal Code which gives the authority to judges not to impose a sentence or not to impose an action on a defendant who is found guilty. Where if article 54 paragraph (2) is applied in an ordinary criminal case, then the resulting judgment will be contrary to the principle of non-retroactive because it is based on the provisions of the legislation that has not been passed. A different thing would happen if the concept of rechterlijk pardon was applied in juvenile criminal cases. Because the Law of the Republic of Indonesia Number 11 of 2012 concerning the Juvenile Criminal Justice System has regulated this concept in article 70. So that if the concept of rechterlijk pardon is applied in child criminal cases then the resulting verdict will not be contrary to the principle of non-retroactive. Because the regulations on which the verdict is based have been in effect before the child commits a criminal act.

[23] Pasal 70 Undang-Undang Republik Indonesia Nomor 11 Tahun 2012 tentang Sistem Peradilan Pidana Anak. Lembaran Negara Republik Indonesia Tahun 2012 Nomor 153 Tambahan Lembaran Negara Republik Indonesia Nomor 5332.

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