



# The Potential Increase Of Penal Burden In 2023 Indonesia Penal Code Book

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## 1. Abstract

Every person who wants to relate to or live in a country is certainly important to pay attention to the laws applied in the country. With the enactment of the new Indonesia Penal Code or Criminal Code Book based on Law Number 1 of 2023 concerning the Penal Code Book (KUHP 2023), it is necessary to observe fundamental and significant changes in the Law in Indonesia, especially on the burden of punishment. The punishment burden is an essential element of Penal Law or Criminal Law. This leads to the analysis of a penal burden. The rationale behind the concept of a penal burden should be emphasized to clarify the definition. A penal burden or also called sentencing weight, a relatively new term, which is a sentencing burden applied in Criminal Law or Penal Law. It is the burden which should be carefully examined and determined by judges sentenced to the crime perpetrator. Thus, it is necessary to observe fundamental and significant changes in the Law in Indonesia after the enactment of KUHP 2023, especially in this study on the changes of the penal burden.

By employing normative research methods, including a statutory approach and a concept approach, this study aims to show changes in the existing penal burden in the 2023 Penal Code Book, especially to emphasize the findings that there is a possibility of doubling or even more of the penal burden contained in the 2023 Penal Code Book compared to the previous Penal Code Book. When comparing the condition before and after the enactment of the 2023 Penal Code Book on January 2, 2026; it is found that there is a doubled-increase, or even more, in the risk of perpetrators committing similar crimes. This notion is proven when there is an additional crime in the form of compensation payment of crimes. The amount of the victim's loss is greater than or equal to the amount of the maximum fine according to the offense imposed on the convict. This indicates a considerable increase in risks for offenders after at least January 2, 2026. Increasing the weight of punishment that ensures the return of losses while ensuring the weight of the sentence to be greater than the benefits obtained from the criminal act is an important improvement to ensure a deterrent Penal Law or Criminal Law.

**Keywords:** 2023 Indonesia Penal Code Book, Economic Analysis of Law, Penal Law, Sentencing, Double Track Sentencing System.

**Received:** 13 December 2024

**Revised:** 22 January 2025

**Accepted:** 30 January 2025

## 2. Introduction

The enactment of Law Number 1 of 2023 concerning the Indonesian Penal Code Book (hereinafter referred to as the 2023 Penal Code Book, or in Indonesian is called KUHP 2023) will come into effect from January 2, 2026 or 3 years from its promulgation in 2023. As formulated in Article 624 of the 2023 Penal Code Book, this law will replace the previous Indonesian Penal Law (hereinafter referred to as the current Penal Code Book). The current Indonesian Penal Code Book itself was formulated in Law of the Republic of Indonesia Number 1 of 1946 of the Republic of Indonesia concerning the Regulation of Penal Law or also called the Indonesian Penal Code Book (in Indonesian is called KUHP).

The current Penal Code Book remains valid today, until January 1, 2026. Its existence can be detected since it was normed in September 1915 and began to be promulgated on January 1, 1918 with the issuance of *Wetboek van strafrecht voor Nederlandsch Indie* Number 732<sup>1</sup>. In its place of origin, namely in the Netherlands, people have already left the book which becomes the source of the Penal Code Book. The Book has been amended several times. Amended in 2012, it resulted in 2012 *Dutch Penal Code Book (Wetboek van Strafrecht)*, hereinafter abbreviated as *WvS*). The latest amendment was done on January 1, 2023. Therefore, *WvS* can even be identified as existing and updated since March 3, 1881<sup>2</sup>.

Carrying a single mission to decolonize the Penal Code Book, sought-after efforts to establish a new Indonesian Penal Code Book have been a complicated process. The mission is an attempt to manifest what is mandated in the preamble to the 1945 Constitution of the Republic of Indonesia, namely "to protect the entire Indonesian nation and to promote general welfare based on Pancasila"<sup>3</sup>. In addition to being backward, the current Penal Code Book also has many significant weaknesses, including (1) the absence of a pattern of punishment; (2) the presence of irrational punishment, especially the lack of equality between imprisonment and fines which became alternative sanctions for imprisonment initially; (3) the weakness of subsidiary fines that are not equivalent to the initial principal imprisonment; and (4) the easily outdated formulation of standard economic values<sup>4</sup>.

On the other hand, as a reference for material Penal Law, both the current Penal Code Book and the 2023 Penal Code Book are very important for every person who wants to relate to or live in the Republic of Indonesia. As a material or substantive Penal Law, the Penal Code Book contains prohibitions on actions that deem criminal acts, formulations that deem such crimes, and formulations of maximum sanctions threats; and sometimes supplementary information concerning formulations of minimal sanctions which can be imposed on violators<sup>5</sup>.

The Indonesian Penal Code Book, especially the 2023 Penal Code Book, is an effort to facilitate access to justice by making it easier to obtain almost all possible criminal acts prohibited in Indonesia including all prohibitions previously found in the various existing laws, comprising corruption and terrorism. The 2023 Penal Code Book is a "total codification policy" in the renewal of Indonesia's Penal Law, which means "national Penal Law only exists and is contained in the Penal Code Book"<sup>6</sup>.

In addition, the Penal Code Book as a material or substantive Penal Law certainly contains three main concepts in Penal Law as revealed by Hebert Pecker: 1) *offence: what conduct should be designated as criminal*; 2) *guilt: what determinations must be made before can be found to have committed a criminal offense*; and 3) *punishment: what should be done with*<sup>7</sup>. The three main concepts can also be referred to by other names, as revealed by Indriyanto Seno Adji as criminal act, criminal liability, sentencing<sup>8</sup>. Accordingly, the material Penal Law contains five essential interrelated building blocks consisting of (1) the criminal

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<sup>1</sup> Andi Hamzah, *Asas-asas Hukum Pidana*, Revised Edition 2008, Rineka Cipta, Jakarta, 2008, p. 19.

<sup>2</sup> Overheid.nl, *Wetboek van Strafrecht*, Rijksoverheid.nl, The Hague, accessed on January 21, 2023, [Online], (<https://wetten.overheid.nl/BWBR0001854/2023-01-01/0>)

<sup>3</sup> Barda Nawawi Arief, *Kebijakan Legislatif Dalam Penanggulangan Kejahatan Dengan Pidana Penjara*, Genta Publishing, Yogyakarta, 4th printing, 2010, p. 1.

<sup>4</sup> T.J. Gunawan, *Keseimbangan Nilai Pidana Penjara dan Nilai Pidana Denda* (translated *The Balance of Imprisonment and Fine Values - Penological Perspective through Economic Analysis Approach*), Kencana, Jakarta, 2022, pp. 104-121.

<sup>5</sup> Topo Santoso, *Hukum Pidana: Suatu Pengantar*, Rajawali Press, Depok, 2020, p. 16-17.

<sup>6</sup> Mudzakkir, et al., *Perencanaan Pembangunan Hukum Nasional Politik Hukum Pidana Dan Sistem Pemidanaan*, Badan Pembinaan Hukum Nasional, Jakarta, 2010, p. 106-107.

<sup>7</sup> Herbert L. Packer, *The Limits of Criminal Sanction*, Stanford University Press, California, 1968, p. 17.

<sup>8</sup> Indriyanto Seno Adji, *Sistem Hukum Pidana & Keadilan Restoratif*, Focus Group Discussion (FGD) material with the theme "Pembangunan Hukum Nasional Yang Mengarah Pada Pendekatan Restorative Justice Dengan Indikator Yang Dapat Terukur Manfaatnya Bagi Masyarakat", Badan Pembinaan Hukum Nasional (BPHN), Jakarta December 1, 2016, p.10.

acts, (2) the formulation of elements that must be met, (3) the maximum threat of punishment, (4) the matters concerning the things becoming the reasons for excuses, and (5) the elimination of criminal liability.

The building blocks can be seen in the 2023 Penal Code Book which is freely translated in Part Two of the 2023 Penal Code Book, about criminal responsibility from Articles 36-39 of the 2023 Penal Code Book, and about the reasons for forgiveness in Articles 40-44 of the 2023 Penal Code Book. These things need to be known because they are the rights of every member of the community which provide opportunities for each person not to be held accountable for criminal acts committed in certain circumstances.

As a result of the promulgation of the 2023 Penal Code Book and the essential building blocks of the material Penal Law, there are two consequences such as follows (1) anyone who wants to live and/or wants to conduct business activities in the Republic of Indonesia, especially after January 2, 2026, must at least know the contents of the 2023 Penal Code Book, (2) anyone who has been staying/living in Indonesia for a long time must understand the fundamental changes due to amendment done to the current Penal Code Book, which is the 2023 Indonesian Penal Code Book. Compared to the old Penal Code, one of the most important changes which makes the 2023 Penal Code Book different is the potential to double, or even more, the burden of punishment.

In addition, the formulation of punishment in the 2023 Penal Code Book can be seen as the application of integrative sentencing objectives theory by Muladi, which integrates in a balanced manner: restorative justice theory, retributive sentencing purpose theory, and relative sentencing purpose theory so that 'retributive justice' is formed in the form of a 'just deserts model' developed with restorative justice theory<sup>9</sup>. The implementation of this theory can also be proven as the implementation of the "double track system" – M. Sholehuddin, which is also stated in the explanation section of Book One No. 8 page 237 of the 2023 Penal Code Book, whose theory asks for all prison sentences to be formulated jointly and in alternative formulations with non-prison sentence in the form of fines / fine sentence and other financial sentence.<sup>10</sup>

In the end, this study wants to reveal the potential for additional penal burden as an increased risk for potential violators when the 2023 Penal Code Book comes into effect, and how the conditions that allow the maximum potential of the penal burden to be applied both in terms of financial penal sentence and penal sentence for deprivation of independence, namely imprisonment.

### 3. Research Methods

This study employs normative research methods, including a statutory approach and a concept approach. The proposed concept approach is several possibilities that may occur involving the criminal value of the imposed fine, the criminal compensation imposed by the judge, and the possibility of the imposed criminal customary obligations. This study aims to determine the changes in the formulation of the threat of penal sentence in the 2023 Penal Code Book and wants to emphasize the findings that there is a possibility of doubling, or even more, the burden of punishment in the 2023 Penal Code Book compared to the promulgation of the previous Penal Code Book.

It is also necessary to disclose the lack of sources of international research materials regarding the 2023 Penal Code Book. This occurs due to the novelty of the 2023 Penal Code Book, resulting in lack of international journals focusing on the analysis of the 2023 Penal Code Book. This research uses legal sources, namely the 2023 Penal Code Book and the old Indonesian Penal Code Book, academic texts that led to the formation of the 2023 Penal Code Book, and other legal materials.

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<sup>9</sup> Muladi and Diah Sulistyani, *Catatan Empat Dekade Perjuangan Turut Mengawal Terwujudnya KUHP NASIONAL (Bagian I, 1980-2020)*, Universitas Semarang Press, 2020, p. 18.

<sup>10</sup> M. Sholehuddin, *Sistem Sanksi Dalam Hukum Pidana – Ide Dasar Double Track System & Implementasinya*, Raja Grafindo Persada, Jakarta, 2007, p. x.

This research will also use an analytical tool based on the theory of economic analysis of law by Richard Posner in which Romli develops into a microeconomic analysis of Penal Law<sup>11</sup>, by proposing risk-benefit analysis by perpetrators; and not the one by the government. Next, in proposing the modeling of human actions in general that will move based on the economic ratios, modeling is proposed based on the rational choice theory which is also used in criminology<sup>12</sup>.

#### 4. Results and Discussion

This study proposes a simple *lexical analysis* of the formulation of sanctions in the 2023 Penal Code Book; which below is loosely translated into English, and its comparison with the current Penal Code Book that is currently still in force. The comparison is between (1) Article 10 of the current Penal Code Book and Article 64 of the 2023 Penal Code Book; (2) Article 10 letter b of the current Penal Code Book and Article 66 of the 2023 Penal Code Book on additional crimes; (3) articles on the application of penal sentence, fines and subsidiaries, especially in Article 30 of the current Penal Code Book and Articles 81-83 of the 2023 Penal Code Book; (4) other articles on the application of additional penal sentence that do not exist in the current Penal Code Book, especially Article 94 of the 2023 Penal Code Book concerning the implementation of criminal compensation payments to victims, and subsidiary sanctions which are equivalent to fines. Likewise, the criminal application of fulfilling local customary obligations and subsidiary sanctions is "considered comparable to category II fines" as formulated in Article 96 of the 2023 Penal Code Book.

In the latest 2023 Penal Code Book, the responsibility of perpetrators no longer only considers the burden of *mens rea*. According to Article 66; particularly in paragraph (1) letter d: "payment of compensation" and letter f: "fulfillment of local customary obligations", as revealed in paragraph (3) of it; "Additional criminal ... can be imposed 1 (one) type or more", the responsibility of criminal offenders based on the 2023 Penal Code Book can also be a cumulation of the principal crime; which calculates the *weight of mens rea*, plus the weight of losses caused to victims with the criminal "payment of compensation", and can even be added to the return of losses of indigenous peoples with the addition of the criminal "fulfillment of local customary obligations".

This study proposes a conceptual approach by conducting an economic analysis of the formulations of penal sentence in the current Penal Code Book and the 2023 Penal Code Book and several possible circumstances that may arise and discusses certain conceptual circumstances that may be subject to provisions providing maximum penal burden.

In the 2023 Penal Code Book, there have been several significant improvements compared to the current Penal Code Book, especially in the perspective of penal sentences or penitentiary law, efforts to harmonize imprisonment with criminal fines, including additional penal sentence for victims' restitution; increased its subsidiary sanctions slightly; and efforts to enable the values of fine sentences to be subsequently adjusted through Government Regulations (according to Article 79 paragraph (2) of the 2023 Penal Code Book).

This research was conducted to identify that the same weaknesses in the current Penal Code Book that are still visible in the 2023 Penal Code Book, which therefore has the potential to hinder the restorative justice approach in Indonesia. One of the important weaknesses in the 2023 Penal Code Book is the absence of a clear formulation regarding the equality of prison sentences and substitute penal sentence, especially fines, criminal damages, and other financial value crimes. It appears that the determination of the values of imprisonment and the criminal value of substitute fines or otherwise determined by the Panel of Judges

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<sup>11</sup> Romli Atmasasmita & Kodrat Wibowo, *Analisis Mikro Ekonomi Tentang Hukum Pidana Indonesia*, Prenadamedia Group, Jakarta, 2016, p. 8-9.

<sup>12</sup> Abintoro Prakoso, *Kriminologi & Hukum Pidana*, Laksbang Grafika, Yogyakarta, 2013, p. 98.

without clear guidelines<sup>13</sup> and leads to elasticity of sentencing, resulting in wide differences in verdicts on almost the same crimes by each panel of judges<sup>14</sup>.

Efforts to harmonize the formulation of the maximum threat of imprisonment and fines are clearly visible in Articles 81-83 of the 2023 Penal Code Book. Efforts to realize equality of value between other penal sentences of a monetary nature such as criminal compensation to victims and criminal fulfillment of customary obligations are also seen in the 2023 Penal Code Book where criminal compensation and criminal fulfillment of customary obligations are equivalent in treatment to criminal fines as revealed in Articles 94 and 96 of the Penal Code Book.

#### **4.1 Penal Burden in the Current Penal Code Book**

In the current Penal Code Book, the formulation of the threat of penal sentence leans only on imprisonment. Despite the fact that both Indonesia and Dutch have adopted a double-track penal system, where Indonesia has long been using the Indonesian Penal Code Book and Netherlands has been using the Dutch *WvS* or the Dutch Penal Code book, the lack of attention to the equality of the criminal value of substitute fines, as well as the weakness of penal sentence in lieu of the criminal fines themselves which are too small are<sup>15</sup> the two main factors in encouraging the prioritization of prison sentences.

Penal theory in Indonesia should have long applied the *dual-track* system, also known as the *double-track* system, *two-track* system, or *two-way* system. The theory, *Zweisprachigkeit* (*dual-track* system) was first proposed by Carl Stoss in 1893,<sup>16</sup> seems to have been applied to the current Penal Code Book, namely to the formulation of the threats of criminal offenses which were partly formulated alternatively between penal sentence of deprivation of liberty; in the form of imprisonment or incarceration, with criminal fines. However, with the above conditions, inevitably the Panel of Judges was forced to avoid imposing sentences in the form of two alternative paths, except for the formulation of cumulative sanctions<sup>17</sup>.

The burden of punishment (/ penal burden) imposed on convicts in the current Penal Code Book apparently has never paid attention to the victim's losses and has been separated in civil proceedings<sup>18</sup>. Even in the current Penal Code Book, it is difficult to implement the enforcement of restorative justice because the burden of punishment only concentrates on *the burden of mens rea* but does not pay attention to the burden of loss of indigenous peoples. However, the change concerning both the burden of punishment and the burden of loss can be found in the 2023 Penal Code Book.

In addition, it is also seen in the threat of penal sentence that can be imposed in the current Penal Code Book formulated in Article 10, especially in letter b, namely additional crimes. There are no types of penal sentence that have the potential to increase prison sentences or other deprivation of independence. Thus, the calculation of the penal burden on the current Penal Code Book only concentrates on fulfilling the element of offense, which would give the panel of judges the right to impose a sentence with a limit on the maximum threat of delicts.

For example, in the crime of theft, based on Article 362 of the Penal Code Book with amendments to criminal fines based on Supreme Court Regulation (PERMA) No. 2 of 2012, and considering Article 30 of the Penal Code Book concerning the application of fines and subsidiaries, a criminal burden is obtained with a

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<sup>13</sup> T.J. Gunawan, et. al., "Imprisonment and Fine Sentence Inequivalence in Netherland's Penal Law", Technium Social Sciences Journal, Vol. 25, 156-160, November, 2021, ISSN: 2668-7798, p. 157-158.

<sup>14</sup> Muladi & Barda Nawawi Arief, *Teori-teori dan Kebijakan Pidana*, 4th printing, Alumni, Bandung, 2010, p. 54

<sup>15</sup> T.J. Gunawan, *Keseimbangan ... Op. cit.* p. 107-110.

<sup>16</sup> Jan Remmelink, *Hukum Pidana – Komentar atas Pasal-pasal Terpenting dari Kitab Undang-undang Hukum Pidana Belanda dan padanannya dalam Kitab Undang-undang Hukum Pidana Indonesia*, translated by Tristam Pascal Moeliono, Gramedia Pustaka Utama, Jakarta, 2014, p. 7.

<sup>17</sup> T.J. Gunawan, *Keseimbangan ... Op. cit.* Pp. 116-117.

<sup>18</sup> T.J. Gunawan, *Konsep Pidana Berbasis Nilai Kerugian Ekonomi* (translated *The Concept of Economic Loss Value-Based Penalties*), Edisi Revisi, Kencana Publishing, Jakarta, 2018, pp. 165-166.

maximum threat of "five years imprisonment" or a fine of Rp900,000,-, or when not paid in its entirety based on Article 30 paragraph (3), namely by "substitute confinement" ... "At most six months". With such a threat formulation and because there is no requirement for the Panel of Judges to apply *a double-track system*, the highest threat of punishment that can be formulated is the maximum criminal threat of imprisonment for offenses that are met<sup>19</sup>.

#### 4.2 Penal Burden in the 2023 Penal Code Book

In the 2023 Penal Code Book, the burden of loss for victims has been included in the calculation of the burden of punishment, especially with the existence of additional criminal sentences of "payment of compensation" according to the Article 66 verse (1) letter d. However, restrictions still remain. Consequently, there is confusion or uncertainty in the application of the maximum threat of each offense whether it is as large as the formulation of the maximum threat of imprisonment of each offense, or based on the equality of criminal treatment of fines, criminal compensation, and criminal fulfillment of customary obligations, so as to allow the maximum threat of each offense to be doubled or more as a formulation of the cumulative prison sentence of imprisonment in lieu of fines, compensation, and fulfillment of these customary obligations.

Efforts to adopt restorative justice that prioritizes monetary penal sentence such as fines, criminal compensation, and fulfillment of customary obligations have also begun to appear in the 2023 Penal Code Book, especially in Article 71 paragraph (1) which directs if "Criminal Acts that are only threatened with imprisonment under 5 (five) years" and as the formulation of paragraph (2) is: "without a victim", or "the victim has no problem", or "not a repetition of the crime", taking into account the purpose of the punishment and the sentencing guidelines referred to in Articles 51 to Article 54" may be punishable by a fine rather than prioritizing imprisonment. Restorative justice has the advantage that penal sentences that are financially restorative, such as fines, are not subject to deprivation of independence; [or putting the perpetrator in physical misery] to achieve its goals.<sup>20</sup>

Efforts to increase subsidiary sanctions compared to the current Penal Code Book can be seen in Article 81, Article 82 paragraph (2) letter a of the 2023 Penal Code Book with the maximum formulation "a maximum of 1 (one) year which can be aggravated for a maximum of 1 (one) year 4 (four) months if there is a concurrent" for "the criminal provisions of the fine that do not exceed the category II fine", and Article 83 paragraph (1) of the 2023 Penal Code Book is formulated "the penalty of fines above category II that are not paid is replaced by imprisonment at least 1 (one) year and at most as threatened for the Crime concerned".

Article 81 paragraph (3) converts penal sentence for fines with confiscation and auction of property or income of convicts to "be confiscated and auctioned by prosecutors to pay off unpaid fines", which then based on Article 82 paragraph (1) has an effort to form equality so that penal sentence of fines of a certain value are equivalent to additional penal sentence in the form of deprivation of wealth or income of the same economic value.

This means that the 2023 Penal Code Book sees efforts to formulate the equality of penal sentence for fines and penal sentence for imprisonment. This equality effort leads to the formulation of penal sentence for fine Y; which is an alternative to the main prison sentence for X, if not paid at all, has the potential to be subject to a substitute prison sentence equal to the basic prison penalty X. This formulation shows an effort to formulate equality back and forth between penal sentence of unpaid fines and penal sentence of deprivation of independence or penal sentence of imprisonment.

In addition, the 2023 Penal Code Book also begins to pay attention to victims by paying compensation to victims, this is formulated in Article 66 paragraph (1) point d, the formulation of subsidiary prison

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<sup>19</sup> T.J. Gunawan, et.al., *"Imprisonment and Fine Sentence Inequivalence..., Op. Cit.*, p 2.

<sup>20</sup> Eddy O.S. Hiariej, *Prinsip-prinsip Hukum Pidana*, Cahaya Atma Pustaka, Yogyakarta, 2014, p. 401.

sentences formulated in Article 94 paragraph (2) for unpaid values applies "If the obligation to pay compensation as referred to in paragraph (1) is not implemented, provisions on the implementation of criminal fines as referred to in Articles 81-83 are applied mutatis mutandis".

Additional burdens on punishment may also be obtained when perpetrators do not only violate the Indonesian Penal Law, but also when commit customary violations so that there is an additional burden in the form of criminal fulfillment of customary obligations. The burden can be viewed with the formulation in Article 96 of the 2023 Penal Code Book, especially paragraphs (2) and (3) which limit the value of fulfilling customary obligations to be equivalent to category II fines; based on Article 79 paragraph (1) point b which is ten million rupiah (Rp10,000,000,-).

Thus, the penal burden in the 2023 Penal Code Book can be seen from two perspectives; namely the cumulative length of imprisonment, and the monetary. Based on the application of the *double-track system* and the fulfillment of the principle of imprisonment *as the ultimum remedium*, application of the 2023 Penal Code Book can be seen as a penal formulation that prioritizes efforts to restore the condition back to prior of the crime act or uphold restorative justice, thus prioritizing sanctions that can restore the condition of victims and the community. Thus, in the 2023 Penal Code Book, the formulation of the principal crime is more appropriate in prioritizing criminal fines with the threat of imprisonment in lieu of fines for unpaid fines. Similarly, this principle also applies in criminal compensation to victims and criminal fulfillment of customary obligations in addition to recovering community losses.

Viewed from the perspective of money, the two calculations of the penal burden serve as a cumulation of criminal fines, criminal compensation to victims, and criminal fulfillment of customary obligations; as a sanction for the restoration of the state of society after a criminal fine. Meanwhile, viewed from the burden of penalizing the type of penal sentence for deprivation of independence, in the formulation of the 2023 Penal Code Book, it is clearly seen when the criminal fine has a substitute sanction formulation which leads to imprisonment returning to the main prison sentence of the formulation of the delict threat. Furthermore, viewed from the perspective of the victim's loss whose value is equivalent to the fine, it is very likely that the 2023 Penal Code Book will contain an increase in the criminal burden. The increase is approximately at least double the penal burden when the offense has a change in the maximum threat of imprisonment regardless.

#### **4.3 Potential and Conditions of the Maximum Penal Burden of the 2023 Penal Code Book**

It should be an important note in the 2023 Penal Code Book that there is no formulation which can be a sentencing guideline for the Panel of Judges in determining the weight of certain sentences against certain circumstances. The formulation of existing sanctions uses the formulation of the maximum threat of both the maximum prison sentence and the maximum criminal of a financial nature which then asks each panel of judges to decide.

Coupled with the formulation of a criminal pattern between imprisonment and fines in the 2023 Penal Code Book which is found to be unfair or unable to provide equal treatment; thus, it is argued that it is contrary to the justice theory by John Rawls, where he argues that justice as fairness (equality or equality of treatment)<sup>21</sup> describes people as members of a society hold equal basic rights and cooperate within an egalitarian economic system. In addition, it can also result in difficulty to determine the formulation of equality of imprisonment for a certain length of time with a fine as a substitute punishment, based on existing regulations.

The aforementioned ideas can be simplified as follows: when the Panel of Judges determines that the appropriate sentence for the convict is four (4) years from a maximum threat of five (5) years imprisonment; For theft offenses under Article 476 of the 2023 Penal Code Book, it is questionable that the choice of determining the criminal fine is formulated from a comparison between the threat of conviction

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<sup>21</sup> John Rawls, *a Theory of Justice*, Havard University Press, Cambridge, Massachusetts, 1999, p. 3.

versus the maximum threat or by other means. For example, in this proportional way, a sentence of four (4) years imprisonment is equivalent to a fine of four hundred million rupiah (Rp400,000,000,-; obtained with a calculation of  $4/5 \times \text{Rp}500,000,000,-$ ).

The same problem arises in the formulation of the conversion of imprisonment in lieu of victim compensation, especially because here there are at least three possibilities, namely the value of the victim's loss which is lower than the maximum threat of the value of the fine; the value of the victim's loss which is equal to the maximum threat of a fine; and the value of the victim's loss which is greater than the penalty fine.

Below is a simple table that shows the sentencing structure<sup>22</sup> in the 2023 Penal Code Book and how it looks like when the criminal values of fines are raised, as well as the reference value or conversion value of each between the maximum threat of imprisonment and the maximum threat of fine. In the table below, the format for writing numbers in the table will use the English language writing format, with ',' and '.' reversed, while those writing outside the table will be displayed according to the format in Indonesian language writing.

<b>Crime Type Category</b>	<b>Maximum Prison Sentence (Year)</b>	<b>Penal Fine Category</b>	<b>Maximum Fine for Penal Fine Category</b>	<b>Penal Fine Value Per Month</b>
1. Very Light	1	I	Rp 1,000,000.00	
		II	Rp 10,000,000.00	Rp 833,333.33
2. Light	2	III	Rp 50,000,000.00	Rp 2,083,333.33
3. Moderate	4	III	Rp 50,000,000.00	Rp 1,041,666.67
4. Heavy	7	IV	Rp 200,000,000.00	Rp 2,380,952.38
5. Very Heavy	15	V	Rp 500,000,000.00	Rp 2,777,777.78
		VI	Rp 2,000,000,000.00	Rp 8,333,333.33
	20	VII	Rp 5,000,000,000.00	
		VIII	Rp 50,000,000,000.00	

**Table 1: Table of Economic Value Conversion Between Penal sentence and Comparison with Sanctions Categories and Minimum Panel Fine Value per Month Prison Sentence**

In this table, you can see some anomalies such as when criminal fines are category III; worth fifty million rupiahs (Rp50.000.000,-), which is equivalent to two possible categories of criminal with threats, namely for a maximum of two (2) years and four (4) years. Furthermore, there is no similarity in the reference value of each equality of the criminal category and the criminal category of fines with the value per month of fines compared to the maximum prison sentence, where each other does not appear to have equality. In short, there is no pattern obtained.

The existing weaknesses in the formulation of the equivalent value of imprisonment to pose a two-way alternative sanction with financial penal sentence, especially criminal fines, have resulted in an in-depth discussion and analysis of a research proposing a two-track system and a two-way formulation, to seek an equilibrium between imprisonment and fines, as well as when unpaid fines are obtained to determine imprisonment in lieu of unpaid fines. The research concerning the two-track system and the two-track

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<sup>22</sup> Badan Pembinaan Hukum Nasional, *Draft Naskah Akademik Rancangan Undang-undang Tentang Kitab Undang-Undang Hukum Pidana (KUHP)*, Kementerian Hukum dan Hak Asasi Manusia Republik Indonesia, Jakarta, 2015, p. 185.

formulation is thoroughly elaborated in a book under the title "*Balance of the Value of Imprisonment and Fines*"<sup>23</sup>.

To better understand the context in which the ideas of a two-track system and a two-way formulation function properly, this study proposes two conditions, ensuring that the two conditions are the only prerequisites to enact the proposed two-way track system and formulation. The two conditions include (1) when the loss is less than the maximum criminal threat of fines and (2) especially when the loss is more than or equal to the criminal threat of fines. Accordingly, at least the maximum penal burden in the 2023 Penal Code Book financially allows the maximum threat to be imposed by the maximum threat of fines and plus the threat of criminal compensation. Meanwhile, in terms of the criminal burden of imprisonment, the maximum possible threat imposed is the principal crime; as a criminal subsidiary of the maximum unpaid fine, plus a criminal subsidiary of compensation equivalent to the criminal subsidiary of the fine.

Below is a criminal case aimed at providing a clearer illustration of the proposed ideas above. There is one case of vehicle theft, supposing the stolen vehicle has a fairly high amount of price, valued at Rp. 500,000,000 (five hundred million rupiahs). In the current Penal Code Book, namely according to Article 362 of the Penal Code Book with amendments to criminal fines based on Supreme Court Regulation (PERMA) No. 2 of 2012, as well as the application of fine sanctions in Article 30 of the Penal Code Book, the above circumstances will only potentially result in a maximum threat of five (5) years in prison.

Meanwhile, with the same case as the imposition of imprisonment sanctions imposed a maximum threat based on Article 476 of the 2023 Penal Code Book, namely theft offenses, of 5 (five) years in prison. The formulation of penal sentence that may be imposed is a fine equivalent to 5 (five) years in prison, plus a criminal sanction of compensation to the victim of Rp500,000,000, - which is subsidized to a maximum of 5 (five) years' imprisonment. According to the maximum value, the offense is threatened. The above conditions show that the overall value of punishment in this situation is 2x (twice) of the threat of basic penal sentence only.

In the example of the case above, it can be suspected that the Panel of Judges can impose a total sentence, namely imprisonment of 5 (five) years or a fine of Rp. 500,000,000 (five hundred million rupiahs) and compensation of Rp500,000,000 (five hundred million rupiahs) with a subsidiary prison sentence of 5 (five) years, a sentence that may replace the combined economic value of Rp1,000,000,000 (one billion five hundred million rupiahs) with a subsidiary or substitute sentence of 10 years (5 years subsidiary fine + 5 years subsidiary damages).

As an additional possibility, there is still a possibility when the crime is a violation of customary obligations, and for example, the customary obligation is charged a maximum of ten million rupiahs (Rp10,000,000), with a maximum substitute criminal sanction in the form of additional imprisonment which is maximum equivalent to a very light category imprisonment of one year. Thus, the cumulative imprisonment sanction in the 2023 Penal Code Book for theft has the potential to increase the maximum threat of imprisonment from 5 years in the current Penal Code Book to 11 years in the 2023 Penal Code Book with all maximum assumptions and when no existing financial penal sentence are paid by the convict.

In addition, there is a possibility that if the convict is sentenced to 5 (five) years' imprisonment and a fine of Rp500,000,000 (five hundred million rupiahs), but the convict can only meet a fine of Rp499,550,000 (four hundred ninety-nine million five hundred fifty thousand rupiahs). In other words, the convict still has not fulfilled Rp450,000 (four hundred fifty thousand rupiahs) of the fine's total amounts. Then the convict may be sentenced to imprisonment in lieu of a fine for at least 1 (one) year. This raises the inquiry of the equivalence of the criminal value in lieu of 1 (one) year in prison with the lack of payment of a criminal fine of only Rp450,000 (four hundred and fifty thousand). This situation will encourage the convict not to maximize the return, where in economic ratio when being unable to pay in full, he will pay up to less than

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<sup>23</sup> T.J. Gunawan, *Keseimbangan... Op. Cit.*, p 223-224.

equivalent to the threat of a minimum sanction of one (1) year. Based on the economic logic, the convict prefers to pay Rp400,000,000 (four hundred million rupiah) and serve the remaining prison sentence of one (1) year, considering that the remaining payment does not get an equivalent return.

Another example of a case is someone who committed a criminal act of corruption with a loss value of Rp1,000,000,000,000 (one trillion rupiah). The crime of corruption before the enactment of the 2023 Penal Code Book still applies the application of Article 2 of Law Number 31 of 1999 concerning the Eradication of Corruption Criminal Acts with a maximum prison sentence of "4 (four) years" and a maximum imprisonment of "20 (twenty) years" with a fine of "at least Rp200,000,000 (two hundred million rupiah) and a maximum of Rp1,000,000,000 (one billion rupiah)", while in paragraph (2) it is explained about the possibility of committing a criminal act Corruption "under certain circumstances" can be punished with the "death penalty". In the 2023 Penal Code Book, provisions with similar cases are regulated in Article 603 which, if translated freely, contains the consequences of imprisonment for a minimum of "2 (two) years" and a maximum of "20 (twenty) years" and a fine of "at least category II" described in Article 79 paragraph (1) point b of Rp10,000,000 (ten million rupiah) and a maximum fine of "category VI" which when seen in Article 79 paragraph (1) letter f is Rp2,000,000,000 (two billion rupiah).

Based on the example cases above, it may be possible for the Panel of Judges to impose a prison sentence of 20 (twenty) years and a fine or compensation of Rp1,000,000,000,000 (one trillion rupiah) and a subsidiary prison sentence of 20 (twenty) years as a substitute if the convicted person is unable to pay the entire criminal compensation imposed on him. However, it raised an inquiry whether can the subsidiary in this case be balanced? or does it still cause losses to the country? As there is still a possibility that the convict does not pay at all the financial sentences imposed on him.

Furthermore, it is also possible if the convict can only pay a sum of Rp999,950,000,000 (nine hundred ninety-nine billion nine hundred and fifty million rupiah). In other words, the convict still has to face a deficit of compensation payment of Rp50,000,000 (fifty million rupiah). Consequently, the subsidiary imprisonment imposed at least is 1 (one) year. When viewed from the value of economic losses incurred and compared to the subsidiary imprisonment imposed, it can be seen that a prison sentence of 20 (twenty) years is equivalent to Rp1,000,000,000,000 (one trillion rupiah), so it can be calculated that 1 (one) year of imprisonment is equivalent to Rp50,000,000,000 (fifty billion rupiah). Thus, it is very likely that the convict prefers to subside his prison sentence, which is 20 (twenty) years rather than having to pay the criminal compensation.

From this case, it can lead to the possibility of more people committing criminal acts of corruption with a large loss value that causes considerable losses to the state. Therefore, in this case researchers also provide input to use criminal punishment based on the concept of balancing the value of imprisonment and fines<sup>24</sup>. This concept can provide certainty of considerably objective value both for the Panel of Judges in handing down its verdict and by the perpetrators and victims of criminal acts that occur.

In addition, there is an indication of the fundamental weakness of the limitation of imprisonment sanctions within a certain time limited by Article 12 paragraph (3) and paragraph (4) of the Penal Code Book which limit the maximum imprisonment sanction that can be imposed consecutively on convicts up to 20 years. This greatly limits the ability of criminal law to deal with crimes that are extraordinary because of the potential damage or losses incurred. Hence, it is assumed that both the economic value and the 20-year imprisonment sanction have nonequivalent quantities. This assumption is made after carefully calculating the total amount of money which needs to be paid by the convict for a total amount of time which needs to be spent by the convict committing imprisonment when referring to the value of the minimum regional wage. As the author of this study resides in Surabaya, the value applies Surabaya city's minimum regional wage.

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<sup>24</sup> *Ibid.*

As clearly stated above, the economic value is obtained from the amount of money becoming the value of minimum regional wage (hereinafter abbreviated as MRW) of Surabaya<sup>25</sup> city. The MRW is later multiplied by the total months in a year and by the total years of imprisonment, which is 20 in the given example. Hence, the formula is written as the value of MRW x 12 x 20. The calculations using the same formula comparing the MRW in 4 years (2013, 2014, 2019, and 2023) reveals that the result of the calculated value is fairly small, such as follows: Rp417,600,000 in 2013; Rp528,000,000 in 2014; Rp929,052,480 in 2019. It is just recently in 2023 that the amount has a figure exceeding 1 billion rupiahs (Rp1,086,114,960).<sup>26</sup>

The study focusing on the 2023 Penal Code Book highlights two visibly significant findings related to the formulation of imposition of monetary penal sentence and the weight of imprisonment. The first finding demonstrates that the 2023 Penal Code Book provides a formulation for the imposition of monetary penal sentence, namely fines, criminal compensation, and criminal fulfillment of customary obligations that are greater than ones in the current Penal Code Book which does not contain the formulation of penal sentence for compensation and criminal fulfillment of customary obligations.

Meanwhile, the second finding is viewed from the perspective of the weight of imprisonment. It is visible that at least in the worst circumstances, namely (1) when the value of victim's compensation is equal to or greater than the value of maximum fines, and there is a sentence to fulfill the customary obligations, and (2) when all penal sentence of a financial or monetary nature cannot be fully fulfilled, the threat of imprisonment in the 2023 Penal Code Book can be cumulated as imprisonment for subsidiary of a fine sentence, plus an imprisonment as subsidiary of victim's restitution; which is treated and most likely limited to the maximum imposition of a criminal subsidiary fine, plus an imprisonment as subsidiary to fulfill customary obligations; equivalent to a fine with category II - ten million rupiahs.

In addition, the formulation of punishment in the 2023 Penal Code Book can be seen as the application of integrative punishment objectives as argued by Muladi, which integrates in a balanced manner comprising restorative justice theory, retributive punishment purpose theory, and relative punishment purpose theory so that '*retributive justice*' is formed in the form of a '*Just Deserts Model*' developed with restorative justice theory<sup>27</sup>. The implementation of this theory can also be proven by the affirmation of the application of the *double track system* by M. Sholehuddin. The affirmation can be found in the explanation section of Book One No. 8 page 237 of the 2023 Penal Code Book, whose theory asks for all prison sentences to be formulated jointly and in alternative formulations with sanctions in the form of fines and other financial crimes.<sup>28</sup>

This formulation of the 2023 Penal Code Book also brings back what Jeremy Bentham revealed to ensure the burden of punishment which is the accumulation of victim losses; as a primary loss, and societal losses due to the projection of the mental attitude of the sick offender; as a secondary loss<sup>29</sup>, a formulation proposed by Bentham to be able to treat the mental attitude of the perpetrator of the crime by ensuring that the punishment must be greater than the benefit obtained by the perpetrator<sup>30</sup>.

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<sup>25</sup> Annissa Mutia, *Daftar Lengkap UMK Jawa Timur 2023, Surabaya Terbesar*, Databoks.Katadata, 8 Desember 2022, accessed on 11 June 2023, [Online], (<https://databoks.katadata.co.id/datapublish/2022/12/08/daftarlengkap-umk-jawa-timur-2023-surabaya-terbesar>). (Translated title: *Complete East Java 2023 minimum regional wage list, Surabaya is the highest*).

<sup>26</sup> T.J. Gunawan, *Keseimbangan ... Op.cit.*, p 223-224.

<sup>27</sup> Muladi and Diah Sulistyani, *Catatan Empat Dekade Perjuangan Turut Mengawal Terwujudnya KUHP NASIONAL (Bagian I, 1980-2020)*, Universitas Semarang Press, 2020, p. 18.

<sup>28</sup> M. Sholehuddin, *Sistem Sanksi Dalam Hukum Pidana – Ide Dasar Double Track System & Implementasinya*, Raja Grafindo Persada, Jakarta, 2007, p. x.

<sup>29</sup> Jeremy Bentham, *An Introduction to the Principles of Morals and Legislation - A New Edition*, earlymoderntexts.com, republished by Jonathan Bennett, [Online], (<http://www.earlymoderntexts.com/assets/pdfs/bentham1780.pdf>), 1823, p. 96.

<sup>30</sup> *Ibid.*, p. 99: rule 11.

## **5. Conclusion**

The results of the study above show the potential for a twofold increase in the criminal burden in the 2023 Penal Code Book compared to the current Penal Code Book, when accompanied by criminal compensation with the amount of victim losses greater than or equal to the maximum criminal threat of fines according to the offense imposed on the convict. This indicates a considerable increased risk for offenders after at least January 2, 2026.

The author argues that the 2023 Penal Code Book is not yet a flawless one. Some weaknesses are still present. However, it can be argued that the 2023 Penal Code Book has demonstrated a much fair improvement aimed to pursue efforts in achieving the goals of criminal punishment. This argument is very likely valid, especially concerning the efforts to maximize the payment of the crime's perpetrators. To ensure a deterrent Penal Law, the 2023 Penal Code Book has aimed to restore an equilibrium, a balanced point, between the appropriate prison sentences and the appropriate monetary penal sentence as an alternative to its original prison sentence. This effort is essential to anticipate the possibility that might occur due to the absence of appropriate prison sentences. The perpetrators prefer to pay than to serve in prison. Hence, it can be stated that what is contained in the 2023 Penal Code Book manifests efforts to encourage the perpetrators to be responsible for the losses they cause to the victims and the society. Furthermore, the 2023 Penal Code Book also increases the weight of punishment, ensuring the return of losses while providing a guarantee of the weight of the sentence to be greater than the benefits obtained from the criminal act.

### **Author Contributions**

Collect the data and wrote the paper.

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### **Funding**

No outside funding was used to support this work.

### **Availability of data and materials**

Please contact the author.

### **Declaration**

The author declares that he has no competing interest.

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