

## **The Economic Analysis of the Penal Formulation and Its Maximum Prison Sentences Limitation for Economic Crimes in Indonesian Penal Code Books**

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### **Abstract**

*Objectives: Identifying the limitation in the prison sentence statutes for ordinary economic crimes in both the current Indonesian Penal Code Book and the 2023 Indonesian Penal Code Book using economic analysis to show the limits where the statute is no longer able to ensure criminal deterrent, which is when the statute cannot ensure crime does not pay to the perpetrator. This raised the question of the rationality of current penal sentencing formulation.*

*Method: Using a normative legal research method, this economic analysis study attempts to reveal the economic rationality of general society in assessing the severity of penal sentencing in the highest position provisioned by using the maximum value of the prison sentence threat to compare it with the possible benefits from the crime in the position of a crime with a significant loss value. This research analyzed the possible maximum outcome of a specific economic crime, analyzed it in both Indonesian Penal Code Books, extending it if any other sentencing can be imposed on the perpetrator, such as the tort law, showing the upper limit of economic value for each Penal Code Book's prison sentence provisioned, and showing that value is meagre compared to the existing economic crime cases in Indonesia within past five (5) years.*

*Result: In some cases that have a high economic loss value, the maximum prison sentence formulation for offences against ordinary economic crimes is not even able to handle the value of the crime's losses, let alone a long-ensuring criminal deterrent. Thus, it is doubtful that the current penal sentence formulation, even at its maximum threat, can protect society and achieve criminal deterrents.*

**Keywords:** 2023 Indonesia Penal Code Book, Economic Analysis of Criminal Law, Economic Crime, Penal Sentencing, Penal Law Reformation.

### **1. INTRODUCTION**

Criminal law as assumed by economists and criminal law experts appears to be no longer capable of stemming economic crime; especially economic crimes with large losses. Some of these arguments presented here are: the argument that prison sentences seem to not able to reduce crimes(Hamzah, 2015), that It is unable to medicate the perpetrator's mental illness that the prison sentence is supposed to tackle; which is shown by a lot of recidivism(Hairi, 2018), and the evaluation that the current Indonesia's penal law is unjust had been the source of analysis from other science filed especially in economic and business. Expressed by the "Deputy Penelitian Ekonomika dan Bisnis" (Research Deputy

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of Economics and Business) from Gadjah Mada University: Rimawan Pradiptyo, expressed that: "Hukuman tindak pidana dinilai masih belum adil" (criminal sentencing is evaluated to be not just/fair)(Dessy Suciati Saputri, 2013).

One of the reasons argued to be the cause of these conditions is the lack of research on criminal sentencing which is compared to the crime's benefits gained from economic crime using the perspective of economic analysis. Sentencing is one part of the most fundamental concepts in penal law(Packer, 1968), but it is rarely found as the focus of any research and penal law/criminal justice scientific discourses both in Indonesia and abroad. Except for the few research papers and books presented earlier by both authors, there is no other research that tries to give an explanation answering the rationality of a specific criminal sentence compared to the original crime.

The economic crimes; however, seem to expand and become more complex through time to be tackled by the current penal law/criminal justice system. It is proven by the current phenomenon where economic crime cases with huge or even massive damages are filling the news in Indonesia attracting lots of attention from the people. This is also shown in the current criminal justice system of Indonesia; while still using the current Penal Code Book – Indonesian Statue/Law Code No 1 Year 1946, it still cannot ensure criminal deterrent by ensuring crime does not pay to the perpetrator.

A similar view is revealed by Gary S. Becker who argued the current; United States of America, criminal justice system cannot ensure crime does not give any benefit to the perpetrator after the end of the criminal justice(Becker, 1968). Ensuring criminal sentencing should not give any benefit to the crime perpetrators has been long forgotten and rarely raised by any modern research. Meanwhile, referring back to the old sentencing guidance; as this is not accepted as any law code which would be the sentencing guidelines or sentencing formulation in sentencing policy, that has been expressing the code that demanded the criminal sentencing must be able to take more than the benefit of the crime. One of them was expressed by Jeremy Bentham as one of thirteen (13) sentencing guidelines; or what is titled "The Proportion between Punishment and Offences", which states" The value of the punishment must always be sufficient to outweigh the value of the profit of the offense"(Bentham et al., 1935). Hence the previous sentencing guidance aims to provide a sentencing formulation that ensures criminal deterrent by ensuring crime does not pay; or give benefits, to the perpetrator of a crime.

This sentencing guidance; ensuring crime does not pay, is supported by many early and more modern theories. Representing the older theories before Bentham such as Cesare Beccaria: There must, therefore, be a proper proportion between crimes and punishments(Beccaria, 2016), and(Thomson, 1953), which is also the same idea by Kant and Hegel in retributivism which sentencing must be balanced to the weight of the criminal act(Ohoitumur, 1997). Representing the newer to the newest views accordingly such as Nigel Walker's "Sentencing in a Rational Society" in 1971 and "The Gravity of The Offence ",

The condition that the current Indonesian criminal justice system is not meeting the sentencing guidance above is further worsened by the condition of the criminal justice system which separates the reparation of the victims' damages into civil/tort law (in Indonesia is called "hukum perdata"), where for ensuring justice to the victims must be fought in tort law, and the criminal justice system only attempt to mediate the moral illness of the perpetrator or mens rea as the damages caused to the society or as a form of moral education(Teng Junaidi Gunawan, 2023). This criminal justice system's formulation is against the sentencing guidance mentioned by Jeremy Bentham that the weight of sentencing must consider the "primary mischief"; which refers to the victims' damages/mischief, and the "secondary mischief"; which is referring to the damages caused to the society as the weight of mens rea(Bentham et al., 1935). This theory

requires the victims' restitution to be included; and not as a separate system of justice, in the expected criminal justice system.

This Indonesian criminal justice sentencing formulation and its victims' restitution effort separation in tort law hurt the effort to pursue justice by limiting the weight of any criminal liability in the form of the sentencing weight. These conditions enable the possibility the maximum sentence provision for a certain criminal law article (hereby is abbreviated as criminal article, in Indonesian is called "delink") unable to provide justice to the law and the society from huge damages greater than its maximum sentence provisioned in its criminal article. The current sentencing formulation is against what had been warned by Jeremy Bentham that there is a possibility where the profits of a crime are greater than the fixed statute limitation of its maximum sentence code(Bentham et al., 1935).

This continuing research raised back the sentencing guidance argued by Bentham which raised the question arguing the sentencing limitation in the current and the 2023 Indonesian Penal Code Book (in Indonesia is called "KUHP" and "KUHP 2023", hence further reference is abbreviated into "KUHP" and "KUHP 2023"), especially in this journal against the maximum sentence formulation for ordinary economic crimes. As Muhammad Sholehuddin (truncated as M. Sholehuddin) argues, the Indonesian Penal Code Book both the current and the 2023 KUHP needs a complete rework in sentencing policy for achieving the penal law's purposes(Sholehuddin, 2003).

This journal is a combination of studies between the authors, which is a part of Teng Junaidi Gunawan's dissertation that led to the publication of two (2) books as parts of its research problems formulation, namely "Keseimbangan Nilai Pidana Penjara dan Denda: Perspektif Penologi Melalui Analisis Ekonomi" (or translated in English as The Equivalent value between Prison Sentence and Fine Sentence - A Penology Perspective through An Economic Analysis)(Teng Junaidi Gunawan, 2023), and "Pemidanaan Berbasis Keadilan Restoratif Yang Berdaya Jera dan Responsif" (The English translation of the title is: Restorative Justice Based Sentencing That Has Criminal Deterrent and Responsive), also its prior study and proposed solution which using economic analysis and its revered engineering to identify the current KUHP and the prior Penal Code Book Draft cannot provide deterrent as it allows the perpetrator of a crime to still gain benefit after the end of the Indonesian criminal justice system(Teng Junaidi Gunawan, 2023). The main purpose of this continuing study is to find a national commonly accepted through a minimum economic formulation that enables society to evaluate and confirm that criminal punishment is just, and fair, and therefore provides a criminal deterrent(Saleh & Gunawan, 2021).

The purpose of this journal is to present this finding on an international scale and to provide a new perspective in evaluating sentencing policy, sentencing pattern, and sentencing guideline, especially in Indonesia Penal Law, both in the present and in future after the enactment of The Law Number 1 of 2023 about Indonesian Penal Code Book (called in Indonesian "Kitab Undang-undang Hukum Pidana tahun 2023", hereinafter abbreviated KUHP 2023). It is argued that this technique can provide a new insight into reforming criminal justice not only in Indonesia but also elsewhere such as in the Netherlands and the United States of America(Gunawan & Sholehuddin, 2023).

The other purpose of this journal is to raise questions regarding the limitations imposed in sentencing policy and sentencing formulation which hinder it from addressing economic crimes, especially the one with huge damages or huge economic gain from the crime, at the end of this paper. To conclude this paper, a recommendation to address these findings that are based on the theories explained in the Result and Discussion is formulated.

## 2. THEORETICAL FRAMEWORK

Sociologically, the current penal law is too preoccupied with proving and calculating the mens rea burden of the perpetrator, and at the same time, consciously or unconsciously, paying little attention to the value of the victim's losses. Instead of reducing the crime rate, the conditions where victims suffer small nominal losses trigger excessive criminalization due to the absence of guidelines that lead to fair, efficient, and effective solutions(Teng Junaidi Gunawan, 2023). A further impact of that condition, it has caused law enforcement officers to carry out long-winded criminal procedures. As a result, the state and the perpetrators are carried away by the flow of the criminal justice procedure which takes up time and resources. Apart from that, it is considered that overcriminalization is doubtful in terms of providing a criminal deterrent for perpetrators because the perpetrators themselves believe that they have been treated unfairly in the criminal legal process.

On the other side, the problem of decriminalization or the sentencing weight that is too little is also rarely under the scope of study to amend it, except for Gary S. Becker who is very influential in this research. A lot of social soughings or opinions that the final result of Indonesia's Penal Law is unjust, which was argued by an economist named Rimawan Pradiptyo that stated the sentencing in penal law is unjust(Dessy Suciati Saputri, 2013).

This research discussion proposes two (2) simple study materials from 2 different legal materials, namely from the Indonesian current Criminal Code Book / KUHP, and the next namely the 2023 Criminal Code Book / KUHP 2023. Through these two study materials, one of ordinary economic crimes offense; or what is also known as "crimes against property" ("kejahatan terhadap harta benda") (Chazawi, 2021), will be analyzed with its maximum sentence provision for the convict in the heaviest conditions that the legal rules allow. At the same time, an assumption or presumption is applied that the profit or the gain of crime has been used up by the perpetrator so that there is no possibility of returning some of it, nor returning all of it in total. The victim's losses then are compared to them with several possible losses arising from several example cases.

As explained above, the separation between criminal justice law (/penal law) and civil law (/tort law), is a separation of the perpetrator's responsibility for the victim's losses so that the victim's losses will be brought or fought for in civil law. This can be seen from the victim's choice to hold the perpetrator directly responsible for the victim's losses which can only be obtained from a civil lawsuit separate from the criminal lawsuit (Article 1365 of the Indonesia Civil Code), or by combining compensation cases as regulated in Article 89, and its procedures in Articles 99 to 101 of Law No. 8 of 1981 concerning Criminal Procedure Code Book (In Indonesia is called in abbreviation as KUHAP).

As the merger of victim compensation in penal law is stated to be treated as in a tort law based on Article 101 of the Criminal Procedure Code Book (KUHAP), whereas any tort law sanctions are limited to, among other things: a) the provisions of Article 19 section (2) of Indonesian Law No. 39 of 1999 concerning Human Rights which is quoted in a free translation: No one may, upon a court decision, be sentenced to prison or to confinement based on reasons of inability to fulfill an obligation in a debt (quoted directly in Indonesian: "tidak seorang juga atas putusan pengadilan boleh dipidana penjara atau kurungan berdasarkan atas alasan ketidakmampuan untuk memenuhi suatu kewajiban dalam perjanjian utang piutang"); b) in social justice; theoretically, there is state protection for the most disadvantaged people to be raised to a humane level as mandated by John Rawls' Theory of Justice (Rawls, 1971), and its implementation by providing protection for debtors in bankruptcy and postponing debt payment obligations.

The separation of criminal victims' compensation into civil law is limited by Article 2 paragraph (1) of Indonesian Law No. 37 of 2004 concerning Bankruptcy and Postponement of Debt Payment Obligations, so that when the criminal perpetrator can no

longer pay, the Tort Law, in theory, requires him to be released and restored after all his assets have been confiscated, leading to the perpetrator's bankruptcy. In other words, except for being impoverished; or the criminal perpetrator's asset confiscation, the convict's responsibility for the victim's losses or compensation is unlikely to result in the additional burden of a criminal prison sentence to the convict.

In circumstances as specified above, namely that the perpetrator is completely unable to pay for the victim's losses, then in the current Criminal Code the burden of criminal sanctions that can be indicted is only found at the maximum threat of the prison sentence formulation.

In a previous first author's article, it was stated that the problem in the criminal justice system is that there are no scales used to weigh the prison sentence imposed as a substitute against the victim's losses compensation so it can be unfair to the defendant and also unfair to the victim(Teng Junaidi Gunawan, 2023). Through efforts to find value equality between prison sentences and fine sentences, it is proposed a conversion formulation that tries to look at the community's perspective on prison sentences (/imprisonment sanctions) by comparing and equalizing it with the economic value obtained by other people who work in the most disadvantaged conditions at the same timeTeng Junaidi Gunawan, "Equivalence Formulation Between Prison Sentences And Fine Sentences That Prioritising Fine Sentences," The Lawyer Quarterly 13, no. 3 (2023).. Therefore, this paper proposes that the economic value of a prison sentence per length of time should be equal to the economic value that any person can gain through the same length of time while doing legit work in the worst conditions.

Thus, this will ensure that the economic value of the prison sentence per time will not be bigger than the economic value of any other person working legally in the worst condition; as one representing Ralws' "the least advantaged", except if additional effort by the imprisoned person is present. This will also send the message to the public that in a prison sentence, the perpetrator of the crime will also pay as long as the other least advantaged people. Using economic analysis of the Indonesia penal law both before and after the full implementation of KUHP 2023, by presenting the value of a specific length of a prison sentence and comparing it to the economic gain of any ordinary people who are working legally in the worst condition; which can be represented by the regional minimum wage such as the country/city minimum wage.

To evaluate the weight of a prison sentence of a specific length, the prior study that proposed to find the equivalence formulation between a specific length of prison sentence with its fine sentence is used. These two sentences act as an alternative or substitute for each other, however, it is found that the value between these two is not equal. The finding is the fine sentence of the current KUHP is very small; even after being amended by the Supreme Court Ruling Number 2 of 2012, which hinders the implementation of a double-track sentencing system(Gunawan, 2023).

The finding proposes to evaluate the prison sentence of a specific length to have an economic value which in turn can be used to formulate an equal fine sentence that substitutes that specific length of prison sentence. The use of a reference value that should represent how ordinary people judge the weight of a prison sentence is proposed using the regional minimum wage, which in Indonesia is determined every year using the country/city minimum wage (In Indonesian "upah minimum kabupaten/kota" or abbreviated as UMK), the regulation referring to the use and yearly changes is provisioned in the Minister of Manpower Regulation no. 15 of 2018 concerning Minimum Wages.

Hence, to formulate the equivalent fine sentence of a specific length prison sentence, the equation of fine sentence for x months of prison sentence is formulated using a mathematic equation as the x months of prison multiplied by country/city minimum wage (in Rp/ month unit), and vice-versa; the same formulation applied in reverse and can be

gained from it(Gunawan, 2023). Where the X length prison sentence is equal to the Y amount of fine sentence, then the Y amount of fine sentence is equal and must be able to substitute the X length prison in that area in the same year.

Further effort of this study is proposing to weigh both the prison sentence and the damages caused by a crime in economic values; which in economic crime is easily can be detected and calculated. This argues the weight of a fine sentence should be the same weight of mens rea, then should this formulation can be used to evaluate and equate the weight of the victim's losses, and therefore the combined weight of a prison sentence as the substitute for fine sentence and victim's restitution.

This research paper uses the Fraudulent Article both in KUHP and KUHP 2023 and evaluate all of its possible additional sentence, or its alternatives. In the current Penal Code Book, the theft Article is stated in Article 378 of KUHP where the offense of fraud is punishable by a maximum prison sentence of four (4) years.

In KUHP 2023, the Fraudulent Article is provisioned in Article 492 KUHP 2023; with also a maximum prison sentence of four (4) years but with additional formulation with a maximum fine sentence Category V, and other Articles which are able to increase the weight of prison sentence such as Article 79 Section (1) letter e.; fine sentence Category V is currently equal to "Rp500.000.000,00 (lima ratus juta rupiah)" or five hundred-million-rupiah, Article 64 of KUHP 2023, Article 66 of KUHP 2023: additional penal sentence, especially Article 66 Section (1) letter d of KUHP 2023: "pembayaran ganti rugi" (paying the restitution [to the victim]), and Article 66 Section (2) of KUHP 2023, Articles to implement fine sentence restitution which are the Article 81 to 83 of KUHP 2023, and Article 94 of KUHP 2023 which is in Section (1) is about paying the restitution to the victim or the victim's heir, and Section (2) is about equalizing the paying the restitution sentence to be treated equally as a fine sentence.

This paper presents a comparison between the maximum length of a prison sentence for one sample of criminal code provision with the possible damages that can be caused by that specific criminal code article, provides an economic value to the maximum provision, and provides proof that economic value of the maximum sentence can easily be passed.

In this theoretical framework using two of Jeremy Bentham's sentencing guidance which are the requirement of punishment must always "outweigh" the profit of the offence(Bentham et al., 1935), and the weight of sentencing must consist of the "primary mischief"; which refers to the victims' damages/mischief, and the "secondary mischief"; which is referring to the damages caused to the society as the weight of mens rea(Bentham et al., 1935). This theory requires the just criminal justice system to include the victims' restitution in formulating the weight of the criminal sentence.

Another important theory that must be used in this paper is the criminal deterrent theory which is derived from Bentham's sentencing guidance. It is argued when the criminal justice system can provide a sentencing system; as a sentencing policy, sentencing guideline, and sentencing formulation, that ensures taking the benefit of the crime and taking more of it, then, it sends a simple message to the perpetrator and the people around that doing a crime will put the perpetrator in a disadvantage position. Thus, the formula of this sentencing formulation is the formula to achieve criminal deterrent, by attacking directly the source motive of any economic crime by taking more than the benefit of a crime(Teng Junaidi Gunawan, 2023).

Additional concepts also must be understood, in this study, the perpetrator of a crime is assumed to be single, so the victim's losses will always be the benefit of the perpetrator. This is always true for a property crime without the interference of the second party perpetrator acting as fencing of stolen goods(Teng Junaidi Gunawan, 2023). This concept can also be extended in a further study done earlier which shows if any crime is done by

more than one perpetrator, by ensuring the perpetrator is responsible for the losses by enforcing a prison sentence equal more to the victims' losses; therefore the victim's losses is equal to the benefit of the crime, the perpetrator will try to restore the damages even is given a fair incentive to paying it with the equal proportion of prison sentence reduction(Teng Junaidi Gunawan, 2023). This concept can be translated as a sentencing system that will follow the money to the perpetrators who gain the crime benefit.

Furthermore, to provide proof that there is and will always be a condition where the benefit of a crime can outweigh the maximum sentencing burden present by its sentencing limitation, ten (10) ordinary economic crime cases and some other economic crime that has huge damages are presented to prove that the profit of an ordinary economic crime can easily outweigh the economic value of the maximum sentence provisioned. To support the recommendation, other nations' maximum prison sentence limitation is also presented.

### **3. METHODOLOGY**

In compiling this research, a normative research method is used which examines existing legal sources; which in this case, the object of this study is the Indonesia Law Number 1 of 1946 of the Republic of Indonesia concerning Criminal Law Regulations or also called the Penal Code Book Republic of Indonesia (hereinafter abbreviated as KUHP), Academic Manuscript of the Latest Penal Code Book Draft of 2015 (Nasional et al., 2015), and Indonesia Law Number 1 of 2023 (hereinafter abbreviated as KUHP 2023), then the sources are analyzed using economic analysis of law, based on relevant theories such as the rational choice theory by Gary S. Becker (Prakoso, 2013), the integrated sentencing purpose theory by Muladi (Muladi & Sulistyani, 2020), (which integrates three theories such as the rehabilitative sentencing purpose – Jeremy Betham, the modern retributive sentencing purpose theory especially the Just Desert theory by Sue Titus Reid) (Sholehuddin, 2003), and the older version economic analysis which especially emphasizes the perspective of the perpetrator with risk-benefit ratio analysis. In addition, the comparative approach (or micro comparison) (Jonaedi Efendi et al., 2018)is also used here to try to compare the maximum limitations of criminal sanctions in various countries such as the United States, Thailand, Brazil, Colombia, and countries from various other parts of the world.

### **4. RESULTS AND DISCUSSION**

#### **A. The Economic Analysis Of Sentencing Formulation, Its Maximum Prison Sentences Limitation Of KUHP, And The Example Of Ordinary Economic Crime With A Large Value Of Damages**

In the analysis of the threat of sanctions under Article 378 of KUHP for the fraud offense, the maximum threat of prison sentence is four (4) years with no other further sentencing option. It is proposed the economic value of that article is equivalent to four years for another person who was working in the same place at the time the crime occurred. Assuming the crime occurred in the city of Surabaya and was carried out in 2023, the economic value of a four-year prison sentence is using the reference value of Surabaya's minimum wage in 2023, which is (Rp4.525.479,- /month) (Keputusan Gubernur Jawa Timur Nomor 188/189/KPTS/013/2022, 2023) or four million five hundred twenty-five thousand four hundred seventy-nine rupiah per month. Therefore, a four-year prison sentence should have an economic value of two hundred ten million twenty-two thousand nine hundred and ninety-two rupiah (Rp.217.222.992,-), where the notion of ',' and '.' in Indonesian numbers are used in revered.

The results of this analysis support the idea that our current Criminal Law is unable to ensure the taking of profits from the perpetrators of the crime. When the perpetrator deliberately spends or hides the gain of one's crime, and the value of the profits obtained is greater than two hundred ten million twenty-two thousand nine hundred and ninety-two rupiah (Rp.217.222.992,-). Then it is certain that the perpetrator will get a profit because other people who work in less fortunate circumstances will get this economic value by working longer than the time the perpetrator served in prison.

As general knowledge shows there are many cases where the value of victim losses is far from this figure. Presented below is a table of ten (10) property crime cases between 2015 and 2020 with a value of more than four hundred million rupiah (Rp. 400,000,000) to prove the possibility of crimes that cause losses beyond the ability of the criminal law to deal with them. This 400 million rupiah itself is used as a reference as it represents almost double the length of a prison sentence for the fraud offense.

Table: List of 10 Property crimes with Damages More Than 400 million Rupiah.

| No. | Supreme Court Verdict Number | Articles Indicted   | The Damages Amount |
|-----|------------------------------|---|--------------------|
| 1   | 6/PID/2016/PT BJM            | Article 372 KUHP  | Rp1.800.000.000    |
| 2   | 55/Pid./2015/PT PTK          | Article 378 jo. Article 64 Section (1) KUHP   | Rp2.700.000.000    |
| 3   | 301 K/PID.SUS/2017           | Article 378 jo. Article 55 Section (1) point 1 KUHP   | Rp8.000.000.000    |
| 4   | 43/Pid.B/2020/PN Jkt.Pst     | Article 378 KUHP  | Rp10.000.000.000   |
| 5   | 1420/Pid.B/2018/PN Jkt.User  | Article 378 jo. Article 55 Section (1) point 1 KUHP   | Rp10.000.000.000   |
| 6   | 203/Pid.B/2018/PN Smn        | Article 378 jo. Article 55 Section (1) point 1 jo. Article 64 Section (1) KUHP                      | Rp10.000.000.000   |
| 7   | 318 /Pid.B.Sus/2015/PN.SBY   | Article 378 jo. Article 64 Section (1) KUHP   | Rp21.641.306.581   |
| 8   | 251/Pid/2020/PT SMG          | Article 363 Ayat (1) ke (4) jo. Article 64 Section (1) KUHP   | Rp27.847.500.000   |
| 9   | 1128/Pid.B/2015/PN.BTM       | Article 374 jo. Article 55 Section (1) point 1 jo. Article 64 Section (1) KUHP                      | Rp36.866.180.700   |
| 10  | 78/Pid.B/2014/PN-Lsm         | Article 49 Ayat (1) Banking Law jo. Article 55 Section (1) point 1 Jo Article 1 65 Section (1) KUHP | Rp75.000.000.000   |

Several additional examples of cases where the crime losses were extraordinary, for example: a) the Pandawa Group investment fraud case which began to be revealed in 2016 with a value of losses estimated at 400-billion-rupiah; b) PT. Qurnia Subur Alam Raya was unable to pay debts amounting to 476-billion-rupiah to 6,480 investors and was trialed and sentenced to 8 years in prison and a fine of 10 billion rupiah; c) the fraud case of PT. First Anugerah Karya Wisata or First Travel; Hajj and Umrah travel agency, in

2017 with a value of losses, in that case, reaching 905-billion-rupiah; d) the Golden Traders Indonesia case is said to have taken away customers' money and gold amounting to 10-trillion-rupiah, and finally; e) the alleged investment fraud case in the Indosurya Savings and Loans Union which is expected to reach a value of 106-trillion rupiah(Rahel Narda Chaterine, 2022).

Even though in the end these demands and indictments are accumulated and/or aggravated by several other criminal articles, a simple economic analysis that compares the results of the prison sentence verdict assumes that no one will want to pay the fine; because the subsidiary penalty instead of a fine sentence only carries a maximum penalty of six (6) months; or eight (8) months for an aggravated penalty, in detention, or the equivalent of only twenty-six million twenty-five thousand eight hundred and seventy-four rupiah (Rp. 27,152,874,-) and thirty-five million three thousand eight hundred thirty-two rupiah (Rp. 36,203,832,-) for 6 months and eight 8 months of Surabaya UMK in 2023. So, it shows the irrationality in the sentencing policy regarding formulating a vice-versa formulation between the prison sentence and its fine sentence alternative, which if not paid fully; rationally, should go back to the original prison sentence.

Furthermore, it is not yet deducted from the certainty of getting remission by just doing good in prison. So, it is impossible for the current KUHP's maximum limit of sentencing will never touch the value of the losses caused to the victim; in the abovementioned conditions with large damage, which is also the value of the profits obtained by the crime perpetrator from the victim or victims.

These conditions show its sentencing policy and its sentencing formulation in current KUHP are irrational, where: a) there is no sentencing structure, sentencing guideline, nor even sentencing formulation; b) the fine sentence, its equivalent with its prison sentence alternative, and the alternative to the fine sentence equivalent cannot be found and irrational; c) the separation of criminal liability weight or burden into two systems where the victim's losses are imposed in the tort law, hinder the current criminal justice system to: i) put the focus on the victim as requested by a victim-oriented criminal justice system, and; ii) be able to identify the missing variable than ensure its ability to achieves its purposes, and most of all; d) the current KUHP sentencing policy cannot ensure criminal deterrent, as the maximum prison sentence provision even cannot outweigh the profit of the crime with a great loss.

## B. The Economic Analysis Of Sentencing Formulation And Its Maximum Prison Sentences Limitation of KUHP 2023

The analysis of the 2023 Criminal Code below also still has weaknesses even though there have been significant improvements. It must be recognized and appreciated that the drafting of the 2023 Criminal Code is a milestone in the Indonesian legal world, especially Indonesian criminal law which has been imprisoned in discourse colonialism, from time to time criminal law experts agree to exert efforts to give birth to criminal law that is truly born from the womb of the soul of the Indonesian people.

**Significant improvements** The 2023 Criminal Code already has advantages over the current Criminal Code, which at least is seen from several aspects, namely: 1) Already considering the victim losses that must be met in the Criminal Law (Vide: Article 66 Paragraph (1) letter d); 2) Open the opportunity for the Panel of Judges to impose a sentence by combining the main crime with other additional crimes in Article 66 paragraph (1) so that the formulation of the sentence becomes a cumulative formula between criminal fines and criminal compensation to the victim; 3) Based on Articles 81 to 83 of the 2023 Criminal Code, it refers to better changes that combine impoverishment of convicts equivalent to bankruptcy efforts of convicts and impose additional burdens if not paid, namely as quoted from Article 83 Paragraph (1) of the 2023 Criminal Code: "... replaced with imprisonment for a minimum of 1 (one) year and a maximum as threatened for the Crime concerned". This formulation has at least tried to balance in two directions

the prison sentence and the alternative fine so that in simple terms it can be read as a maximum prison sentence of X or a maximum fine of Y, which if not paid fully returns to the maximum prison sentence X.

Without prejudice to respect for the services of criminal law experts who have contributed a lot to the preparation of the 2023 Criminal Code, it is argued that there must be efforts for the 2023 Criminal Code to be open for academic review for a better and more ready to be implemented Criminal Code to realize the basic ideals of legal reform(Sholehuddin, 2003).

In the 2023 Criminal Code, on the other hand, the idea of imposing criminal sanctions on losses caused to victims has been accommodated and has been separated from the Civil Law to be reunited into criminal law. This can be seen from Article 66 Paragraph (1) letter d, and its implementation which is equivalent to a criminal fine, namely based on Article 94 of the 2023 Criminal Code, especially Paragraph (2). In the 2023 Criminal Code, there is an opportunity for the Panel of Judges to impose a sentence in the form of cumulation between the main crime and the crimes, he added as formulated in Article 66 paragraph (1), this formulation is affirmed in the provisions of Article 66 paragraph (2) of the 2023 Criminal Code.

Thus, this formulation allows doubling the threat of the principal imprisonment sanction imposed by the Panel of Judges to be added with an additional criminal subsidiary payment of compensation which if not paid in full can be reimbursed; especially for losses greater than ten million rupiah (Rp10,000,000,-); Category II Fine, with "the longest as threatened for the Crime concerned" (Vide: Article 83 Paragraph (1) of the 2023 Criminal Code). It can be assumed that this formulation can double the maximum threat of fraud criminal offenses from four (4) years to up to eight (8) years, of which four (4) additional years are obtained from the principal crime acting as an alternative to Category V fines (Vide: Article 492 of the Criminal Code 2023 fraud offenses) that are not fully paid, and an additional four (4) years are obtained from the criminal alternative of unpaid damages.

The profit and risk ratio study is again submitted with the same analysis formulation in assessing the maximum threat of criminal sanctions in the 2023 Criminal Code. Thus, the maximum threat of imprisonment from the subsidiary criminal fine and the subsidiary criminal compensation reaching eight (8) years will have a value of four hundred twenty million forty-five thousand nine hundred and eighty-four rupiah (Rp434,445,984,- = Rp4,525,479 / month x 12 months/year x 8 years). This is certainly of very small value compared to the potential that may arise, some of the cases above have seen the value of losses reaching hundreds of billions to hundreds of trillions.

The above situation is a big question that makes the idea of a study of the maximum limitation of criminal sanctions for economic crimes argue, perhaps it is worth considering returning to Jeremy Bentham's suggestion: not to limit the threat of criminal sanctions as a whole, but only to the maximum threat of mens rea burden alone. At least, when yearning for a Criminal Law that can provide deterrent power and educate convicts not to do the same, Bentham's provisions need to be considered that punishment must ensure the taking of crime profits.

It is argued that it is impossible to educate criminals if, in the end, everyone can judge at the end of the Criminal Law, even the maximum prison penalty allowed by law is not able to pursue the economic value of the losses caused, thus a society with this simple economic study can judge the convict to pay the profits of the crime he committed in a much shorter time than everyone who works legitimately.

It is also submitted as additional material for consideration, the identification of weaknesses in the 2023 Criminal Code, especially the formulation of the criminal value of fines Category V and above which in theory rational choice or rational human choice is

subject to economic ratios alone, it is seen that the existence of such large fine values is very likely to be ineffective because it is very unlikely to get payment from the convicted for obvious reasons: Alternative/subsidiary criminal sanctions from these criminal fines are very limited in the formulation of each delict. Even in the value of the basic criminal threat, namely imprisonment which is generally limited to twenty (20) years as formulated in Article 68 Paragraph (4), the formulation of the economic analysis study shows that twenty (20) years of imprisonment is only able to reach an economic value of one billion fifty million one hundred fourteen thousand nine hundred sixty rupiah (Rp1,086,114,960,-) for MSE value in 2023.

The preceding writing questioned the Judge's willingness to impose criminal sanctions in an alternative threat model; imprisonment x years or fine y rupiah, for Criminal Category Fines I to IV because it is too light compared to the maximum prison sentence: 7 years imprisonment compared to the achievement of the general public against the criminal Category Criminal Fine IV which is only three (3) years nine (9) months and twenty-two (22) days, and so on Meanwhile, the effectiveness of the formulation of criminal fines is so large in the Criminal Category of Fines VI and above compared to the limitations of imprisonment in general which are only 20 years or around Rp1.086.114.960,-.

To present a review of the above arguments, a simple table is proposed below:

Table 2: Comparison Between Fine Sentence Structure and Its Theoretical Estimated Prison Length as the Fine Sentence Substitute Using 2023 Surabaya's UMK

| The Reference Value        |  | Rp4.525.479  | Theoretical Verdict |           |         |
|----------------------------|--|--|---------------------|-----------|---------|
| The Fine Sentence Category | The Maximum Fine Sentence Value According to KUHP 2023 | Theoretical Estimated Prison Length As The Fine Substitute (in months) | In Year             | In Months | In Days |
| I                          | 1.000.000  | 0,22   | 0                   | 0         | 7       |
| II                         | 10.000.000   | 2,21   | 0                   | 2         | 9       |
| III                        | 50.000.000   | 11,05  | 0                   | 11        | 2       |
| IV                         | 200.000.000  | 44,19  | 3                   | 8         | 7       |
| V                          | 500.000.000  | 110,48   | 9                   | 2         | 14      |
| VI                         | 2.000.000.000  | 441,94   | 36                  | 9         | 28      |
| VII                        | 5.000.000.000  | 1.104,85   | 92                  | 0         | 26      |
| VIII                       | 50.000.000.000   | 11.048,55  | 920                 | 8         | 16      |

In addition, it also filed a comparison of cases that concentrated on losses, returns, and criminal sanctions that sought reasons for justice for the First Travel fraud verdict whose loss value reached Rp. 905,330,000,000, - or almost 1 trillion Rupiah which was money from 63,310 pilgrims who canceled their departure, while the return efforts obtained from the perpetrators were only around 40 billion Rupiah (Jawapos.com, 2019) - or a shortfall of around 860 billion Rupiah. Such a situation both in theory and practice in the current Criminal Law and in the criminal law in the future (Criminal Code 2023), such a situation displays the inadequacy of maximum sanctions in fraud offenses; and in the broader context of ordinary economic crimes, in achieving justice for enormous losses.

The above conditions occur due to the threat model and the formulation of prison sanctions that limit cumulatively both in general: 20 years of imprisonment by Article 12 Paragraphs (3) and (4) of the Criminal Code, as well as specifically each formulation of offenses that limit the maximum imprisonment sanctions that may be imposed. Even

further, it can be detected that weaknesses in the penal system or the theory of the penal system adopted in Indonesia can be the cause of limitations of criminal sanctions against possible losses that can arise.

This study of the equality of imprisonment and fines can certainly also be used as a comparison and analysis of the possibility of criminal compensation of the same value. With the existing limits on prison penalties, both in general and specifically in each formulation of the delict, it is questionable the possibility of prioritizing perpetrators to pay back compensation as effectively and efficiently as possible. What is clear is that the maximum limitations of criminal sanctions for economic crimes are very beneficial for convicts for events with very large victim losses; as well as benefiting the perpetrator, as some examples of cases revealed above.

This condition also limits the ability of the Criminal Law to apply restorative justice, because of the limited economic value of imprisonment; In terms of pure economic ratios, it is very unlikely that the convict will try to pay back the victim's losses, because by choosing his prison sentence even at the highest risk still benefits the convict.

In addition, there is an effort with a fairly new concept in the formulation of enforcement of criminal sanctions for fines in the 2023 Criminal Code, namely the concept of impoverishment. The codification of the concept can be seen in Article 81 paragraph (3). However, with many expressions of the lack of functioning of impoverishment efforts that have been carried out in Law No. 31 of 1999, especially in Article 18 of Law No. 31 of 1999, as revealed by Donal Fariz, many problems arise in the implementation of corrupt impoverishment efforts([detiknews.com](https://detiknews.com), 2023). This condition is very likely to be explained even in ordinary property crimes, the existence of this provision without ensuring an increase in imprisonment commensurate with the proceeds of crime profits even though it has been through impoverishment efforts will always provide room for the occurrence of crimes to benefit the perpetrators. In economic analysis and rational choice theory, while paying back the profits of crime is less profitable than paying them by serving much more profitable corporal punishment, the urge not to pay, including to flee assets to the holder of the proceeds of the crime, or spend them before being sentenced to imprisonment, is much more beneficial to the perpetrator. Ultimately, without an equitable formulation of imprisonment that reimburses the offender for losses not returned the only way to ensure the result of the criminal law going forward is always to ensure the crime does not benefit the offender.

Departing from these conditions, the author through the design of a deterrent restorative justice-based Criminal Law proposes a collision with these limitations, which will be proposed in the next writing as a formulation of restorative justice-based punishment that is deterrent and responsive, a formulation that is expected to provide clarity or transparency of the size of punishment based on efforts to recover the losses of victims and the community or community; from the weight of mens rea, which is firm and measurable (with the nature of the purpose of retributive punishment), which at the same time is educational by providing deterrent power (with the nature of rehabilitative punishment objectives), and at the same time is restorative and implements an efficient and effective double track penal system; because it requires the formulation of threats and sentences of imprisonment and criminal sanctions that can be paid together, and alternative criminal sanctions that have not been paid proportionately.

This is to ensure that the end of the Penal Code using this idea can ensure that whether paid in full or in part by imprisonment in proportion to the proportion of sanctions not paid, the convict must be burdened with the economic value of the criminal sanction cumulatively equal to the value of his damages and fines; To ensure taking advantage of the crime because the convict must pay more with additional criminal sanctions, compensation, and criminal fines. This equality between imprisonment and fines will support the application of restorative justice in the Criminal Law system that does not

emphasize suffering or hurting perpetrators Gunawan, "Equivalence Formulation Between Prison Sentences And Fine Sentences That Prioritising Fine Sentences.".

### C. Examples in Other Nation with Prison Sentence Higher Limit than 20 Years

It was also proposed to enrich the results of research related to this research suggestion, the results of micro-comparative research on other countries were submitted. In U.S. criminal law, before the implementation of the U.S. Sentencing Guidelines, the maximum penalty for imprisonment did not exist. Citing the world's 10 longest prison sentences, the United States occupies 7 positions. It is argued that the first position should fall on sanctions for Charles Scott Robinson, who in this paper is placed in position 3. In first place went to Chamoy Thipyaso of Thailand who was sentenced to 141,078 years by his judge; however, the limitation of imprisonment in Thailand is only 20 years and only served 8 years ago released, so it is not the toughest prison sentence. The second position is also the same as the sanctions imposed by judges on Otman el-Gnaoui, Jamal Zougam, and Emilio Suarez Trashorras of Spain at 42,924 years but Spain has a maximum limit of 40 years in prison(How Africa, 2018).

Charles Scott Robinson was sentenced to imprisonment of 30,000 (thirty thousand) years with a calculation of 5,000 years for every rape of a 3-year-old child 6 (six) times(Godfrey, 2021). For imprisonment, sanctions beyond life imprisonment can be traced from legal sources from the Internet with the title "List of longest prison sentences" seen several countries included in the list such as South Africa, Australia, Brazil, the Philippines, Mexico, Guatemala, New Zealand, Puerto Rico, Sri Lanka, and Turkey(Godfrey, 2021).

Also seen in other legal materials is a list of countries that do not limit the maximum prison penalty before being sentenced to life imprisonment, among others: Australia, Austria, Belgium, Bulgaria, Canada, Denmark, Estonia, Finland, Germany, Republic of Ireland, Lebanon, Lithuania, and others on this list (unless found fault in the Netherlands which is limited to 30 years in this table is not limited). Some countries with a maximum witness prison sentence of more than 20 years before life imprisonment include Brazil: 40 years, Croatia: 40 years, the Czech Republic: 30 years, Macau – China: 30 years, Uruguay: 45 years, and Mexico: 74 years(Nation Master, 2021).

The above source of legal material is reinforced by the Nation Master which shows that most countries in the world do not have or set a maximum limit of imprisonment before life imprisonment. Countries with the highest order of maximum imprisonment before life imprisonment include El-Salvador: 75 years, Mexico 70 years, Colombia: 60 years, Panama 50 years, and several other examples(Nation Master, 2021).

Chamoy Thipyaso of Thailand was sentenced to 141,078 years by his judge for corporate crimes against 16,231 people in a \$300 million pyramid scheme at the time(Lindsay Stidham, 2017), José Luis González González received Mexico's longest prison sentence in 2012 with 2,035 years in multiple frauds, and Sholam Weiss who was sentenced to 845 years in prison in 2000 for his participation in the bankruptcy of the National Heritage Life Insurance Corporation in New York, Dwayne Whitaker to 439 years in 2014 – for multiple attempted robberies, and theft in the first degree, and Bernard Madoff who in 2009 admitted to fraudulent Ponzi schemes of thousands of investors and sentenced to 150 years.

The table and explanation above also confirm Jeremy Bentham's warning against the formulation of criminal sanctions that have been established or limited by law: "This is the case whenever the punishment is fixed while the profit of delinquency is indefinite; or, more precisely, when the punishment is limited to something that can be surpassed by the profit of delinquency" which in free translation "This is the case the sanction has been determined (or limited) while the profit of the offense is not determined; or, rather, when

the conviction is limited by something that can be exceeded the advantage of the offense"(Bentham et al., 1935).

## 5. CONCLUSION

Based on the description above, it is argued that the limitation of the maximum threat code and formulation of a prison sentence in both the current Penal Code Book (KUHP) and the 2023 Penal Code Book (KUHP 2023) limits its ability to offset the balance of justice, especially for economic crime offences with high economic losses. Thus, it is logical to question the ability of the maximum threat of imprisonment for each Penal Code Book to protect society against such ordinary economic offences with such damages, encourage restorative effort of these conditions, encourage convicts to pay compensation and fines, as well as provide a criminal deterrent.

The effort to provide criminal deterrent in KUHP 2023 is using the effort of impoverishment; confiscating the perpetrator's assets is analyzed and argued it will not achieve its purpose. As long there is an upper limit in a sentencing formulation that is not derived or equal to the damages caused by a crime and its restitution in the form of fine and/or victim's restitution, then this study shows if the benefit of crime is great and the criminal sentencing in the form of prison sentence is light, the economic analysis dictates with a considerable potential that: a) there is always an effort to hide the profits of the crime, and; b) the current sentencing policy as a system will never ensure to all criminal cases to full fill the principle that should hold in any criminal justice system; which is ensuring crime does not pay to the perpetrator.

As a suggestion, if the maximum limit formulation here is intended as the maximum limits of mens rea, it is still acceptable. But, when it became the maximum limit of the sentencing as provisioned in each Article as a whole, this condition is unacceptable as it will limit itself against its ability to achieve justice and to provide a deterrent. Future sentencing formulation should consider opening the weight of prison sentence as a substitute, with equal economic value, to the fine sentence and the victim's restitution, following the sentencing formulation or guidance from Jeremy Bentham that the weight of sentencing must consider the "primary mischief; or the victims' restitution sentence, and the "secondary mischief"; or the fine sentence.

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