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Imprisonment and Fine Sentence Inequivalence in Netherland's Criminal Law

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Abstract. In the effort of renewing Indonesian criminal law; or criminal justice, which until now there is an empty norm that can rationally explain the crime perpetrator is convicted to a sentence of 2 years imprisonment, 3 months of imprisonment, or criminal fine of a certain amount, this study proposed a finding of above-mentioned research's idea with micro comparisons between Indonesian and Netherland criminal law and criminal sentencing. This normative legal research is part of a larger study, namely the equivalent formulations formulation of imprisonment and fines, which in this study discuss the findings of imprisonment and criminal fine inequality, including violations to the theory of double track or dualistic sentencing system in Netherland. The analysis of criminal sanctions in the Netherlands uses economic analysis of criminal / penal sentence. With legal research approach of statute approach and micro comparison approach between Indonesian and Dutch criminal law, the same weaknesses that greatly influence criminal law to apply restorative justice both in Indonesia and; especially in this writing, in the Netherlands. Without prison and fine criminal equivalency, and criminal fine that is too low as alternative penal sanctions to imprisonment; that are worthy of being convicted to the perpetrator, the judge will be reluctantly impose the fine sentence, in such that it pushes the end result of criminal justice only to the option of hurting the perpetrator rather than to restore conditions caused by the damages of a crime.

Keywords. economic analysis of law, restorative justice, renewal of criminal law, chance, deterrent power theory

Introduction

Criminal law is about crime or violations; which is simply seen as an act that is prohibited by law, and the consequence of violations of the prohibition called criminal /penal sanctions, penal sentence / sentencing, or punishment.(Pecker, 1968) Currently, there are still empty norms in criminal law, especially that lays the foundation of a sentencing that has deterrent, is fair and measurable. The empty norms mentioned includes: the empty norm that provide an explanation of why a criminal offender was sentenced to imprisonment or criminal sanctions in the form of a fine, the empty norm of formulation that determines the value of criminal fine which is equivalent to the imprisonment sentence; as its alternative, including the empty norm for formulating sentencing structure and sentencing guidelines, which can at least can provide clarity from the perspective of economic analysis.

Gerry A. Freguson stated the absence of a clear consensus regarding the actual theory of sentencing that underlying the penal sentence.(Sholehuddin, 2007) The expression was also

reinforced by Kaplan quoted by Barda Nawawi Arief who expressed: The penal sanctions available for different codes are different, at all without a basis or rational basis, different sanctions are often just a reflection of small and not crucial differences (Arief, 2011). Three problems above are rarely discussed both inside and outside Indonesia legal research. The rarity of a legal research like this, contributes to the condition which the irrational formulation of criminal sentences is undetected.

This equivalency formulation is very necessary as a sentencing guideline for the judge in imposing criminal sentence that is based on restorative justice, that places imprisonment as the last resort or *ultimum remedium*. This formulation also needed by the legislature as a rational sentencing structure to formulate a double track / dual track / two ways sentencing that coded as an equivalent between imprisonment and criminal fine (next is abbreviated as fine) as a rational and equal alternative to the imprisonment in the first place.

In this study, the findings show inequivalence and irrational fine as an alternative to imprisonment in Dutch criminal law. At least some alternative imprisonment and / or detention for one value of fine, and the same findings are also detected otherwise. So that the reference value cannot be found between fine and imprisonment; as the fine's alternative, that is desired by its lawmaker. Whereas it is argued, the reference value between fine and imprisonment is needed to formulate a rational and fair sentencing; according to common society's view with economic rationale.

Research methods

The type of research used in this study is normative legal research.(Soekanto & Mamudji, 2011) By using primary and secondary legal materials, along with tertiary legal material as supporting material. The research approaches used are

Discussion

Problem in Criminal Law is confirmed by Research M. Sholehuddin which is based on the double track system Theory in the Indonesian Criminal Justice System (CJS), which in this theory requires equivalency of criminal sanction types, especially custodial sentence; especially imprisonment, with sanctions such as compensation, rehabilitation, supervision, and other punishment.(Sholehuddin, 2007) The equivalency of imprisonment and other penal sentence that are economically equivalent in the fine sentence paid to the state, as well as compensation paid to victims, thus, can be interpreted as the formulation of double track sentencing system is between imprisonment and financial sentences that can be measured by economic value.

Modern sentencing system; is argued here, is the application of a two-way sentencing system theory (*zweisprachigkeit*) (Remmeling, 2014), double track system, two track systems, or dualistic sanction that are adopted in the Netherlands (Boone, 2002) and Indonesia, but the application; just as alike in the Netherlands, shows conflicting implementation to what is expected in double track sentencing system. This theory requires in its application, a certain length of imprisonment must have an equal fine sentence as the alternative of imprisonment to begin with, thus if the fine is not paid in full then the cumulation of the combine value of imprisonment and fine which has been paid must be equal to the value of the original amount of fine sentence.

In the absence of an equivalence formulation between imprisonment and fine, thus the formulation to determining how much imprisonment must be carried out due to an unpaid fine is undetermined. Thus, it encouraged the convicted to choose not to pay the fine as long as not getting fair treatment for the good efforts given; paying some of the fine. The fine sentence will also not be imposed by the judge if the judge considers the criminal sanction provisions will

give a sentence formulation of a fine and its default sanctions to the fine that is not paid are undervalued, so that it closes the option of settlement of this crime by being paid by the perpetrators.

Equivalency between an imprisonment and fine sentence with a clear economic value, is hoped that in the future it can be a basic reference value conversion that explains why a person was imposed on a prison sentence with a certain time from the perspective of the property crimes' losses. This equivalency is needed on the imprisonment and / or detention with a certain length of time, which in this case should have equivalent to the measurable value of other criminal sentence or treatment, especially criminal fine sentence (fine) and restitution / recovery to the victim that has clear and measurable unit in the economic value of the country concerned.

The above problems are found not only in Indonesia, but also found in the Netherlands. In the discussion below it was revealed some problems in the Netherlands sentencing which in this study only limited to the crime of property in Netherland / Dutch Criminal Code. In this study the Netherlands Criminal Code / *Wetboek Van Strafrecht* version year 2012 (hereinafter abbreviated as WVS 2012) (*EJTN.Eu, Criminal Code, European Judicial Training Network (EJTN), Belgium, Last Modified on 24 Januari 2014, Accessed on 1st Desember 2020, [Online]*, n.d.) was analyzed and displayed below. In this study, the analysis of the WVS 2012 is quoted and using the unofficial in English translation.

To ensure and convince the judge that the imprisonment; that was considered by the judge deserved to be imposed on the convict, has equivalent value with its alternative fine sentence. Thus, convincing the judge to verdict these two sanctions together as an alternative to be chosen by the convicts.

Discussing of the sentence formulation of the theft article in the Netherlands is described in Section 310 which is quoted: "*a term of imprisonment not exceeding four years or a fine of the fourth category*", which is based on Section 23 points 4 is "€ 19,500". The sentence formulation in WVS 2012 as a total does not pay attention to the value of the victim's loss. The formulation of theft offence article at WVS 2012 is valued per month worth € 406.25 (four hundred and six euros twenty-five cents), while according to Dutch minimum wage data in 2012; especially on 30th June 2012, amounted to € 1,446.5 / month.

The degree or gradation of fine sentence in the WvS 2012 consists of 6 fine categories which are obtained from Section 23 points 4 with categories and values after 1 January 2012 as follows: Category 1: "€ 390"; Category 2: "€ 3,900"; Category 3: "€ 7,800"; Category 4: "€ 19,500"; Category 5: "€ 78,000", and finally; Category 6: "€ 780,000". But tracking in WVS 2012, the fine category 6 is not found in any section that uses it, at least in the translation file obtained.

As an example of a fine sentence gradation with its imprisonment / prison sentence; or the existence of several different imprisonment length alternatives that have the same fine sentence, are: for fine category 4 in addition to Section 310 with a maximum of imprisonment of 4 years, there is also another imprisonment alternatives with different lengths, namely: 2 months of imprisonment in Section 135, 6 months in Section 139A, 1 year in Section 136 and 137E verse 2 or , 1 year 6 months in Section 129, 2 years in Article 118, 3 years in Section 117A and 132, 4 years 6 months in Section 256, and 5 years in Section 111 WVS 2012. While fine category 5 in WVS 2012 is seen as alternative maximum imprisonment with different values such as: 30 years in Section 92 to 95A, 20 years in Section 105, 15 years in Section 98A paragraph 1 (hereinafter abbreviated as 98A(1)) and Section 99, 10 years for Section 96, and 6 years in Section 98 WVS 2012.

The above list does not include all available possibilities and only taken by some up to Section 256 to prove the absence of imprisonment and fine sentence equivalency in the WVS

2012. In addition, it is shown that some imprisonment alternatives to a fine category 2 which has maximum threat of imprisonment alternatives such as: 2 weeks in Section 144, 1 month in Section 148, 2 months in Section 146, 3 months in Section 134, and 4 months in Section 192 paragraph 1 degree 2 ("2 °"), 6 months in Section 283 paragraph 1, and even no imprisonment alternative in Section 378 and 435 WVS 2012.

Based on Section 24A WVS 2012, a fine sentence can be repaid as long as "*a minimum of one month and a maximum of three months*" and certain condition the terms repayment length can be as long as 1 or 2 years. Section 24B WVS 2012 broadly set a term that fine sentence can be added € 15 after the first warning and is raised one-fifth of the value or minimum of € 30 for the second warning. Section 24C paragraph 3 contains provisions if fine sentence and recovery sentence are not paid with default detention with a term minimum one day and maximum one year, and the default detention value for one day worth € 25.

It is noticeable that in the 2012 WVS, there are the same limitations in the Indonesian Criminal Code Book (*Kitab Undang-undang Hukum Pidana* hereinafter abbreviated as KUHP) which currently is encouraging the convict to be reluctant to pay the fine sentence imposed. Some restrictions are seen in Section 24C paragraph 3 which limits the subsidiary / alternative sentence of whatever how much the fine is to a maximum of one year detention, so that the fine category 4 ("€ 19,500") is having a subsidiary sentence in the form of a maximum of one year detention. This condition makes the judge; is argued to be, hesitant to impose fine because of logical reason that question the term of a four-year imprisonment with an alternative of a maximum fine sentence "€ 19,500" which has an alternative of one year detention.

Furthermore, the provisions of the default detention value per day is analyzed to be illogical. The rounding up of a fine sentence per € 25 for each day that is much smaller than € 48.22 per day obtained from the Dutch minimum wage on June 30, 2012. This condition is exacerbated by circumstances in the Netherlands that currently the minimum wage dated 5th February 2021 recorded at € 1685. (*Take-Profit.Org, Netherlands Wages: Minimum And Average, Accessed on 22nd Maret 2021, [Online], (Https://Take-Profit.Org/En/Statistics/Minimum-Wages/Netherlands/)*, n.d.)

When the panel of judges decided to include alternative sanctions for imprisonment with the alternative fine sentence, then the problems mentioned above will make the primary sentence to be weakened because there is a potential for the economic value of imprisonment is greater than fine. Even if the fine sentence is imposed, it will not be paid by the convict because based on simple economic analysis can be concluded default detention is far more profitable than the fine category 4 to 6 based on 2012 minimum wages (1 year = 12 months x € 1,446.5 / Month = € 17,358 which is less than fine category 4: € 19,500).

Penal sentence in WVS 2012 and Indonesian Criminal Code have the same weakness in sentencing formulation when have to be read by the judge as a whole, namely the threat of imprisonment X length with an alternative of fine sentence Y, which if not paid is subjected to default detention Z to the fine sentence. When the sentencing terms is collected only for custodial sentence, the threat provision becomes imprisonment of X or default detention of Z which Z is much smaller value than X.

Theft article in Section 310 WvS 2012 if it is read overall with Section 24A and 24C WvS 2012 becomes: "a term of imprisonment not exceeding four years or a fine of € 19,500, or default detention [to the fine] of one year", which should be detected as a norm conflict. The same conditions found in Indonesia with the open translation of Article 362 of the Criminal Code – *delik pencurian* (theft article), which the fine sentence formulation is amended by Article 3 of Supreme Court Ruling Number 2 of 2012 (*Peraturan Mahkamah Agung* or abbreviated as *PERMA No 2 Tahun 2012*), in conjunction with Article 30 Paragraph (5) & (6)

KUHP; thus, the sentencing formulation is threatened by maximum imprisonment of five [(5)] year, or a maximum fine sentence of nine hundred thousand rupiah [(Rp. 900,000)] with a 6-month default detention to the fine (under [] is added by the writer).

Conclusion

Inequivalence between imprisonment, fine sentence, and its default sentence to the fine sentence is greatly hampered the implementation of imprisonment as the last resort or *ultimum remedium* which is expecting other penal sentence especially monetary based penal sentence to be imposed together with its imprisonment as expected in the theory of double track / dual track sentencing system. Hence, it is recommended to amend the sentencing formulation to be rationalized with economic analysis so that the comparison between fine sentence and imprisonment can be formulated with the amount of fine sentence Y divided by imprisonment X length will always constantly valued according to one reference value for all penal threats inside the future WvS. Furthermore, it is expected that this reference value must be able to follow to follow the development of times and must be equivalent to the economic value assessed by the community as economically just. At least this step is necessary to achieve what is expected in Tokyo Rules: United Nations Minimum Standard Rules for Non-Custodial Measures.

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