

Implementation Imprisonment Penalty as Subsidiary of Fine Penalty: Inconsistency of State Financial Losses

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ABSTRACT

The Supreme Court has issued Supreme Court Regulation No. 5 Year 2014 as guidance on fine penalty and imprisonment. This study aims to evaluate the consistency of imprisonment penalty as replacement penalty after the issuance of Indonesia Supreme Court Regulation Number 5 Year 2014 on Fine Penalty as Additional Penalty in Corruption. This research is normative juridical research with cases approach. The data used in the 140 verdicts of the district court in the period January - December 2015. The results show the district court verdicts are inconsistent in converting fines into imprisonment because The Indonesia Supreme Court Indonesia has no regulation or parameters to convert it. Unavailable regulation or parameters makes an obstacle in the effort to return the state financial losses.

KEYWORDS

corruption, fine, imprisonment, penalty, replacement, Indonesia

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Introduction

Corruption has become a latent danger in all dimensions of the nation's life. Corruption is systemic and cultural in the private and public sectors (Watimena, 2012). Corruption is not only caused to provide for a living, but it is also done because the corruption is also not see the level of education. The eradication of corruption through the traditional criminal justice system currently creates problems because of the retaliatory punishment pattern to the perpetrators and the exclusion of the restoration of the impact of the crime so that it does not reflect Pancasila justice. The Judicial Commission of the Republic of Indonesia (2014) states that the settlement of corruption cases that reflect Pancasila justice is done by maintaining balance and harmony between individual, community and state interests through a restorative approach. Through a

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restorative approach, criminal penalty are granted with the aim of improving the personality of the criminals themselves, making the offender a deterrent, making certain criminals incapable of committing other crimes (Lamintang & Lamintang, 2012).

The restorative justice approach in corruption eradication has begun through additional criminal in the form of fine penalty as regulated in Article 34 of Law Number 3 Year 1971 concerning the Eradication of Corruption. The fine penalty requires the defendant to pay a substitute amount equal to the amount of property acquired from corruption. The fine penalty aims to restore the state's financial losses and return property acquired from corruption to the state. The provision of the fine penalty has the disadvantage of not setting an alternative penalty for the convicted person who does not pay the fine penalty. The provision of fine penalty shall be refined through Law Number 31 Year 1999 concerning the Eradication of Corruption in which Article 18 provides for the deadline for payment in one month since the verdict is legally enforceable. If the convicted person does not pay within one month then the prisoner is imprisoned. In this case, the imprisonment duration does not exceed the maximum threat of a principal penalty.

The provision of fine penalty in Law Number 31 Year 1999 concerning the Eradication of Corruption still has a weakness because there is no formulation of the calculation of the the length of the imprisonment and the amount of fine penalty. On the one hand, the length of imprisonment depends on the amount of unpaid fine penalty. On the other hand, the amount of fine penalty is very varied, so there is no consistency in the imprisonment length conversion from fine penalty.. Inconsistency of fine penalty conversion can be seen from the Djoko Susilo case and Anas Urbaningrum case. Djoko Susilo is required to pay fine Rp. 32,000,000,000, - subsidiary 5 (five) year imprisonment, while Anas Urbaningrum is required to pay fine Rp. 57,592,330,580, - and USD 5,261,070, - subsidiary 2 year imprisonment. If the fine conversion divided into the length of imprisonment so Djoko Susilo prison worth Rp. 17.534.246 each day and Anas Urbaningrum prison worth Rp. 172.583.891 each day.

Legal vacuum for calculation formula of the amount of fine penalty and the length of the imprisonment makes the criminal penalty has no certainty so that cause the disparity of court verdict penalty. Penalties that can't be assessed are a threat to fair trial and careful in examining, hearing and deciding cases that ultimately hinder the eradication of corruption (Nababan, 2015). This paper focuses on the role of the Indonesia Supreme Court in maintaining the imprisonment penalty as replacement fine penalty.

Method

This research type is normative juridical research using library research method. The data used are secondary data in the form of books, journals, research results, legislation, court decisions and related documents. The approach used is case approach and comparative approach. The data obtained were analyzed descriptively qualitative to answer the problem formulation.

Results and Discussion

Criminal Penalty System in Indonesia

The purpose of criminal penalty continues to evolve following the development of a conceptual outlook, namely a retributive view which looks back on the past and the utilitarian view that views the future. The retributive view holds that punishment is a negative reward for misbehavior, while the utilitarian view argues that punishment as a means of achieving a useful purpose to protect society (Gunarto, 2009). The purpose of criminal punishment in Indonesia combines the retributive and utilitarian views reflected in Article 54 of the Indonesia Criminal Code which states that criminalization aims to prevent the commission of criminal acts by enforcing legal norms for the protection of the community, to popularize the convict by coaching so as to be a good and useful person, caused by criminal acts, restoring balance, and bringing a sense of peace in society and freeing guilt on the convicted.

To achieve these objectives requires a certain approach in criminal detention. B.N. Arief (2011) argues that there are 3 (three) main approaches to criminal penalty detention, namely (a) Traditional approach with indefinite system or maximum system by establishing general and specific maximum for each criminal act; (b) An imaginative approach by simplifying the classification of criminal and maximum criminal acts into each of the classes; and (c) A practical approach is to establish maximum penalties that are generally imposed on reasonable fair practice.

Each country has a particular approach in criminal detention, but the court's verdict must be able to meet the justice and community certainty. The verdict does not meet the value of community justice resulting in the community not trusting the judiciary. Therefore, the criminal detention system can maintain a determininate penal determinism. The discretion given by the judge through the system of indeterminism must be pressed on certain formulas for a more definite verdict. Thus, the disparity of criminal penalty must be minimized so that the public will feel justice and certainty in the decision of the court (Rutkowski, 2017).

Judicial Power and Disparity of Criminal Penalties

Indonesia Constitution provides for independent judicial power in the process of administering justice and law enforcement practices. In exercising the judicial powers, the judge has the freedom to determine the exact penalty by choosing (a) the criminal type (strafsoort) in relation to the criminal alternative system and (b) the criminal weight (strafmaat) in accordance with the minimum and maximum limits on the law. The freedom of the judge may result in a disparity of criminal penalty, namely the unlawful application of criminal offenses to the same offense or to criminal offenses whose baht properties can be compared without clear justification grounds (Muladi & Arief, 1998). L. Loqman (2002) states that the disparity of criminal penalty is influenced by internal factors, the factors of the law itself, the factors of interpretation, political factors and social factors.

The criminal penalty system in Indonesia recognizes principal penalty and additional penalty. Article 10 of the Indonesia Criminal Code regulates the principal penalty consist of death penalty, imprisonment and fine penalty. Additional penalty consists of revocation of certain rights, appropriation of certain goods and the announcement of a judge's decision. Additional criminal forms for each type of criminal offense have certain characteristics in accordance



with the types of criminal offenses and purposes of criminal prosecution, including (a) Additional criminal penalty in Article 63 of Law No. 8 Year 1999 on Consumer Protection aimed at protecting consumers such as confiscation of certain goods, orders for termination of certain activities causing loss of consumers, liability for withdrawal of goods from circulation and revocation of business license; (b) Additional criminal penalty in Article 119 of Law Number 32 Year 2009 concerning Environmental Management which aims to protect the environment in the form of reparation as a result of crime and the obligation to do what is neglected without rights; (c) Additional criminal penalty under Article 77 of Law Number 21 Year 2014 on Geothermal, which aims to maintain national energy sustainability and security in the form of confiscation of goods used in committing criminal offenses, appropriation of profits derived from criminal offenses; and / or obligation to pay any costs incurred as a result of a crime; (d) Additional criminal penalty under Article 71 of Law no. 11 Year 2012 on the Child Criminal Justice System which aims to provide special protection to children in the form of appropriation of profits derived from criminal acts, fulfillment of customary obligations and / or criminal penalties that are replaced by job training. Through the criminal penalty system, the judge has the opportunity to select the principal penalty types and additional penalty in order to achieve the purpose of criminal detention.

The criminal justice system using principal and additional penalty is also provided for in Article 18 of Law Number 31 Year 1999 concerning the Eradication of Corruption which in essence stipulates that additional criminal penalty in the Penal Code also applies to corruption. In addition, corruption convicted criminals may be subject to additional criminal in the form of confiscation of goods obtained from corruption offenses, payment of surrogates, the closure of all or part of the enterprise and the withdrawal of all or part of certain rights granted by the Government to the convicted person.

Through judicial power, judges may elect additional financial penalties in the form of confiscation of goods obtained from corrupt acts to restore state financial losses and fine penalty to remove financial benefits from corruption. In practice, fine penalty calculation and property obtained from corruption is also not an easy matter because of several factors such as (a) The development of transaction services through banking and non-banking finance services so that it would make it difficult for judges to sort property derived from criminal acts of corruption and which are not from corruption and (b) The property acquired from corruption has been converted into an asset based on its volatile nature, such as property, jewelry, stock and so forth (Muladi & Arief, 1998).

The Role of Indonesia Supreme Court in Maintaining Consistency of Penalty Conversion from Fine Penalty to Imprisonment Penalty

Law Number 31 Year 1999 concerning the Eradication of Corruption and Law Number 20 Year 2001 concerning Amendment to Law Number 31 Year 1999 concerning the Eradication of Corruption does not regulate the conversion calculation about fine penalty to imprisonment causing the conversion disparity. Other regulations also do not regulate it so that penalty conversion becomes legal vacuum (Fauzan, 2013) so that the Supreme Court can exercise its role through the Indonesia Supreme Court Regulation for the use of judges as a guide to determine penalty conversion from fine penalty to imprisonment.

The role of the Indonesia Supreme Court is to achieve the vision and mission of the Indonesia Supreme Court where the Blueprint of the 2010-2035 Indonesia Supreme Court has a vision of "The Realization of Indonesia's Supreme Justice Board". One of the Indonesia Supreme Court's mission to support the vision is "Increasing public trust in the judicial system". To gain public trust in the judicial system, the judicial process must be transparent and accountable (Supreme Court of the Republic of Indonesia, 2015).

The Indonesia Supreme Court has issued The Indonesia Supreme Court Number 5 of 2014 on Fine Penalty as Additional Penalty in Corruption on December 31, 2014. Through that regulation, additional penalty of replacement fine penalty is regulated in more detail such as (a) Additional criminal penalties can't be imposed on joint; (b) The substitution fine penalty is imposed proportionally if each defendant is not known exactly the amount of property acquired from corruption; (c) Custody of a replacement fine penalty shall still be imposed on a convicted person who has transferred property acquired from corruption to a third party; and (d) The execution of fine penalty by the prosecutor where the property of the convicted person can still be seized and auctioned as long as the convicted person has not yet completed the principal penalty.

Based on Indonesia Supreme Court data noted there were 140 verdicts at the district court level that were severed during the period January to December 2015 which provided a fine penalty that can be replaced by imprisonment. The number of verdict that provide the fine penalty and the imprisonment during that period can be seen from Table 1.

Table 1. District Court's Verdict on Corruption Cases (January - December 2015)

Fine Penalty (in million IDR)	Prison Penalty (in month)					
	0-3	3-6	6-12	12-18	18-24	> 24
0 - 10	1	1	-	-	-	-
> 10 - 50	38	6	1	-	-	-
> 50 - 100	13	4	1	1	-	-
> 100 - 200	17	8	4	-	1	-
> 200 - 500	8	4	4	2	1	2
> 500 - 1.000	3	4	1	3	2	-
> 1.000 - 5.000	-	2	2	-	2	1
> 5.000	-	1	-	-	1	1

Sources: Indonesia Supreme Court data based on www.putusan.mahkamahagung.go.id

Table 1 shows the disparity in determining conversion from fine penalty to imprisonment duration. Example, Verdict Number 20/Pid.Sus.TPK/2015/PN.Dps and Verdict Number 304/PidSus/2015/PN.Bks. On the one hand, Verdict Number 20/Pid.Sus.TPK/2015/PN.Dps gives fine penalty IDR 7.000.000, - subsidiary with 5 months imprisonment, while on the other hand Verdict Number 304/PidSus/2015/PN.Bks gives a fine penalty IDR 12.619.743.600 subsidiary with 6 month imprisonment.

The disparity in the duration of imprisonment for conversion fine penalty can also be seen from 140 decisions at the district court level that were terminated during the period of January to December 2015. If the amount of



replacement fine penalty is converted to the length of the prison substitution, then the data can be obtained according to Table 2.

Table 2. Fine Penalty Subsidiary by Imprisonment Penalty

Fine Penalty (IDR) Subsidiary by Each Prison Day	Number of Decisions
0 < Fine Penalty < 100.000	3
100.000 < Fine Penalty < 500.000	25
500.000 < Fine Penalty < 1.000.000	41
1.000.000 < Fine Penalty < 2.500.000	36
2.500.000 < Fine Penalty < 5.000.000	16
5.000.000 < Fine Penalty < 7.500.000	12
7.500.000 < Fine Penalty < 10.000.000	6
10.000.000 < Fine Penalty	1

Sources: Indonesia Supreme Court data based on www.putusan.mahkamahagung.go.id

Based on the above data, the Indonesia Supreme Court Regulation has not been able to answer the disparity in the determination of imprisonment as a substitute of the replacement fine penalty caused by unavailable standard calculation of prison penalty as a subsidiary of fine penalty. The disparity of the court verdict is caused by the indeterminism of the judge to determine the amount of the fine penalty, while the judge is limited to determine the imprisonment that does not exceed the maximum of the principal penalty as regulated in Article 18 paragraph (3) of Law Number 31 Year 1999 on Eradication of Crime Corruption. Therefore, an alternative formulation is needed to determine the length of imprisonment subsidiary for fine penalty can reflect the value of justice and certainty in the community.

Alternative Model for Penalty Conversion from Fine Penalty Become Imprisonment

In some countries, financial penalties may be replaced by imprisonment using certain characteristics. In the UK, Article 13 of the Criminal Justice Act 1948 states that offenders can pay fines directly or in installments. Convicts who do not pay a fine will be subject to imprisonment as a replacement criminal. In Argentina, a criminal penalty in place of a fine of fines for a fine of at least 50 Pesos up to 2.000 Pesos in which a convict who does not pay shall be subject to a maximum imprisonment of 1.5 years (Hamzah, 1987a). In Australia, a criminal penalty of a fine of fines for a minimum fine amount of 50 Schilling up to 1.000.000 Schilling with due regard to the economic condition of the offender and the impact of penalty on the livelihood of the convicted person and his family (Hamzah, 1987b).

A.R. Surihaiyono (2012) argues that the parameters of the calculation of the length of imprisonment as a substitute for financial crimes can use a model such as:

A. Replacement prison system with fix value. Calculation of criminal duration of imprisonment in accordance with the specified amount of fix. Countries that use this system include (a) the Philippines where a daily prison change for a fine of 8 Pesos, (b) Thailand where a daily prison change for a fine of 5 Baths;

B. Income system of perpetrators of criminal acts per day. Calculation of the duration of imprisonment according to the income of the perpetrator of the crime per day according to the imprisonment imposed to the perpetrator. Countries that embrace this system include Sweden, Denmark, Norway, Germany, Austria and Portugal.

According to T.J. Gunawan (2015) that the fine penalty is the implementation of the concept of crime does not pay, the convict must be given reasonable time and opportunity to make replacement payments, including confiscation of the convicted assets and payment opportunity in installments within a reasonable time. The execution of a substitute for fine penalty is the last option if the convicted person cannot return the fine penalty. The calculation of the duration of imprisonment shall be calculated by considering the income of the convicted person.

Conclusion

Based on the above description it can be concluded that the implementation of the imprisonment as subsidiary of fine penalty has not reflected the justice and legal certainty due to the absence of the calculation formula. The Indonesia Supreme Court through Indonesia Supreme Court Regulation Number 5 Year 2014 on Additional Fine Penalty In Corruption has not been able to reduce the disparity because there is still Article 18 paragraph (3) of Law Number 31 Year 1999 on Eradication of Corruption which limiting certain formulations to determine the length of the imprisonment for fine penalty.

The authors suggest Article 18 paragraph (2) and (3) of the Law of the Republic of Indonesia Number 31 Year 1999 concerning the Eradication of Corruption shall be amended so that (a) the prisoner shall have the opportunity to pay subsidiary in installments; (b) the amount of the imprisonment shall not be limited to the maximum threat of the principal, but shall be adjusted to the amount of the fine penalty. In addition, the Supreme Court needs to set the parameters of the conversion calculation of imprisonment for fine penalty to minimize the disparity of court decisions that ultimately increase public confidence in the judiciary in Indonesia.

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Disclosure statement

No potential conflict of interest was reported by the authors.

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