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REVIEW ARTICLE

COMPARISON OF *RECHTERLIJK PARDON* CONCEPT ON 2019 CRIMINAL CODE DRAFT AND ARTICLE 70 LAW NUMBER 11 OF 2012 CONCERNING JUVENILE CRIMINAL JUSTICE SYSTEM

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ABSTRACT

The formulation of the idea of forgiving judges (rechterlijk pardon) in the Draft Criminal Code is motivated by the rigidity and inhumanity of the current Criminal Code. Which resulted in small cases that were decided criminal, because the current Criminal Code does not accommodate the authority of judges to forgive cases that are considered unfit to be sentenced. This modification of the rechterlijk pardon concept is expected to reflect a sense of justice, benefit within the framework of Pancasila as a source of law for the Indonesian nation. In contrast to the concept of rechterlijk pardon in Article 70 of Law no. 11 of 2012 concerning the Juvenile Criminal Justice System, which has previously applied the

concept, to minimize the imposition of crimes against children which should not be based on appropriate retaliation for the crimes committed, because it will be fatal to the physical and physical development of children. To answer the existing problems the author uses a qualitative approach with normative juridical research on the statute approach, conceptual approach and comparative approach. The use of this normative qualitative analysis method is closely related to the problems discussed in comparative approach and conceptual approach, so that it takes the form of descriptive-analytical. The results of this research comparison show that the forgiveness of judges in the Criminal Code Bill needs to categorize the types of minor/moderate/serious crimes and what crimes are forgiven. categorized based on the material law itself must also adjust to the implementing rules, namely the Draft Criminal Procedure Code related to the concept of judge forgiveness, so that it is well harmonized. In contrast to the concept of pardon of judges (rechterlijk pardon) in the SPPA Law, which already has a reference to minor crimes in the Criminal Code, there are also special formal rules, so that the concept of forgiveness of judges has been implemented.

Keywords: *Comparison of the Concept of Judge's Forgiveness (Rechterlijk Pardon), Draft Criminal Code, SPPA Law.*

INTRODUCTION

The idea of forgiving judges is not new in the renewal of criminal law in the world, previously it has been applied by other countries with established legal systems, one of which is the Netherlands, the Netherlands is one of the mecca of Indonesian criminal law, because until now the rules of criminal law which in Indonesia still adopts the KUHP of Dutch heritage, namely *Wetboek Van Strafrecht* (WvS) which was stipulated on February 26, 1946 by issuing Law Number 1 of 1946. In the Netherlands itself the concept of *rechterlijk pardon* (judge's pardon) is contained in Article 9A of the Criminal Code of the Netherlands.

In responding to the increasingly rapid developments of the times and the growing criminal problems, Indonesia gave rise to the concept of *rechterlijk pardon* (Judge's forgiveness) in the Draft Criminal Code. The existence of the concept is considered in line and appropriate if later applied in this country, because it is in accordance with living values and national legal values oriented to Pancasila as the way of life of the Indonesian nation. The criminal concept

contained in the Criminal Code still uses the concept of "*No Sorry for You*" so that imprisonment is the last remedy for criminal offenders, (Barlian & Nawawi Arief 2017: 33) the concept of "*No Sorry for You*" reflects the rigid nature of a regulation that does not progress in its implementation. resolve the problems of law enforcement in the renewal of national law. Judges are not given the pure authority to forgive and do not impose penalties (Nawawi Arief 2014: 79).

As a result, many small cases occurred such as the theft of 3 cocoa beans by Minah's grandmother, the theft of flip-flops by the defendant AAL and the theft of watermelons by Basar and Kholil who were sentenced to be incompatible and even contrary to the values of justice, benefit and humanity that live in society (Nawawi Arief 2009: 10) The case reflects that judges are still bound by the normative rules contained in the Criminal Code, which is also a criticism for the authorities, especially the legislature to immediately ratify the Criminal Code Bill which is on its way tired of developing criminal law towards a better and progressive.

The conception of *rechterlijk pardon* (judge's pardon) is the basis for judges to consider the objectives and guidelines for punishment, in addition to criminal acts (objective/legality requirements) and errors (subjective requirements in justifying a sentence to someone (Yosuki & Adriawan, 2018: 5). Previously, progressive steps related to *rechterlijk pardon* (judge's pardon) were contained in Article 70 of Law Number 11 of 2012 concerning the Juvenile Criminal Justice System in which judges had the authority not to impose a crime if the sentence was deemed not to reflect in terms of justice and humanity.

Because in criminal acts committed by children, as much as possible not to impose a crime, it is highly recommended for settlement outside the court either by diversion or a restorative justice approach. For certain crimes, sometimes the imposition of a crime is not always considered appropriate to improve the condition of the perpetrator, especially children who are still in their infancy (Arif & Ambarsari, 2018: 174).

This paper will specifically discuss the comparison of the arrangements for the forgiveness of judges contained in the Draft Criminal Code as an alternative concept of the rigidity and inhumanity of the legality of the Criminal Code in seeing a phenomenon of crime that continues to grow, but the applicable material rules are not able to solve the problem. With the concept of pardon of judges in Article 70 of Law no. 11 of 2012 concerning the Juvenile Criminal Justice System, which views that a criminal act does not always end in prison as one way to treat the perpetrator for the crime that has been committed, especially for minor cases that have been specified in article 70.

This study uses a qualitative research approach, with a normative juridical type of research, collecting data using document or library studies (Sugiyono 2009: 29). In this normative legal research several approaches are used, namely the statute approach, conceptual approach, and comparative approach (Ibrahim 2005: 444). The source of data used by the author comes from primary legal materials in the form of the 2019 Criminal Code Bill and Law No. 11 of 2012 concerning the Juvenile Criminal Justice System, in addition to using secondary legal materials derived from books, journals and scientific writings related to this research.

COMPARISON OF THE CONCEPT OF JUDGE'S PARDON (*RECHTERLIJK PARDON*) OF THE 2019 CRIMINAL CODE BILL & ARTICLE 70 OF LAW NO. 11 OF 2012 CONCERNING THE JUVENILE CRIMINAL JUSTICE SYSTEM

In terminology, forgiveness is also known as "forgiveness", "pardon", "mercy", "clemency", indemnity, and "amnesty" whose meaning is not rigid and (flexible), can be interpreted as forgiveness for actions that are contrary to the legality of the law. -invitation, on the basis of justice in society. (Setiawan 2021:39). The concept of *rechterlijk pardon* itself according to Andi Hamzah if an act is an offense, but socially it means little, then there is no need to impose a crime or action (Hamzah, 1994: 137).

The judge's authority to forgive (*rechterlijk pardon*) by not imposing any criminal sanctions/actions is also divided by the "*culpa in causa*" principle or the "*action libera in causa*" principle which gives the judge the authority to remain accountable for the perpetrator of a crime even though there is a reason. criminal eraser (Gunarto, 2012: 95).

The concept of forgiveness is not new in the criminal system in countries with established legal systems, one of which is the Netherlands. Indonesia itself has adopted and implemented the concept of pardon for judges contained in Article 70 of the SPPA Law, even in the Draft Criminal Code the concept has been published, but has not been implemented, because until now the bill has not been ratified as a positive law in this country. In this discussion, we will discuss several comparisons regarding the concept of judge forgiveness (*rechterlijk pardon*) in the 2019 Criminal Code Bill and Law No. 11 of 2012 concerning the Juvenile

Criminal Justice System. However, we will first discuss the origin of the concept of pardon by judges in the Netherlands, as the mecca of Indonesian criminal law.

I. THE CONCEPT OF JUDGE'S PARDON (*RECHTERLIJK PARDON*) JUDGE'S FORGIVENESS FROM THE DUTCH WVS PERSPECTIVE

The existence of judge forgiveness in the Dutch criminal law system or referred to as rechterlijk pardon or the institution of judge authority to forgive, cannot be separated from the very rapid development of the modern world and the shifting of the paradigm of criminal goals that are no longer oriented to "*revenge*" for the actions committed. This is the influence of the notion of subsociality (subsocialiteit) which explains that if an act is an offense, but socially it means little, then there is no need to be subject to a crime or action. The theory initiated by MP Vrij initially appeared in socialist countries such as China and Russia. VRIJ's observations are focused on habits carried out by juvenile judges or local court judges who use their authority under article 77 WvS.

The accommodation of the new institution which was later referred to as the judge's authority to forgive (*rechterlijk pardon*) was inseparable from the influence of ideas on the theory of sub sociality. Regarding the concept of *rechterlijk pardon* or judge's forgiveness, according to Prof. Nico Keijer and Prof. Schaffmeister, prior to the concept of judge's pardon, if in certain special circumstances the judge in the Netherlands was of the opinion that in fact a sentence should not be imposed, even though it was very light. It is clear that Article 9a of the Dutch WvS (rechterlijk pardon) is essentially a “criminal guideline” which is motivated by the idea of flexibility to avoid rigidity in the laws and regulations. The existence of this guide for forgiveness of judge’s functions as a "safety valve" (*Veiligheids-klep*) or emergency exit (*nooddeur*) (Nawawi Arief 2014):

Table 1. Some Arrangements Regarding Rechterlijk Pardon's Decision in the Dutch Criminal Procedure Code

Chapter	Arrangement
Article 9a Criminal Code of Netherlands	*The judge may determine in the judgment that no punishment or measure shall be imposed, where he deems this allowed, by reason of the lack of gravity of the offense, the character of the offender, or the*

	circumstances attendant upon the commission of the offense or thereafter. The translation is that a judge's pardon institution can be carried out for minor offenses and/or from the personality of the perpetrator or the circumstances at the time or after the offense is committed.
Article 353 paragraph (1) Criminal Procedure Code of Netherlands	*In the case of application of section 9a of the Criminal Code, of imposition of a punishment or measure, of acquittal or dismissal of the charges, the District Court shall, subject to application of section 94, give a decision on objects whose return has not been ordered. This decision shall be without prejudice to any person's right in regard of the object.* The translation is to explain the position of the goods/objects confiscated in the decision of Rechterlijk Pardon.
Article 359 paragraph (4) Criminal Procedure Code of Netherlands	*In the application of section 9a or section 44a of the Criminal Code, the judgment shall state the special reasons which led to the decisions*. The translation is related to Rechterlijk Pardon's decision, the panel of judges/judges must provide special reasons for considering their decision.
Article 402 paragraph (2) letter a Criminal Procedure Code of Netherlands	*Appeal may be filed against judgments concering minor offenses, rendered by District Court as final judgment or in this course of the hearing, by the public prosecutor with the court which rendered the judgment, and by the defendant who was not acquitted of the entire indictment, unless in this regard in the final judgment:* *a… under application of section 9a of the Criminal Code, a punishment or measure was not imposed.* The translation is that Rechterlijk Pardon's decision cannot be appealed.
Article 427 Paragraph (2) letter a Criminal Procedure Code of Netherlands	*Appeal may be filed against judgments concering minor offenses, pronounced by the Courts of Appeal by the Public Prosecution Service attached to the court which rendered the judgment, and by the defendant, unless in this regard in the final judgment:* *a. under application of the section 9a of the Criminal Code, a punishment or measure was not imposed, or […].* The translation is that Rechterlijk Pardon's decision cannot be appealed.

Sources: Saputro (2016: 74)

The history of the journey between the Dutch Criminal Code and the Indonesian Criminal Code is almost the same, but the development of the Dutch Criminal Code is always changing, adjusting in modifying the type of punishment given and not being rigid. It is proven that the Dutch Criminal Code has been amended 455 times, including article 9a which is an insertion article for the Rechterlijk Pardon concept (Nawai Arief 2021). This concept was implemented in 1983 by the Dutch who were able to reduce the existing crime rate, this was reflected in the empty prisons in the Netherlands because the number of prisoners in prison was very small. In fact, since 2004, the Dutch government has closed 24 (twenty-four) prisons.

In contrast to the Indonesian Criminal Code itself, which until now is 75 years old after being stipulated in 1946 as the Criminal Code (KUHP) for the Indonesian people, it seems to be stagnant in place, rigid and does not adapt to the increasingly rapid and modern developments of the era. Even in the Netherlands there is a tendency to decrease the use or application of imprisonment, as can be seen from the practice of the courts, there is a growing distaste for the crime of deprivation of liberty and fines (Kholiq & Abdul, 2015).

II. THE CONCEPT OF FORGIVENESS OF JUDGES (*RECHTERLIJK PARDON*) IN THE INDONESIAN CRIMINAL CODE BILL 2019 VERSION

The Criminal Code is part of the system in Indonesia, a sub-system within the framework of the national legal system. Which according to Lawrence M. Friedman in his theory of the legal system said that "*The elements of a legal system are Substance, Structure, Culture, and Impact*". And the renewal of criminal law must also be accompanied by the renewal of knowledge about criminal law. This has a logical consequence that criminal law does not only include legal substance (legal substance reform) it must also be accompanied by a renewal of the legal culture of society (legal culture reform) and the renewal of its legal instruments (legal system reform), all of which are systemic and cannot stand alone to realize aspired to justice (Nawawi Arief 1998: 133). Because Indonesia is a former Dutch colony with a Civil Law (Continental Europe) legal system, written rules in the form of statutory regulations are the main source of law. And in this case, the first reform carried out is related to the legal substance of the Criminal Code which focuses on legal reform related to the conception of the idea of forgiving judges (*Rechterlik Pardon*) in the Draft Criminal Code.

The criminal system as outlined in the Draft Criminal Code Bill is motivated by various ideas or principles as follows (Ahmad M 2018:954):

a. The idea of a mono dualistic balance between the interests of society (general) and individual interests;
b. The idea of a balance between "social welfare" and "social defense";
c. The idea of a balance between criminal-oriented offenders" (criminal individualization) and "victim" (victim)
d. The idea of using a “double track system” (between criminal/punishment and action/treatment/measures);
e. The idea of making “non-custodial measures effective (alternatives to imprisonment);
f. The idea of elasticity/flexibility of sentencing (“elasticity/flexibility of sentencing”);
g. Idea of criminal modification/change/adjustment (“modification of sanction”; the alteration/annulment/revocation of sanction”; re-determining of punishment”)
h. The idea of subsidiarity in choosing the type of crime;
i. The idea of a judge's pardon (“rechterlijk pardon/judicial pardon”);
j. The idea of prioritizing / prioritizing justice over legal certainty.

The current nationally valid Criminal Code does not regulate the issue of the principle of forgiveness of judges, so there is a need for a formulation in the Criminal Code Bill. This Criminal Code Bill was formed to adjust the Dutch heritage criminal law WvS (KUHP) which is no longer relevant to be applied in this modern era of the Indonesian nation. Because the principle of forgiveness of judges is a reflection of the principle of humanity in the philosophy of the Indonesian nation, namely Pancasila, and will change the paradigm of the rigid Criminal Code to become flexible and as an integral system (Maulidah, 2019: 289).

The solution for the pardon of judges contained in the ideas/principles of the Draft Criminal Code in the future, gives the authority to carry out "pardoning or pardoning judges" ("rechterlijk pardon" or judicial pardon"). However, the existence of the rechterlijk pardon principle is motivated by an idea or thought (Gunarto, 2012: 95):

a. Avoiding the rigidity/absolutism of punishment;
b. Provide “safety valves” (“veiligheids”);
c. The form of judicial correction to the legality principle (“judicial corrective to the legality principle);

d. Implementing/integrating the value or paradigm of “wisdom of wisdom in Pancasila;
e. Implementing/integrating the “purpose of punishment” into the terms of sentencing (because in granting forgiveness/pardon, judges must consider the purpose of sentencing);
f. So the conditions or justifications for sentencing are not only based on the existence of "criminal acts (legality principle) and "errors" (culpability principle), but also on the "purpose of punishment".

The conception of the principle of forgiveness of judges (*Rechterlijk Pardon*) is in the reformulation stage of the Criminal Code Bill in Article 54 Paragraphs (1) and (2). This concept becomes the basis for judges to consider the purpose of sentencing as well as sentencing guidelines. The purpose of sentencing is formulated explicitly in Article 51 Paragraph (1) of the Criminal Code Bill, namely (KUHP Bill 2019, Article 51):

a. Preventing the commission of criminal acts by enforcing legal norms for the protection of society;
b. Socializing the convicts by conducting coaching so that they become good and useful people;
c. Resolving conflicts caused by criminal acts, restoring balance, and bringing a sense of peace in society; and
d. Release the guilt of the convict.

That the punishment must take into account those formulated in Article 54 Paragraph (1) of the Draft Criminal Code, namely:

a. The form of error in the making of a criminal act;
b. The motive and purpose of committing a crime;
c. The inner attitude of the perpetrator of the crime;
d. The crime committed whether planned or unplanned;
e. How to commit a crime;
f. Attitudes and actions of the maker after committing a crime;
g. Curriculum vitae, social condition, economic condition of the perpetrator of the crime;
h. The effect of the crime on the future of the perpetrator of the crime;
i. The effect of the crime on the victim or the victim's family;
j. Forgiveness from the victim and/or his family; and
k. The public's view of the crime committed.

In article 54 paragraph (2) of the Criminal Code Bill it is stated that "the lightness of the act, the personal condition of the perpetrator, or the circumstances at the time the crime was committed and what happened later, can

be considered by the judge not to impose a crime or not to impose an action taking into account the aspects of justice and humanity. (Criminal Code 2019: article 54). The giving of sorrow is not merely to demean human dignity, so in upholding law and justice, justice must be prioritized, because law is actually created for human happiness. On this basis, future judges will have legal standing to forgive people who have actually committed criminal acts on the grounds of the maker's personal circumstances and humanitarian considerations view that the person does not have to be punished (Yosuki, 2018: 10).

Furthermore, in considering the provisions of articles 52 and 54, several conditions were stipulated to confirm that imprisonment should not be imposed/pardoned if (RUU KUHP 2019: article 70):

a. The defendant is a child
b. The defendant is over 75 (seventy-five) years old;
c. The defendant has committed a crime for the first time;
d. The loss and suffering of the victim is not too great;
e. The defendant has paid compensation to the victim;
f. The defendant did not realize that the criminal act committed would cause a large loss;
g. The crime occurred because of a very strong incitement from another person;
h. The victim of a crime encourages or mobilizes the occurrence of the crime;
i. The crime is the result of a situation that cannot be repeated;
j. The personality and behavior of the defendant ensure that he will not commit another crime;
k. Imprisonment will cause great suffering to the defendant or his family;
l. Guidance outside the correctional institution is estimated to be quite successful for the defendant;
m. The imposition of a lighter sentence will not reduce the seriousness of the crime committed by the defendant;
n. The crime occurred in the family or;
o. Because there was an error.

As for the limitation of criminal acts that get the "facility" of the judge's pardon based on article 70 paragraph (1), it is also regulated in article 70 paragraph (2) of the Criminal Code Bill, where the "facility" of the judge's forgiveness clearly explains the limitations based on the qualifications of "the provisions as referred to in paragraph (1). (1) does not apply to criminal acts punishable by 5 (five) years or more, special minimum crimes or certain crimes that endanger or harm the community or harm the state's finances or economy" (RUU KUHP 2019, Article 70).

Consideration about the categorization of criminal acts, whether a crime with a prison sentence of 5 years and below is a minor crime, because of the philosophical background, the judge's forgiveness so that this light crime does not need to be punished. The Criminal Code has not determined the types/categories of minor/moderate/serious crimes. And whether qualifications under a sentence of 5 years in prison are included in the light/moderate category, then to explain this, the Draft Criminal Code needs to formulate the type of criminal act in order to facilitate the reference to Article 54 paragraph (2) regarding the pardon of judges in order to provide certainty of what crimes are committed. can be forgiven.

Regarding article 70 paragraph (1) and paragraph (2) which explain the qualifications of judges to impose pardons, Article 71 is further explained, namely (RUU KUHP 2019):

(1) If a person commits a crime which is only punishable by imprisonment for under 5 (five) years, while the judge is of the opinion that it is not necessary to impose a prison sentence after considering the objectives and guidelines for punishment as referred to in article 52 and article 54, that person is subject to a fine.
(2) The fine as referred to in paragraph (1) can only be imposed if:
    a. No victims;
    b. The victim doesn't mind; or
    c. Not a repeat of the crime.
(3) The fine that can be imposed based on the provisions as referred to in paragraph (1) is a maximum fine according to category V and a fine according to category III.
(4) The provisions as referred to in paragraph (2) letter c do not apply to people who have been sentenced to imprisonment for crimes committed before the age of 18 (eighteen) years.

However, the terms of forgiveness that have been mentioned in article 70 are not relevant to the meaning of the supposed forgiveness, because article 71 provides an explanation that the judge does not need to impose a prison sentence but can be fined. Forgiveness means that the crime is abolished (no crime) / is not subject to any action / crime, and if it is still subject to a crime even though it is in the form of a fine then it is not an apology. So, the existence of article 71 seems to give a sign that the provisions in article 70 are not for forgiveness, especially in article 54 (2). In the clause "*imprisonment as much as possible ...*" contained in article 70, although it says "*with due regard to the provisions of*

articles 52 and 54" it is not specifically and unequivocally that this is a requirement for the judge's pardon (*rechterlijk pardon*).

The explanation of article 54 paragraph (2) is used to forgive someone who has committed a crime, but (it is not stated whether there is another criminal alternative: imprisonment is replaced by a fine, etc.). Also, the explanation of article 71 related to "this provision is intended to overcome the rigid nature of the formulation of a single criminal as if it requires that the judge only impose a prison sentence. This means that Article 71 as an explanation of the existence of Article 70 still allows for punishment and is not oriented to forgiveness and abolition of the crime. Article 70 as a clause-systematic requirement has the opposite meaning, in countries that adhere to the civil law legal system, the principle of legal certainty becomes one of the practices that the formulation of the law must be clear as also instructed by Law.

The formulation of the concept of forgiveness is much different from positive criminal law (KUHP) which is currently rigid in nature where punishment is only based on three main problems of criminal law, namely crime, error and sanctions (criminal). If the punishment is only action-oriented, then the type of punishment given will tend to be inhumane but if it is focused only on the perpetrator, then criminal law will fail to carry out its function as public law because it ignores the interests of the community, the state, and its victims. So, with the concept of *rechterlijk pardon* (judge's pardon) in the Draft Criminal Code, it is hoped that it can change the direction of criminal imposition which aims to balance the general standard of justice in society against a crime.

Even though the judge has provisions for forgiveness in the sentencing guidelines, there are several points of limitation so that the panel of judges can pass a decision in the form of pardon, namely (Evandy A B & Nawawi Arief 2017: 36):

a. Easy action.
b. The lightness of the personal circumstances of the maker.
c. The lightness of the situation at the time the action was carried out, or what happened later.
d. By paying attention and considering in terms of justice and humanity.

Thus, the regulation of *rechterlijk pardon* cannot only be regulated in the Criminal Code Bill because the Criminal Code Bill only contains material criminal rules. Even the provisions of the previous judge's pardon are not contained in this Dutch heritage Criminal Code. Therefore, the regulation of *rechterlijk pardon* must also be adjusted to the formal rules, namely the Draft Criminal Procedure Code (Ahmad, 2018: 956). With the formulation of the existing Criminal Code Bill

with the rules of procedural law, it is hoped that it can repair any damage caused by a rigid criminal process that is more humane, justice with an orientation to moral justice, social justice and legal justice in accordance with the form of the Pancasila philosophy and carried out in accordance with the objectives of criminal law (Evandy A B & Nawawi Arief 2017: 43).

Judges as the last bastion for justice seekers in the realm of criminal justice system whose decisions are accounted for not only before the nation, state, and society especially those seeking justice but also to God Almighty, judges must have morality, integrity, intellectuality as well as experience and skills. In deciding a case, it is not only trapped in written rules but also balanced with conscience, then the above provisions merely give the judge the authority to give an apology decision if deemed necessary and it is judged that the criminal decision does not reflect a sense of justice and humanity based on the limits set. there is.

DETERMINATION OF JUDGE'S PARDON (*RECHTERLIJK PARDON*) IN LAW NO. 11 OF 2012 CONCERNING THE JUVENILE CRIMINAL JUSTICE SYSTEM

The formulation of criminal sanctions in Law no. 11 of 2012 concerning the Juvenile Criminal Justice System adheres to the so-called Double Track System. This law has explicitly regulated the types of criminal sanctions and action sanctions at the same time. The use of the two-way system (*zweipurigkeit*) is a consequence of the Neo-Classical approach. In the development of positive law in Indonesia, it has been recognized that the existence of action sanctions other than criminal sanctions, even though the Criminal Code adheres to the Single-Track System which only regulates one type, namely criminal sanctions (article 10 of the Criminal Code). The threat of action sanctions in Law no. 11 of 2012 shows that there are other means besides punishment (penal) as a means of overcoming crime (Widodo, 2016: 71).

According to Law No. 11 of 2012 concerning the Juvenile Criminal Justice System, what is meant by children in conflict with the law are divided into 3 (three) groups, namely children in conflict with the law; children who are victims of criminal acts; and children who are witnesses to criminal acts. What is meant by a child in conflict with the law is a child who is 12 years old but not yet 18

years old who is suspected of committing a crime. Meanwhile, what is meant by a child who is a victim of a crime is a child who is not yet 18 years old who has suffered physical, mental, and/or economic loss caused by a criminal act. Then what is meant by a child being a witness to a crime is a child who is not yet 18 years old who can provide information for the purposes of investigation, prosecution,

The Law, it puts forward the resolution of legal conflicts involving children as perpetrators in the recovery and compensation of losses suffered by victims rather than punishing children as perpetrators, known as the concept of Restorative Justice, this is motivated by the concept of thought which states that the process of resolving criminal cases involving children as perpetrators not only aims to punish children but also aims to educate children. Restoring and restoring conditions as before the crime occurred. In the juvenile criminal justice system, it is as minimal as possible not to impose a sentence and not be based on appropriate retaliation for the crime committed, because it will be fatal to the child's physical and physical development (Susanti, 2019: 191).

Therefore, the implementation of the juvenile criminal justice system should be carried out based on the principles as contained in the SPPA Law as follows (Government of the Republic of Indonesia 2012, Article 2):

a. Protection;
b. Justice;
c. Non-discrimination;
d. the best interests of the child;
e. Respect for children's opinions;
f. Survival and development of children;
g. Guidance and guidance of children;
h. Proportional;
i. Deprivation of liberty and punishment as a last resort; and
j. Avoidance of retaliation.

Crime is seen as a disease of society that must be cured, not just as an act that violates the rule of law. Healing is the main concern, not in punishing the perpetrator (child) who is proven guilty of committing a crime, but it is preferable to be given sanctions in the form of actions such as returning to parents or attending education and training (Nola 2014: 2). The regulation of judge pardon (*rechterlijk pardon*) in Article 70 of Law no. 11 of 2012 concerning the Juvenile Criminal Justice System (SPPA), states that, "*The lightness of the deed, the child's personal circumstances*", when examined, the provisions of article 70, then the elements are as follows (Setiawan, 2021: 49-50).

a. The light of action
   The lightness of this act refers to a crime that is minor in nature, and does not have a major social impact, especially for child perpetrators, it is recommended to use a solution, either diversion or restorative justice or in handling cases of children known as reparative board youth panel.
b. Child's personal situation
   This child's personal situation considers the individual aspects of the child who commits a crime, which can be seen by looking for the background or origins of the child to his family and life in society or it can also be done with the help of psychology or characterology, because the perpetrator is a minor, it must look at the factors that have been mentioned above.
c. The circumstances at which the crime was committed and after
   This element looks at the conditions that follow the child perpetrator at the time of the crime and whether the act committed is a form of repetition or not, whether the act is the result of planning, losses and suffering experienced by the victim and the role of the victim in the occurrence of the crime.
d. Can be used as a basis for consideration
   The phrase "can" here have an optional meaning whether or not the judge may grant forgiveness by considering other elements that have been fulfilled. This consideration is subjective, depending on the elements whether the child offender can be forgiven or not, if it does not meet the elements to be forgiven, then it cannot be forgiven.
e. Do not impose criminal or action
   The authority not to impose a sentence is then stated in the form of "stipulation" of judges.
f. Justice and humanity
   This element of justice and humanity has a very broad meaning. Justice is one of the goals of law in addition to certainty and expediency. Ideally the law must contain all three, however, justice is the most important and main goal, because the existence of law is to provide the fairest justice for the parties. Especially with the perpetrators are minors.

The article reads that there are guidelines not to impose a sentence on several conditions. This concept is in line with the integrative theory that the purpose of the law is for self-respect, happiness, welfare, and human glory, placing a resolution that is not only emphasized that the rule of recording is on community compliance with the law. But emphasizes that law essentially consists of norms, actors and values as can be called the tripartite character of Indonesia's

social engineering. Apart from that, if "the defendant does not realize that the crime committed will cause a very large loss" imprisonment is also not appropriate to be imposed (Akbar 2021: 96-97).

In Law No. 11 of 2012 concerning the Juvenile Criminal Justice System, has applied the *rechterlijk pardon* concept in its implementation, in contrast to the *rechterlijk pardon* concept in the Criminal Code Bill which is still in the planning process as *ius constituendum* and has not been implemented. In the *rechterlijk pardon* concept in the SPPA Law, judges are given full authority by positive law to be able to forgive by looking at all aspects that occur in the field. Of course, if the punishment is still imposed, it is considered that it will not have a positive impact, especially for the perpetrators of children.

That in resolving a case in Article 70 of the SPPA Law with a child as the perpetrator of a criminal act, the judge has the option not to impose a crime with the existing provisions on the child to be forgiven. And the legal product resulting from the forgiveness given by the judge is not in the form of a decision, but in the form of a determination. Judges do not use the word "judgment" but simply use the word "determine". The decision made by the judge should be explored from the provisions of the existing judge's forgiveness concept, in order to fulfill the sense of justice and humanity based on Pancasila. Determination of qualified judges requires a combination of knowledge (knowledge) in mental, emotional and spiritual energy. Optimizing the mastery of science in energy will touch the mind,

The difference between the juvenile justice system and the adult justice system is that the adult justice system focuses more on justice which emphasizes retribution (retributive justice) and justice which emphasizes on compensation (restitutive justice). The juvenile justice system places more emphasis on justice which emphasizes restoration and not retaliation. Settlement of criminal cases by involving perpetrators, victims, families of perpetrators/victims, and other related parties to jointly seek a fair solution that, apart from being able to provide a deterrent effect, can protect child perpetrators from the vulnerability of adult correctional institutions (Tarigan, 2015: 110). In the juvenile justice system, the process that takes precedence is diversion and also restorative justice.

So from the two discussions above, the comparison is in general the concept of forgiveness of judges (*rechterlijk pardon*) contained in the Draft Criminal Code and the SPPA Law has the same philosophical background, which is to give the judge the authority to give the "forgiveness" option to the accused who is suspected of committing a crime, but the act is a minor crime, has no social impact, even when an action is imposed in the form of punishment, it does not

reflect from the side of humanity and justice in accordance with Pancasila. Of course, the pardon is based on the provisions contained in Article 54 Paragraph (2) of the Criminal Code Bill and Article 70 of the SPPA Law which are under the same consideration, namely by looking at the lightness of an act, the personal condition of the perpetrator, the circumstances at which the crime was committed.

Although in general the context of the judge's pardon is the same, but the implementation is different, the forgiveness in the Criminal Code Bill regarding minor crimes in question has not determined the type/category of minor/moderate/serious crimes, while in the SPPA Law there has been a categorization, so that the judge's pardon (*rechterlijk pardon*) in the SPPA Law, there is already a reference to minor crimes in the Criminal Code as well as special formal rules, so that the concept of pardon for judges has been implemented. So, in the Criminal Code Bill, it is necessary to ensure that any criminal offenses that are forgiven are categorized based on the material law itself and must also adjust to the implementing rules, namely the Criminal Procedure Code Bill regarding the concept of judge forgiveness. Because the Draft Criminal Procedure Code is also the subject of the procedural law in enforcing the material rules contained in the Criminal Code Bill.

CONCLUSION

From the discussion above, it can be concluded that the concept of judge forgiveness (*rechterlijk pardon*) in the Indonesian legal system contained in the Draft Criminal Code is very important and needed for judges, this can be a reference for judges in deciding a case, where the case is very light and does not have a big impact. socially but there is no optional not to impose a sentence on the defendant, so far, the legal rules contained in the Criminal Code do not reflect the values contained in Pancasila as *philosofische grondslag*, the way of life of the Indonesian people who are divinity, humane and social. Its rigid and inhumane nature is the basis that it is necessary to include the concept of judge pardon (*rechterlijk pardon*) in the goals and principles of punishment in the formulation of the Criminal Code in the future. In contrast to the concept of pardon of judges (*rechterlijk pardon*) contained in Article 70 of Law No. 11 of 2012 concerning the Juvenile Criminal Justice System which has been implemented first, the concept of pardon of judges in the a quo law is solely aimed at minimizing criminal penalties to children who do not may be based on appropriate retaliation for the crime

committed, because it will be fatal to the physical and physical development of the child. The regulation in this law is the most substantial thing that strictly regulates the concept of restorative justice for children in conflict with the law, by providing alternative pathways for law enforcers, families, victims, and the community in seeking a settlement process outside of criminal justice, namely diversion-oriented efforts. on the restorative justice approach model. The Dutch legacy of the Criminal Code is very rigid, not dynamic and humanist, so in order to realize a criminal law that is more humane, and community based as contained in Pancasila, the DPR as the people's representative should immediately update the main criminal system of the Criminal Code and ratify the Criminal Code Bill so that it becomes a positive rule. The applicable law replaces the Dutch heritage Criminal Code which is very ancient and not progressive by including the formulation of the principle of judge forgiveness, so that judges have the authority not to impose criminal penalties on small cases, solely so that social justice for the Indonesian people can be realized in real terms. The Criminal Code Bill has not determined the types/categories of minor/moderate/serious crimes.

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