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**IMPLEMENTATION OF SANCTIONS OF IMPRISONMENT IN LIEU OF A FINE IN ILLEGAL FISHING  
CASES IN INDONESIA'S EXCLUSIVE ECONOMIC ZONE (ZEEI)**

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Marimin

Doctoral Program in Law, Diponegoro University, Semarang

Email: [mmarimim242@gmail.com](mailto:mmarimim242@gmail.com)

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**Abstract**

Positive law has emphasized that illegal fishing in ZEEI can only be subject to a fine without being followed by imprisonment in lieu of a fine, but until now there are still practices that deviate from the positive law, such as decision number 71/Pid.Sus-Prk/2017/PN. Ran. This paper will describe the judge's considerations in the decision and relate it to the doctrine of criminal law for its application in the future. This paper uses doctrinal legal research with a legal, conceptual, and case approach. From the results and discussion, it can be seen that the judge in the decision number 71/Pid.Sus-Prk/2017/PN.Ran who applied the substitute confinement sanction was based on considerations of the value of justice and expediency. Here the judge ignores the value of legal certainty by deviating from the Fisheries Law and SEMA No. 3 of 2015, and the judge was then guided by the Criminal Code. The attitude of the judge who prioritizes justice and expediency needs to be appreciated, but the judge's deviation is not appropriate because in understanding the Fisheries Law, the judge does not pay attention to the UNCLOS 1982 which explicitly states that illegal fishing perpetrators cannot be subject to corporal punishment, including imprisonment. The author suggests that in the future judges rely on progressive legal thinking when they want to apply confinement sanctions in lieu of fines against illegal fishing actors in the ZEEI.

**Keywords:** Implementation, Sanctions, Imprisonment in Lieu of Fines, Illegal Fishing, ZEEI

**INTRODUCTION**

Fisheries crime (TPP) has become one of the global issues in various countries in the world because it is not easy to solve, especially if the perpetrators come from foreign countries without the right to enter the waters of other countries to catch fish illegally (1). This has also become a classic problem for the Indonesian state from the past until now in the Indonesian Exclusive Economic Zone (ZEEI), in the form of TPP practices carried out by foreign fishing vessels (2). To combat TPP, Indonesia has enacted Law of the Republic of Indonesia Number 31 of 2004 concerning Fisheries as amended by Law of the Republic of Indonesia Number 45 of 2009 (hereinafter referred to as the Fisheries Law). The formation of this law refers to the Law of the Sea Convention issued by the United Nations, namely the United Nations Convention on the Law of the Sea (UNCLOS 1982) which was ratified by Indonesia through Law No. 17/1985. UNCLOS 1982 regulates the matters concerning the jurisdictional boundaries of a country's maritime territory with other countries, including the authority of a coastal state in its Economic Exclusive Zone(3).

The ratification of UNCLOS 1982 had a consequence for Indonesia, namely the provisions for the implementation of fishing at sea, especially in the ZEEI, referring to the provisions of UNCLOS 1982. The provisions referred to are contained in Article 73 of UNCLOS 1982 which confirms that if

foreign vessels do not comply with the laws and regulations of the coastal state in the event of the conversion of fishery resources, the coastal state can arrest the vessel, but it must be immediately released with a reasonable bond given to the coastal state. Punishment against foreign ships also may not be in the form of corporal punishment (imprisonment), unless there is an agreement between the countries concerned(4). The provisions of Article 73 of UNCLOS 1982 have been adopted in Indonesia as stated in Article 102 of the Fisheries Law which stipulates that illegal fishing using foreign vessels in the ZEEI is only subject to a fine, and is not subject to corporal punishment.

The positive law, although firmly states that the sanction for illegal fishing in ZEEI is fine, but in practice, there are still problems related to the application of confinement in lieu of a fine. In practice, some judges impose sanctions on perpetrators of illegal fishing in ZEEI in the form of fines without substitute imprisonment and some judges impose fines by applying imprisonment in lieu of fines. Based on this fact, the Supreme Court of the Republic of Indonesia Circular Letter Number 3 of 2015 concerning the Implementation of the Formulation of the Results of the 2015 Supreme Court Chamber Plenary Meeting was issued as a Guide to the Implementation of Duties for the Court (SEMA No. 3 of 2015).

In the SEMA it is expressly stated that in the case of illegal fishing in the ZEEI area, the defendant is only subject to a fine without being sentenced to imprisonment in lieu of a fine. This SEMA is expected to unite the judges' views regarding law enforcement in the ZEEI area carried out by foreign-flagged vessels. SEMA No. 3 of 2015 was also not implemented consistently because there are still judges who apply confinement sanctions in lieu of fines for illegal fishing perpetrators in the ZEEI. This can be seen, for example, in the Decision of the Fisheries Court at the Ranai District Court Number 71/Pid.Sus-Prk/2017/PN.Ran, with the defendant "N" being a Laos national. In this decision, the panel of judges sentenced the defendant to a fine of Rp. 500,000,000.00 (five hundred million rupiahs), provided that if the fine is not paid, it is replaced with imprisonment for 6 (six) months.

From the above circumstances, the authors are interested in studying further the application of imprisonment in lieu of a fine. This study is important because positive law has confirmed that perpetrators of illegal fishing in the ZEEI can only be subject to a fine without being accompanied by imprisonment in lieu of a fine, but in practice, there are still judges who apply a penalty in lieu of a fine. This paper attempts to describe the judge's considerations in decision number 71/Pid.Sus-Prk/2017/PN.Ran and relate it to the criminal law doctrine for its future application.

## **METHODS**

This study uses a type of doctrinal legal research, namely research on laws that are conceptualized or developed based on the doctrines adopted by the conceptualizer and/or the developer(5). Under this type of research, the researcher uses a legal approach, a philosophical approach, and a case approach. The data used are primary data (library material) which is collected by library study technique. The data that has been collected is then processed and analyzed by qualitative methods. The results of the analysis then conclude with the logic of deductive thinking, namely applying general things to concrete things, which in this case concerns the application of confinement in lieu of fines for illegal fishing perpetrators in the ZEEI.

## **RESULTS AND DISCUSSION**

**Considerations of Judges Who Implemented Sanctions Imprisonment in Lieu of a Fine for Illegal Fishing Perpetrators in ZEEI in Decision Number 71/Pid.Sus-Prk/2017/PN. Ran**

A court decision is a judge's statement pronounced in a court session that is open to being in the form of a sentence, free or free from all lawsuits. The limitations of such court decisions are stated in Article 1 point 11 of the Criminal Procedure Code. The court decision referred to in this provision is included in the type of final decision(6). Mertokusumo quoted by Wijayanta and Firmansyah stated that basically, a decision consists of four parts, namely the head of the decision, the identity of the parties, considerations, and the verdict(7).

Thus, it can be stated that the decision number 71/Pid.Sus-Prk/2017/PN. Ran is a judge's statement at a court hearing open to the public who examines illegal fishing cases in ZEEI. This decision is included in the final decision in the form of punishment because the judge imposed criminal sanctions on the accused of illegal fishing in the ZEEI. The decision also contains four parts, including the judge's considerations. In applying the sanction of confinement in lieu of a fine against the perpetrators of illegal fishing in ZEEI, the judge based on several considerations as follows:

- 1) The provisions of Article 102 of Law no. 31 of 2004 will take a long time to wait for these countries to agree with the government of the Republic of Indonesia, while TPP carried out by foreigners continues and occurs in the fisheries management area of the Republic of Indonesia with various intensities and continues to cause real losses from criminal acts. for the Republic of Indonesia, especially in the fishery sector;
- 2) There is injustice in terms of punishment for Indonesian citizens and foreigners who commit TPP, where there is special treatment for foreigners whose provisions cannot be subject to imprisonment and corporal punishment in any form, while for Indonesian citizens this is not the case so that this violates the principle of universal law, namely the principle of equality before the law;
- 3) In terms of losses, the TPP carried out by foreigners caused more losses than the TPP carried out by Indonesian citizens. This is related to the technology that has developed regarding fishing owned by foreigners compared to Indonesian citizens, most of whom still use fishing equipment that is simple and not as sophisticated as foreign fishermen;
- 4) A criminal act committed by a foreigner if only a fine is imposed, there will be the ineffectiveness of the TPP law enforcement, especially regarding the punishment of a fine that is not disserted with an alternative criminal substitute for a fine, so that it does not provide a deterrent effect on foreigners who commit fisheries crimes in the fishery management area of the Republic of Indonesia. Indonesia;
- 5) If the defendant is a foreign national and is not subject to a fine in lieu of a fine, then what is the executive power of the decision? While the defendant has been sentenced to a fine and is obliged to pay it, then what is the legal status of the defendant who has not served the sentence? Is it left without legal certainty? If the defendant does not pay the fine, it is a punishment for the defendant for his actions;
- 6) In Article 103 of the Criminal Code it is stated that the provisions in Chapters I to VII of this book also apply to acts thats are punishable by other statutory provisions, unless the law

provides otherwise so that based on these provisions the law - the fishery law does not regulate imprisonment in lieu of a fine, then legally this provision also applies to TPP;

- 7) Based on Article 7 paragraph (1) of Law no. 12 of 2011 concerning the Establishment of Legislations, states: Types and hierarchy of laws and regulations consist of 1) the 1945 Constitution of the Republic of Indonesia; 2) MPR Decree; 3) Laws/Perpuu; 4) Presidential Regulation; 5) Provincial Regulations, and 6) Regency/City Regional Regulations, it is clear that the Circular Letter of the Supreme Court is not known in the order of laws and regulations so that SEMA No. 3 of 2015 can also be deviated by the provisions of Article 30 paragraph (2) of the Criminal Code;
- 8) Thus, if the defendant does not pay the fine stated in the verdict, it will be replaced with imprisonment. The fine imposed must pay attention to the ability and humanity aspects of the perpetrator, namely the defendant only fight those who depend solely on their daily income from fishing, so that even if the defendant has to be sentenced to a fine, the aspects of decency and justice will take into account the income of the defendant as a consideration main. For legal certainty for the defendant so as not to cause social problems in the community related to replacement confinement if it is not paid after the verdict is determined.

From the description of the judge's considerations above, it can be understood that the judge in the decision number 71/Pid.Sus-Prk/2017/PN.Ran who applied for confinement in lieu of fines for illegal fishing perpetrators in ZEEI was guided by Article 30 paragraph (2) of the Criminal Code. This article states that the penalty imposed if it is not paid will be replaced with imprisonment(8). This confinement law is also referred to as "confinement in lieu of a fine" or "subsidiary confinement"(8). Here, the judge deviated from the provisions of Article 102 of the Fisheries Law and SEMA No. 3 of 2015, which confirms that illegal fishing perpetrators using foreign vessels in the ZEEI are only subject to a fine, without being followed by imprisonment in lieu of a fine.

#### **Considerations of Judges in Implementing Sanctions Imprisonment in Lieu of a Fine for Illegal Fishing Perpetrators in ZEEI for the Future**

In the previous sub-discussion, it has been emphasized that the judge in the decision number 71/Pid.Sus-Prk/2017/PN.Ran which applies substitute confinement sanctions against illegal fishing actors in the ZEEI is based on considerations of the value of justice and expediency. Here the judge ignores legal certainty as embodied in the provisions of positive law, namely Article 102 of the Fisheries Law. In addition, the judge also ignored the internal regulations in the form of SEMA No. 3 of 2015. The law and SEMA explicitly state that illegal fishing actors using foreign vessels in the ZEEI can only be subject to a fine, without being followed by imprisonment in lieu of a fine.

Listening to the judge's consideration in decision number 71/Pid.Sus-Prk/2017/PN. Ran, there has been a struggle between the value of legal certainty and the value of justice and legal certainty. Gustav Radbruch has conveyed the settlement between these three values when discussing the basic ideas of law. This discussion of Radbruch by most legal theorists and legal philosophy is also identified as the three objectives of the law, namely justice, expediency, and legal certainty. (9)(10) Radbruch states that these three basic ideas are the common goal of the law. Radbruch realized that in practice there was a clash between these three basic ideas. When a

conflict or conflict occurs, the principle of priority must be used, where the priority is justice, the second is a benefit and the last is legal certainty. Benefits and legal certainty must not conflict with justice, as well as legal certainty must not conflict with expediency. (9)

The principle of priority teaching proposed by Radcruh in its development was rejected so the casuistic priority teaching emerged. This teaching is considered the most relevant to answer current legal problems, which are based on the reason that human life in the modern era is increasingly complex, so the standardized priority choices sometimes create conflicts between legal requirements in certain cases. Sometimes, justice in one case is still prioritized over benefits and legal certainty, but in other cases, benefits are prioritized over justice and legal certainty. It is even possible that legal certainty is more appropriately prioritized over justice and benefit. (9)

Thus, it can be stated that the judge in the decision number 71/Pid.Sus-Prk/2017/PN. Ran seems to prioritize justice and expediency, rather than legal certainty. Justice, in this case, is prioritized over expediency because in his judgment the judge seems to first consider the aspect of justice when he is going to apply confinement in lieu of a fine. Judges in this context seem to realize that justice is the most substantive or essential goal of the law, although it is not the only goal of law(11).

The value of justice is interpreted by the judge as equality before the law (equality before the law), namely so that there is equality in the application of law to foreigners and Indonesian citizens. Equality before the law is one of the principles contained in the concept of the rule of law(12)(13). The principle of equality before the law is recognized normatively and implemented empirically(12)(13). This principle should also be applied in Indonesia because it has declared itself as a state of law which is affirmed in Article 1 paragraph (3) of the 1945 Constitution of the Republic of Indonesia. The principle of equality before the law is then included as a human right as stated in Article 28D paragraph (1) 1945 Constitution of the Republic of Indonesia.

Meanwhile, the value of expediency by judges is related to the effectiveness of TPP law enforcement. With the implementation of imprisonment in lieu of a fine, it is hoped that it will have a deterrent effect. Doctrinally, such goals are referred to as objective or relative theories, which seek to prevent errors in the future or as a means to prevent errors. This theory is also called the theory of prevention, which can be seen from two aspects, namely general prevention and special prevention. General prevention is aimed at potential perpetrators to discourage committing crimes for fear of the consequences, while special prevention is aimed at perpetrators not to repeating their actions. (14)

The judge's consideration that prioritizes justice and expediency over legal certainty should be appreciated, but the author does not agree with the use of Article 30 paragraph (2) jo. Article 103 of the Criminal Code. Judges here implicitly based on the principle of "*lex specialist derogate legi generalist*". Following this principle, the panel of judges concluded that confinement in lieu of fines can be imposed on perpetrators of illegal fishing in the ZEEI because the Fisheries Law does not explicitly regulate confinement in lieu of fines so that based on Article 103 of the Criminal Code, Article 30 paragraph (2) of the Criminal Code can be used as the legal basis.

In understanding the Fisheries Law, judges should also need to link it to UNCLOS 1982 because it was one of the sources for its formation. UNCLOS 1982 essentially emphasized that punishment for foreign ships should not be in the form of corporal punishment (imprisonment) unless there is an agreement between the countries concerned. Thus, if the Fisheries Law is linked to

UNCLOS 1982, then the criminal fines imposed on the perpetrators of illegal fishing may not be followed by imprisonment in lieu of fines because this sanction is included in corporal punishment. Under this understanding, Article 30 paragraph (2) of the Criminal Code also cannot be a guide in the application of confinement sanctions in lieu of fines for illegal fishing perpetrators in the ZEEI.

The judge when applying the sanction of imprisonment in lieu of a fine should be based on progressive legal thinking which according to Satjitpo Rahardjo chooses to allow himself to be open and fluid so that he can always catch and digest the changes that occur<sup>(15)</sup>. Sidharta stated that if this progressive law is associated with the law enforcement process, then the law must be pro-people and put justice above regulations (laws). Law enforcers must dare to break through the rigidity of the regulatory text (legal mobility) if the text injures the people's sense of justice<sup>(16)</sup>. The attitude of the judges in decision number 71/Pid.Sus-Prk/2017/PN.Ran who prioritizes justice has been thinking progressively.

### **CLOSING**

Based on the description of the results and discussion above, it can be concluded that the panel of judges in the decision number 71/Pid.Sus-Prk/2017/PN.Ran is guided by Article 30 paragraph (2) of the Criminal Code. In his consideration, the judge prioritizes the value of justice and expediency so that the judge as the incarnation of legal certainty is sidelined. In addition, the panel of judges also deviated from SEMA No. 3 of 2015 because it is not included in the hierarchy of laws and regulations currently in force in Indonesia. The judges' considerations used to deviate from the law and SEMA were not appropriate because the panel of judges was guided by the Criminal Code without considering the 1982 UNCLOS which strictly prohibited imposing corporal punishment on perpetrators of illegal fishing in the ZEEI. The sanction of confinement in lieu of a fine is included in corporal punishment so that it cannot be applied to perpetrators of illegal fishing in the ZEEI. Suggestions from the author, the judge in considering the application of imprisonment in lieu of a fine needs to be more careful and needs to be based on progressive legal thinking, which prioritizes justice in the law enforcement process.

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