

# Optimalizing Fine Penalty on the Criminal Act Convict of Administrative Penal Law Concept-based Excise as an Endeavor for Returning the State Income Potential

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**Abstract** - An individual who commits violations or crimes relating to the excise sector can be imposed a criminal act sentence, not only due to his reckless actions but also to his wrongdoings. Those elements, thus, say that criminal acts relating to the excise sector can be classified into a part of an administrative, criminal act as his actions cause the loss of other people or a vast range of community, particularly the potential loss of state income. The issue occurs as the convict has no will to choose the fine penalty as the replacement of the potential loss of state income; instead, he prefers imprisonment to pay the fine. Consequently, the Excise Law needs to be evaluated by internalizing the courage of returning state loss which has already been regulated in the Law of corruption eradication as a reformulation for optimizing state income potential.

**Keywords** - Fine penalty, Excise, State Income.

## I. INTRODUCTION

Communities of a nation absolutely expect the establishment of serenity, peace, and prosperity among interacting individuals within an environment. Law becomes one of the peace-creating tools among people in daily life by prioritizing law as a regulator that is used genuinely. It is similar to the existence of current applicable laws and regulations containing certain rules so that the serenity and prosperity of people in a nation can occur. Indonesia, as a plural country, has the responsibility to create a legal regulation that can protect its people from any crimes. Therefore, decisions on criminal act law are deniably important in order to govern administrative-legal activities in Indonesia. It is because criminal law has strict penalties so that the person who violates criminal provisions will be discouraged from committing crimes. In other words, criminal law is a set of rules that contains prohibitions accompanied by penalties in the form of criminal acts.

The crucial problem in Indonesia presently is the number of violations in the excise sector. For example, as quoted in the Customs Media Center, it was stated that

within two months, from January to February 2021, there were 456 (four hundred and fifty-six) illegal cigarettes cases that have been prosecuted following by potential state loss estimated at up to Rp 554.010.790. (five hundred fifty-four million ten thousand seven hundred ninety rupiahs) (Bea dan Cukai, <https://www.beacukai.go.id/berita/amankan-penerimaan-negara-bea-cukairingkus-jutaan-batang-rokok-ilegal-di-berbagai-daerah.html>, accessed on 31 July 2021).

Whereas the main purpose of excise duty is to accelerate resources to finance governmental expenses in an administratively feasible, fair, and efficient manner. Excise also provides one of the main lenses to measure the capacity of the state information and power relations of society. Excise is used to encourage or prevent certain types of behavior, repair market demerits, and modify the revenue or wealth distribution. At a fundamental level, however, the main reason for the existed tax system is to impartially allocate governmental expenses. In other words, the necessity of fiscal revenue acceleration has to be balanced with other economic policy purposes, such as efficient resource allocation, equitable revenue distribution, and competitive trading sector (Baharuddin Lopa, 1984:38).

Excise is an indispensable sector of state income. The loss potential of the state income is caused by criminal acts in the excise sector cannot be devalued, as one of the big approval elements of the state, since the state loss potential becomes its own disputable matter. One endeavor to prevent a greater loss of the state because of criminal acts relating to excise sector by undergoing market operation administered by customs and excise office also has been accommodated in the Excise Law by imposing criminal act sentence that a convict must be responsible for. The Excise Law adopts a double-track system in imposing sentences, namely criminal act penalty and fine penalty.

The double-track system elicits a new problem; since the defendant can choose which penalty he prefers, he takes imprisonment penalty rather than paying fine. In several laws, particularly outside the Criminal Code,



several types of criminal penalties apply, including those adopting a single-track system (using one type of criminal penalty) and the dual-track system (using two types of criminal penalty). The current implementation of the double-track system possesses no corresponding pattern in determining the penalty type as it is applied to be an “additional penalty” and “act” sentence. In addition, the division into criminal types still focuses on the Criminal Code (Basic and Additional Criminal). Determining criminal act sentence has to be under the principle of *quae sunt minoris culpae sunt majoris infamiae* (despicable crime is returned by despicable judgment). However, there must be a limit to the judgment (*poenae sunt restringende*) (Barda Nawawi Arief, 2000:10). In practice, the imposition of criminal charges against the defendant often yields other sustainable problems of society.

It has been commonly understood by law enforcement officers that imposing a fine penalty has nearly been conducted or paid by the convict committing an excise-relating crime. The convict chooses to be prisoned as the replacement penalty of the fine he cannot afford. Imprisonment phenomenon, as replacement penalty in criminal act judgment, which is the corresponding problem or being hated, the convict particularly prefers imprisonment penalty to pay a great number of the fine. In other words, the possible cause of the imprisonment penalty phenomenon is a hardship in implementing criminal act decision; the relation with the convict who commits a crime in excise sector because of common perception among the convicts that the fine penalty which is charged to optimum remedium is too high. It consequently discredits the excise system itself since the money which is necessary to be deposited to the state is lost.

## II. METHODOLOGY

The method applied in the present research was normative or doctrinal by utilizing primary and secondary legal materials. Primary legal materials are authoritative that it has authority (Peter Mahmud Marzuki, 2011:81). It is authoritative legal materials, which content of laws and regulations, official notes or minutes in the law formulation, decision of the judges, meanwhile secondary legal materials are explanatory of primer legal material, even though those are public-relating materials.

## III. DISCUSSION

### A. *Why was the fine penalty in Excise Law strongly avoided by the Excise Convict?*

Before discussing the fine penalty, the author would like to discuss its purpose. The main purpose of criminal activity charges cannot be separated from the general definition about penalty purpose or criminal act sentence; thus, the purpose of its penalty in order to achieve prosperity and public order is fundamental, even though the implementation has still caused infliction. The court relies on retributive theory in deciding the crime committer's competence to execute not because of his awareness over the state executing plan, instead of his understanding about the reason behind his punishment, as

communal judgment. A criminal act sentence is determined as the cause of the individual committing a crime or *quia peccatume*. A crime is a result of obligatory consequence that is apparently aimed as the retribution of his crime. Penalty or punishment is a way to protect society's matter of interest (Lamintang P. A. F, 1987:64). Theory of relative review concerning penalty is not the justification of the crime committed by the person, but as a way to achieve serenity among society.

However, not all parties had the will to compensate for the loss of the crime they had committed. The major excuse was that the defendant had no consent to losing some of the properties he had gained so that he preferred taking imprisonment penalty. Another excuse was that the evidence relating to the defendant's possessions was problematic; it was due to a crime committed by a person who had been on behalf of someone else's.

The implementation of the imprisonment penalty as the replacement of a great fine became the option for the defendant as it was possible and justified legally instead of paying the fine. In other words, it should be legal because it was given by the judge and known in Indonesian criminal act court. Moreover, the criminal act penalty is the replacement of paying the fine, which was regarded to be minor while the number of fines considered being high, that the defendant would not be able to return the nominal which had been decided by the judge.

Criminal act enforcement of fine penalty basically is to preserve safety and order of people who had been affected by the crimes so that legal security was necessary (Soerjono Soekanto, 2012:52). The enforcement of the fine penalty is an obligation for an individual who has committed crimes in order to repair environmental balance whose implementation is law-oriented or by returning a fine. The relevant legal policy for imposing a fine penalty as the replacement imprisonment penalty relating to excise criminal act is in accord with the Indonesian court system.

Fine concept implementation in Indonesia has resembled the fines and fees system applied in American criminal court. The number of fines usually is decided in an exact single number, or in a limited range, for each violation or crime. This exact number is imposed on all defenders because of crimes, regardless of the convict's economic condition. When the fee is decided in low number, the penalty causes a little effect or deterrent effect on those who considered being economically capable. Whenever the greater fine is charged to the poor defendant, it would be impossible for them to pay. In most cases, the defendant finally took the imprisonment penalty instead of paying the fine. One of the reasons Indonesia applies a fines and fees system which is to return the state loss caused by the crimes. In addition, the fine penalty has to be proportional to the violation level committed by the defendant, and it has to have a similar effect (economically) on those individuals with different social-economic statuses.

Although many judges have attempted to view the fees system by considering how the convict determines the amount of the fine, they are not provided with the tools to do that systematically. The structured system has been

currently and experimentally tested in the United States. The concept and technique of a fine structured system are adequate to set several options of fine penalties for American criminal courts (Lamintang P. A. F, 1987:65).

The imposition of fees and fines penalty is because the defendant's assets are not detectable. This happens as the assets are on behalf of someone else's. Besides that, the defendant's illegal source of income hampers the law enforcement officer to investigate the evidence (Lamintang P. A. F, 1987:68).

The implementation of the fine penalty has been used for a long time, especially when the defendant has no income legitimacy. Some examples of fine penalties for the convicts of tax or customs are evasion, gambling, bling fees, drug dealing or possession, and prostitution. Sometimes the fine is rigid and often simultaneously imposed with other penalties or sentences (Lamintang P. A. F, 1987:69). To impose a finely structured penalty in this situation, it may be most useful to assess the convict's lifestyle and estimate the convict's daily net income. This is the approach taken by the Corruption Eradication Commission, which takes note that KPK judges regularly assess the defendant's economical resources in deciding the amount of state loss and determine the appropriate penalty to be imposed. Experienced judges and court officials can draw some rough conclusions about the convict's income from observing personal appearance and attire, criminal history, and questions about a life situation, ownership (such as cars, televisions, and stereos), and personal habits (such as smoking and vacation). The capability to verify the convict's source of income should not prevent courts from validating the fine, yet establishing procedural guidelines of when and how it can be administered is the essential point of the policymakers to be taken into account.

While most of the convicts have abundant capital assets, several of them only have a few or even not any, such as illegal cigarette sellers, alcoholic drinks with no tax stamp; either in small scale or big scale stalls or shops. The foreclosure or even seizure of the assets, which should have been regarded as the leakage replacement of the state income potential in the excise sector, literally has already been conducted in the initial investigation, yet the investigation in this area has been less explored. Meanwhile, KPK has already calculated assets such as private properties. If the fee is needed to be determined in criminal cases (particularly those involving white-collar crimes), it is crucial to develop a method to accumulate the money and properties of the convict, like a net income. Therefore, the judges are able to determine the state loss and the fine that must be paid by the convict.

If the fine penalty is selected as a part of the dual-track system, the public prosecutor needs to develop a thematic method to adjust the amount of fine by considering the impact (on earning capacity and personal freedom) of other penalties such as imprisonment, home-based electronically monitored confinement, or drug-supervised intensive care. Unless adjustments are made on a unit scale and/or system assessment, the imposition of combination between finely structured penalties with other

penalties will vividly be more severe for the convict instead of the fine penalty itself.

Once the unit scale and scoring system have been developed, before the system is implemented, the planner group should have a reviewed scheme and seek feedback on its baseline health. In addition, the key system actors in the justice system (judges, prosecutors, lawyers, court staff, probationary officers, and law enforcement officers) may be useful to elicit reactions from community organizations, victim groups, experiences of practitioners from other jurisdictions, and the public. One way to provide a reviewing action is to develop a series of test scenarios that explains the specific type of violations and convicts with different income, occupation, and household situation. For each scenario, the number of finely structured units to be charged and the nominal of dollars resulting from the fine penalty will be shown for violators in different economic circumstances.

### **B. How are the provisions of the fine penalty relating to the excise sector in the Excise Law?**

Implicitly, regulation of fine penalty in Excise Law that has been legally stated in Article 59 in Excise Law mentions that: (1) if the fine penalty is not paid by the defendant, the assets and/or the defendant's properties will be taken to compensate the loss; (2) relating to compensation of state loss which cannot be fulfilled, the fine penalty is replaced with six-months (maximum) imprisonment. The settlement of fine penalty on the excise-relating criminal act is taken from some or all assets owned by the convict and/or legally seized properties which are later to put under auction and/or that legally properties would be taken to replace the fine penalty itself.

Paragraph (2) Excise Law is a merit form of fine penalty implementation. This makes the defendant disregard his obligation to return the state loss. Indonesian Corruption Watch (ICW) states that the state finance loss is an actual and potential loss. Also stated by ICW, an agreement on the scale of state finance loss has not been settled yet (Emerson Yuntho dkk, 2014:43).

A provision in Excise Law by the Attorney General of the Republic of Indonesia had been followed up with the issuance of the Deputy Attorney General for Special Crimes Number: B-397/F/Ft/03/2019 dated March 20, 2019, Regarding Criminal Claims for Fine in Criminal Cases in Taxation, Customs and Excise sector which revoked the Letter of the Deputy Attorney General for Special Crimes Number: 1868/F/Ft.2/10/2018 dated 17 October 2018 Regarding Criminal Claims in Criminal Cases in the Taxation, Customs, and Excise Sector, which emphasized that:

"If within one month the fine cannot be paid, the assets and/or properties of the defendant can be confiscated by the Prosecutor in terms of replacing the amount of fine that must be paid, and if it is not sufficient, it is replaced with a maximum six-month imprisonment."

The provision clearly states that the Attorney General of the Republic of Indonesia, as the prosecution agency and the executor, has clearly followed up the payment due

date in the excise sector, so that by setting the due date when the fine falls due, the convict is expected to pay the fine. This policy is according to the content of Article 273 paragraph (1) and paragraph (2) of the Criminal Code.

The compensation of the state loss is an obligation for the convict in order to recover state finance, yet the provision in Excise Law directly states that a chance to choose either fine penalty or imprisonment penalty, which has already been decided by the judges, is given to the convict.

Considering the issue, the author suggested that the provisions for the fine penalty need to be adjusted to Law Number 20 of 2001 concerning Amendments to Law Number 31 of 1999 concerning the Eradication of Corruption Crimes (UU PTPK). As a legal norm, the existence of Article 32 paragraph (2) of PTPK Law has a purpose that has to be achieved by the establishment of the Act. This means that the principle of state economic loss is a problem since its principle, which has been explained in PTPK Law, is still considered invalid. The implementation of law enforcement against corruption has nearly made a decision mentioning that the defendant has harmed the state due to his action. A civil lawsuit for compensation is possible in terms of corruption, philosophically, as a basis for seeking regulatory legitimacy or justification for the state in formalizing it as a norm.

It can be seen in the formulation of Article 18 paragraph (1) letter b of the PTPK Law, which states "except for additional penalties in the Criminal Code," for additional punishments, it is the payment of replacement money which is equal to the assets obtained from the act of corruption". The provision makes the convict of corruption have no loopholes to fail in paying the fine. This provision should be applied in the Excise Law.

Furthermore, Article 18 paragraph (2) of the PTPK Law states that "In case that the criminal act convict does not submit the replacement money as written in paragraph 1, no later than one month before the decision of the panel of judges has been declared to have binding legal force, then the properties can be followed up by the public prosecutor and auctioned off to get the replacement money." This provision actually has to be adopted by the Excise Law. In order to secure the state finance loss, a legal instrument that compels the convict must be invented. Therefore, the alignment of the assets and properties of the convict has to be valid.

As for Article 18 paragraph (3) of the PTPK Law, it is stated that "with regard to the assets or properties of the convict who cannot afford to pay the replacement money, the convict may be sentenced to a maximum six-month imprisonment which is in accordance with primary sentence stated in the PTPK Law and therefore the length of the sentence has been determined by the judges." As a last resort, if the convict's assets cannot cover the demerits, then the criminal provision is the last option. The provision in the Excise Law is too early to stipulate the imprisonment penalty. In case the defendant does not want to pay the fine, the option of corporal penalty should not be immediately offered, but it has to be accompanied by a compelling auction of the defendant's assets.

Eddy Rifai mentions that replacement money is an additional criminal act of corruption case, the amount of loss due to corruption must be paid by the convict using the assets obtained from the crime, if the assets are insufficient to pay the replacement money, the penalty can be replaced with imprisonment as an additional penalty (Sunarto, 2016:47-48). Furthermore, according to Novian Saputra's explanation, the primary criminal act sentence is an obligation by the Judge on the charges of the Public Prosecutor, and everything that is proven in additional penalty is optional under Article 18 of the Corruption Eradication Law (Indriyanto Seno Adji, 2009:32). The judge decides on an additional penalty in the form of a substitute fine, then the amount of money that must be given is based on the results of the BPK audit, the state loss is based on the result of the trial regarding the amount of money taken by the convict, whether the result of the crime can be given to the state, and whether the act of criminal acts corruption is carried out concurrently so that the Defendants may be subject to payment of compensation in the congregation.

After reviewing the provision contained in Article 18 paragraph (2) of the PTPK Law, there is a penalty of "assets can be sold off (auction) or confiscated", based on the producers of properties referred to in that article, the properties belong to the defendant who is not obtained from the criminal act of corruption, or it is not the assets used to commit a criminal act of corruption. Since it is according to the trial proves that confiscated assets are properties obtained from the criminal act of corruption, the provision of Article 18 paragraph (1) letter a of the PTPK Law will apply so that the Prosecutor does not need to carry out confiscation and auction-based on Article 18 paragraph (2) PTPK Law. Furthermore, based on Article 18 paragraph (3) of the PTPK Law, it is stipulated that "with regard to the convict's insufficient properties in terms of paying the replacement money, the convict may be sentenced to a maximum imprisonment based on the sentencing principle stated in the content of the PTPK Law and therefore the length of sentence has been decided by the judge."

The provision of the PTPK Law does not provide a chance for corrupt convicts to fail in paying the fine for state loss. This is what the Excise Law should have formulated. However, the current Excise Law still gives a chance for excise convicts to avoid paying the fine.

#### **IV. CONCLUSION**

In the case of excise crimes, penalty or fine is expected to be a substitute for money that arises as a result of the defendant's actions which are detrimental to the state. However, the implementation of imprisonment as a substitute for a relatively great fine is an option to choose criminal penalties because it is possible, and it is legally justified to choose imprisonment rather than paying the fine. In other words, this should be legal since it is released by the judge and familiar with the Indonesian criminal justice system. In addition, the fine is considered too high, and the convict is unable to pay the fine, which has been decided by the judge. This is possible because

Article 59 of the Excise Law states that if the convict does not pay the fine, it will be subsidized with imprisonment.

The regulation of fine penalty is implicitly stated in Article 59 of the Excise Law: (1) if the fine cannot be paid by the convict, the replacement is taken from the assets and/or properties of the convict to compensate for the loss (2) regarding the state compensation which cannot be fulfilled, the fine penalty is replaced by maximum six-month imprisonment. Settlement of fine penalty for criminal cases in excise sector is taken from all or some of the assets owned by the convict and/or properties legally confiscated, which is then sold off for assets and/or legal properties used to replace the fine.

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