

Trends & Policies in Criminal Justice

No. 017 August 2021

Misuk Park
Senior Research Fellow
at Korean Institute of Criminology
and Justice
(misuk@kic.re.kr)

Jinkuk Lee
Professor at Ajou University

Seyeong Nam
Attorney at Law

Kwangsuk Kim
Researcher
at Korean Institute of Criminology
and Justice

A Legislative Scheme for the Property-Based Fine System

Necessity and Purpose

- The current system of imposing a fixed-amount fine for an identical offense is a persistent problem that causes inequality in the effect of criminal punishment, depending on the defendant's financial conditions.
- The monetary penalty system has been improperly implemented to achieve its objectives because detaining fine defaulters in a workhouse results in a vicious cycle from monetary penalty to imprisonment, stigmatizing fine defaulters as criminals by converting a monetary penalty to imprisonment.
- The Government makes continuous efforts to seek an alternative to the monetary penalty system to date since 1986, when discussions on the introduction of the so-called "day-fine system" (property-based fine system) began as an amendment to the Criminal Act.

- Refer to the newly inserted provision of Article 44(4) in the 1992 Bill for the amendment to the Criminal Act:

"The defendant's financial ability shall be considered in determining the amount of a fine."

The Need to Review the Issues Being Discussed on the Introduction of the Property-Based Fine System and Present a Policy Proposal

- Empirical data are necessary because the rash introduction of a day-fine system will cause distrust in the judiciary, considering that it is difficult to properly investigate individuals' income and property.
- A jurisprudential review is necessary because differentiating the amount of a fine for an identical crime according to a defendant's financial conditions or ability may contravene the principle of culpability.

Keywords

※ Monetary penalty, day-fine system, property-based fine system, fairness of criminal penalties, default in the payment of a fine

Research Methods

Analysis of Prior Studies and Statistical Data

- This study basically aims to evaluate the performance of the monetary penalty system and proposes policy recommendations for the future. To this end, official and unofficial statistical data about the current status of the system's implementation have been analyzed based on a review of related legal systems and prior studies. The analysis primarily checks the performance of the monetary penalty system, the current status of the system's implementation, and the problems and issues that have been drawn from the analysis so that they can be utilized as basic data for formulating a policy.
- Most of the prior research data only insist on the necessity of introducing the day-fine system on a scheme to improve the system but do not mention a specific scheme to legislate the day-fine system, the methods of implementing the monetary penalty system, and the performance of the system through comparative legal analysis. Therefore, this study can promote differentiation by proposing a specific way based on empirical data about a scheme to improve the monetary penalty system. Furthermore, the design is expected to improve usability as practical policy data.

Collection of Opinions for Introducing the Property-Based Fine System and Preparation of Policy Data Through a Survey on the Perceptions of Ordinary Persons and Experts

- This study is a policy research project in its nature, which is expected to bring about specific outcomes of legislation by collecting opinions on the perceptions of the monetary penalty system and the direction toward the development of the national criminal policy from the general public and experts and exploring the possibility of specific institutionalization.
- What cannot be omitted from discussions regarding the introduction of a system is the process of extensively collecting opinions not only from the

persons in charge of the system but also from ordinary persons and experts.

- Online survey from August 4 to 8, 2020, with 1,089 ordinary persons

- In the case of reforming the monetary penalty system, it is necessary to listen to the voice of experts and academic circles and collect their opinions on adopting a day-fine system.
- Academic circles have supported the reform of the monetary penalty system. In particular, it was found during discussions on an amendment to criminal law that the majority of opinions from academic circles supported the introduction of the property-based fine system. Therefore, this study intended to examine the direction of the improvement of the system and the specific details thereof by rearranging the experts' opinions through the analysis of prior studies and by sharing expertise and experience in the criminal penalty system with experts.

- Online survey from August 21 to September 1 with experts (criminal law professors)

Comparative Law Review

- The survey aims to propose a proper policy based on the results in the countries that introduced and implemented a day-fine system, rather than comparative legislation in the general monetary penalty system or the system of imposing a fixed amount of fine for an identical offense by looking at the outcomes and challenges of them.
- The targets of the comparative legal research were the United Kingdom and the United States for the Anglo-American legal system and Germany and Switzerland for the continental legal system.

Review of Legislative Bills

- This study has drawn and analyzed issues for the development and improvement of the monetary penalty system by analyzing legislative bills introducing a day-fine system in the past. Moreover, the study used the issues drawn from the analysis and the background of the introduction of such bills in survey questions for experts and ordinary persons.

- Among the legislative bills introduced in the form of a special act on the adoption of a day-fine system, which have been reviewed in this study, one bill was introduced in the 18th National Assembly and another one in the 19th National Assembly. Also, a new bill in the 20th National Assembly, and other ones were introduced in the form of a bill for a partial amendment to the Criminal Act.
- The bills for a special act on the introduction of a day-fine system and for a partial amendment to the Criminal Act aimed to introduce a day-fine system that authorizes the imposition of different fines depending on financial ability. The legislative intent of the bills was to specify the number of days in proportion to the severity of illegality and the level of liability to pronounce a day-fine in accordance with financial ability. There are some differences among the bills with regard to specific issues.
- Under the legislative bills for the introduction of a day-fine system, there are many provisions on which no agreement has been reached in the course of designing a basic day-fine system, such as provisions concerning the maximum number of days, the range of a fixed daily amount, the excessively overdetermined amount of a day-fine, and its subjects. Thus, such issues have been reviewed in this study to utilize the findings for the review in proposing a scheme to adopt a policy on them in the future.
- A low execution ratio of fines and increased number of detention cases to a workhouse indicate a possibility of danger that the normative power of monetary penalty as a punishment will decrease or be neutralized. Such phenomena will strengthen the idea that violators do not have to pay a fine and may ignore it. Consequently, the monetary penalty will not have preventive effects as originally contemplated.
- Around 2010, as a result of discussions on the improvement of the monetary penalty system, the system has been revamped to some extent to solve the problems of unfairness and inequality in the penal effect of the monetary penalty system under the Rules on the Execution of Pecuniary Punishment by the Prosecution Service. Provisions for installment payment and deferred payment of fines under the Rules on the Collection of Payments by the Prosecution Service and provisions concerning orders to perform community service work as an alternative under the Act on Special Cases Concerning the Execution of Fine Defaulters' Community Service Work were legislated and have been practically utilized. However, the burden of work is still big, and there are many provisions that need to be amended in terms of cost.
- In the case of alternative methods for fine defaulters, an order to perform community service work and installment payment or deferred payment of fines have limitations in achieving sufficient results as an alternative system. Even after the Act was amended, the problems of so-called emperor's labor (or the value of prison labor varied in accordance with the criminal's social status), etc. have not subsided. **This issue seems inevitable under the current system of imposing both fixed amount of fine for an identical offense, which limits the maximum amount of a fine that can be converted into the number of days for which a fine defaulter is detained in a workhouse, and the maximum period of detention.**
- It is necessary to discuss the day-fine system as a new system with which we can overcome problems in the monetary penalty system. Furthermore, expectations for legislative fruits are higher than ever.

Highlights

Review of the Monetary Penalty System and its Current Implementation Status

- The monetary penalty system has been extensively utilized as an alternative to imprisonment but it converts a fine to detention in a workhouse if a person fails to make a payment, in spite of its usability and significance as a criminal sanction. Consequently, the functions and effects of the monetary penalty system have not been fully recognized.

Analysis of Perceptions of Ordinary People and Experts on the Property-Based Fine System

- In the survey on the perceptions of ordinary people and experts on the property-based fine system, the argument of prematurity or the lack of practicality, which had been argued as a ground for opposing the introduction of the system, was examined through empirical research to determine the direction of discussions on the introduction of the system.
- The results of the survey with ordinary people show that 72.6% of all respondents agree that socioeconomic conditions have been calibrated to some extent to adopt a property-based fine system. Meanwhile, 85.3% of all respondents agree that the system could be implemented as a limited trial in a specific area or for a specific crime for one or two years to examine the timing and method for implementing the system. Such results can be utilized as a driving force for the introduction of the system.
- However, it is difficult to ignore that 73.4% of respondents answered (with multiple answers) that it was unreasonable to differentiate a penalty for an identical crime due to the gap between the rich and poor. Moreover, 32.8% of the respondents answered that even the introduction of the property-based fine system would not be able to resolve the problem of default in the payment of fines by poor people.
- Experts expected that the property-based fine system would relieve penalty imbalance, which is a problem of the current system of imposing a fixed amount of fines for an identical offense, while proposing to implement the system as a limited trial. Meanwhile, a network through which related agencies can share information to determine the status of wealth must also be established. Moreover, a grace period for the implementation of the system must first be specified.
- Methods for securing stability in courts' investigations and establishing a system for cooperation among

related administrative agencies, financial institutions, the National Tax Service, the National Health Insurance Service, etc. must be established instead of making excuses.

- It is necessary to establish a legal authority for inquiring data about health insurance and tax collection for determining a defendant's financial conditions to ensure the validity of the property-based fine system or to help the judge determine a fine.

Analysis of Property-Based Fine Systems in Foreign Countries

- In the case of a pilot project implemented in the United States for a day-fine system, there are opposing opinions on the ground that the introduction of the day-fine system is not very helpful in securing tax revenue because of an increase in administrative costs. However, in the past, it was concluded through a pilot project of the day-fine system in the United States that the execution cost could be rather reduced, which could improve tax collection.
 - It is true that administrative costs are incurred when establishing a new system, securing human resources, and conducting research on economic situations. The information necessary for the investigation of economic situation has already been collected under the current United States judicial system for the calculation of child-rearing costs, the appointment of a court-appointed attorney, and other welfare benefits to avoid redundancies in expenses. Furthermore, an offset can be expected from the decrease in overall administrative costs for criminal justice because of a reduction in administrative costs, resulting from a decrease in nonpayment rates, execution costs for nonpayment, and recidivism rates.
- The United Kingdom has long enforced a statute that requires the consideration of a criminal's economic circumstances when imposing a fine. However, it has implemented a pilot project for a unit fine system because of overcrowding in correctional facilities, an increase in the nonpayment rate of fines due to unemployment, the burden of execution costs of probation and community service work, etc.

- In the case of the United Kingdom, the unit fine system was positively evaluated because the rate of payment of fines increased, while the period of full payment decreased, and the execution procedure was simplified after the implementation. Nevertheless, the system was abolished only six months later because it failed to obtain a national consensus on an over-deviation in the amount of fines for an identical crime, depending on economic situation.
- As shown by the introduction and implementation of the unit fine system in the United Kingdom, there are implications for the personal economic situation to be considered when determining a fine, while a substantial penal effect can be achieved at the same time through sentencing guidelines. Moreover, concerns arise regarding the burden imposed on courts by investigations of economic situation for determining the amount of a fine may be relieved by utilizing the defendant's voluntary information report.
- In the case of Germany, pecuniary penalty has been utilized as a typical sanction for misdemeanors. In particular, an emphasis is placed on the equality of sacrifice in determining the amount of a day-fine.
 - In Germany, investigating an individual's economic circumstances is not allowed due to legal limitations on tax-related information, such as access to tax data for investigating a defendant's property, etc. The court allows to estimate an actor's income, property, other basic facts, etc. for determining the number of days and imposes a day-fine, relying on the defendant's voluntary declaration and other audit reports, etc. describing the status of property, occupation, education, and the place of residence in detail.
- In the case of Switzerland, an emphasis was originally placed on overcoming problems of short-term imprisonment by introducing a day-fine system. However, short-term imprisonment was reintroduced because of a decrease in the penal deterrent power of the monetary penalty after the system's implementation. Therefore, the introduction of a day-fine system can reduce the deterrent power and effect of a
 - fine as a penalty if it is approached simply as a means to overcome the negative effect of short-term imprisonment.
- In Switzerland, the prosecution or court may request the national tax authority, pension institutions, medical insurance institutions, institutions for unemployment insurance, etc. to provide information about a defendant's property as part of the investigation for wealth status. Upon receiving such a request from federal administrative agencies, as well as Canton or Gemeinde administrative agencies, institutions should provide the information necessary for determining the number of days.
- There are only a few countries that have introduced a day-fine system in Asia because it is not easy to grasp an individual's income and status of property, particularly in the case of the property-based fine system. In this region, legal discussions like those in the United States and other countries are uncommon.

Policy Proposals

- **Significance of the Property-Based Fine System**
- Under the property-based fine system, a person who is unable to pay a fine may avoid detention in a workhouse as an identical fine is imposed for an identical crime. The legislative intent for such a system is acknowledged because the court can promote the parity of the penal effect between the rich and the poor by converting a day into an amount and imposing a fine in accordance with the number of days, considering the actor's income, status of property, etc.
- The property-based fine system aims to remedy inequality in terms of the penal effect and prevent the inefficient conversion of penalty. The system has advantages as it maintains the concept of liability for conduct and promotes the equality of suffering, considering the defendant's ability to pay a fine.
- Even from the perspective of comparative law, the fact that the day-fine system has been widely adopted in Europe as a basic penalty suggests an important implication for introducing the system and establishing the direction of the policy.

- **Results of the Review on Whether the Property-Based Fine System Contravenes the Principle of Culpability under Criminal Law**
- The argument that differentiating fines for an identical crime in correspondence to the defendant's economic circumstances would possibly contravene the principle of responsibility was one of the main issues that arose in the course of discussion on the introduction of the property-based fine system and the main ground for opposing related legislative bills during the 18th through 20th terms of the National Assembly.
- The principle of culpability is a legal principle that prohibits any criminal punishment not premised on culpability or exceeding it. Therefore, it is reasonable to assume that the principle does not prohibit determining a sentence within its extent. Still, it does not mean that an objectively identical sentence should be always imposed for cases in which culpability is identical. Rather, the principle should be interpreted that the subjective severity of punishment by the receiving party should be the same.
- It is difficult to see that the property-based fine system is contrary to the principle of culpability because it also considers the subjective penal suffering of an actor. Therefore, arguing that there is a problem in determining a fine in consideration of the defendant's economic status is invalid because Article 51 of the current Criminal Act states that such condition should be considered in sentencing.
- In order to ensure that the property-based fine system does not contravene the principle of culpability by imposing a fine based on an individual's economic strength, it must be possible to ascertain individuals' income and assets as a precondition.
 - In the survey with ordinary people, 56.1% of all respondents answered that it was possible to ascertain the income of individuals with the current system.
- **Results of the Review on the Argument of Prematurity for the Introduction of the Property-Based Fine System**
- There is an argument that it is premature to introduce the day-fine system because the data about an individual's income and status of property are insufficient in reality where accurate data for assessing economic ability as the basis of a fine are not disclosed, no adequate system has been established for ascertaining property, etc., and the day-fine system is extremely unfavorable to most of salary earners and taxpayers.
- The results of the survey with ordinary people show that 72.6% of respondents believe that the current system for ascertaining income and property is appropriate. Such an answer can serve as a driving force for introducing and implementing the property-based fine system.
- According to the results of the survey on experts' opinions, the majority opinion is that there is no problem in improving the infrastructure of the monetary penalty system as economy-related legal systems have been improved to make it easier to inquire and ascertain a defendant's status of assets, taxation standards have become transparent, and income data have been computerized.
- In view of ordinary people's perception and experts' evaluation of the introduction of the property-based fine system, what should be deliberated on are the methods for securing stability in court investigations and establishing a system for cooperation among administrative agencies, financial institutions, the National Tax Service, the National Health Insurance Service, etc., rather than reasoning for the impossibility of investigation of property.
- **A Scheme to Relieve Difficulties in Investigations of Income and the Status of Property**
- In fact, it is not easy to investigate a defendant's personal and economic situation, which is deemed to be a key element in determining a fine under the day-fine system. It is also difficult to allow access to tax data for determining a day-fine, as in Germany. Therefore, preparing a scheme is necessary to estimate a defendant's income.
- If the prosecution or court is authorized to estimate a defendant's property, despite the citizens' low confidence in the prosecution or court, it should be considered that ordinary citizens may still challenge the fairness of sentencing.

- It is necessary to authorize investigation agencies or courts to access required information about an actor's income and prepare a basis for the examination of an actor's income by prescribing the obligation of administrative agencies to provide information necessary for determining the number of days for a fine (refer to Article 34 of the Swiss Criminal Code).

- **Specific Issues of Legislative Bills**

1) Number of Days

- The number of days proposed by legislative bills for the introduction of the day-fine system varies from 180 days to 3 years. The bill introduced by Seungsu Jo of the 18th National Assembly, insisted that it was appropriate to specify one year as the maximum number of days for a fine, considering that the system has an advantage of preventing the negative effect of short-term imprisonment.¹⁾ Later, the number of days proposed by the bills introduced by Seongyeop Yu, Kijun Kim, and Sangmin Lee, Members of the 19th National Assembly, respectively, was a maximum of one year (300 to 365 days). The number of days proposed by bills introduced by Wanju Park and Jaeseong Choi, respectively, was a maximum of three years.
- This study proposes three years for the maximum number of days, considering the results of the comparative legal review, the opinion from the Legislation and Judiciary Committee, the purpose of the monetary penalty system, and the period of detention in a workhouse under the current statutes.

2) Fixed Amount of a Day-Fine

- The fixed amount of a day-fine, previously proposed by legislative bills, ranges from a minimum of KRW 10,000 to a maximum of KRW 50,000,000 maximum. As to whether to set an upper limit on the fixed amount of a day-fine, there was a bill that placed emphasis on imposing more fines on the rich to attain the purpose of the day-fine system, as in Finland and Denmark, without specifying an upper limit on the fixed amount of a day-fine. However, it is reasonable to specify an upper limit because the omission of

an upper limit is tantamount to the omission of a legal penalty under the current legal system, and specifying a legal penalty is a minimum control over sentencing discretion. Therefore, we suggest to specify KRW 10,000,000 as the upper limit of the fixed amount of a day-fine. On the other hand, it is proposed not to specify a lower limit on the fixed amount of a day-fine to prevent short-term imprisonment in a workhouse, which is a negative effect of the detention of fine defaulters who fail to pay a small amount of fines.

- An individual's income, property, etc. can serve as the basis for the calculation of the amount of a day-fine. It is reasonable to consider the average income and property of the defendant and his/her dependents in determining the amount of a day-fine. Excluding the property of the defendant's family from calculating the amount of a day-fine is suggested because the property of any person other than the defendant has nothing to do with the defendant's perpetration, as mentioned in the survey with ordinary people and experts for this study.
- It is proposed to formulate a scheme to standardize the determination of a fine by authorizing the Supreme Court to establish guidelines for the determination of the amount of a day-fine by its regulations.

3) Establishment of Authority for Investigating a Defendant's Income and Status of Property

- As a result of deliberation on legislative bills, the 19th National Assembly established the legal authority under which a judge may inquire relevant information, including the current status of collection of taxes and details of social insurance, such as health insurance, in order to ascertain a defendant's economic conditions. However, the success of the legislation depends on whether a defendant's status of property can be clearly investigated after all. It is important to secure the information for determining income and property if it cannot be ascertained because the amount of a fine should be flexibly determined after specifying information for sentencing and considering financial conditions thoroughly.

¹⁾ The Special Legislative Bill (Bill No. 1806178) Proposed by Jo Seung-SU, a Member of the National Assembly, As the Representative of Proposing Members, on the Day-Fine System.

- The matters subject to investigations under the guidelines for determining a fine should include an individual's income and property, personal state of residence, family relations, the actor's obligation to support his/her family, the kinds and amount of taxes paid. The most basic means for determining the fine's amount is to ascertain income and property by asking questions to the actor first. For example, if an actor is required to submit relevant documents (salary statements, statements related to declarations of global income tax, documents related to the payment of medical care insurance premium, etc.) through a voluntary declaration, etc., the actor's economic conditions can be roughly estimated. However, whether an actor is required to voluntarily declare his/her income is another issue. The results of the survey on the perception of ordinary people in this study suggest that it seems inappropriate to introduce the property specification system in relation to the defendant's right to remain silent.
- In the case of Germany, a court can access an individual's financial information in banks without any restriction to investigate an actor's income and property. However, even under current statutes, a court has an institutional device with which it can ask any public office or a public or private organization, *ex officio* or upon request of a public prosecutor or a defendant or his/her counsel, to report necessary matters or forward documents under the custody of such office or organization (refer to Article 272 of the Criminal Procedure Act). It is also necessary to consider that the court may request the provision of required information for determining the amount of a day-fine and that, particularly, a court may request the submission of necessary information for issuing a permit for community service work in the case of an order issued to a fine defaulter to perform community service work as an alternative (refer to Article 6 of the Act on Special Cases Concerning the Execution of Fine Defaulters' Community Service Work).

Expected Effects of Policies

Realizing National Agenda through the Reform of the Monetary Penalty System

- As disputes over the fairness and equity of criminal penalties persist, the study is expected to be used as basic data for proposing legislative bills to the National Assembly and providing a practical model for national agenda at the same time by directly contributing to the criminal policy of the current government that endeavors to promote the fairness and equity of the monetary penalty system that highly affects the lives of ordinary citizens.

Guaranteeing the Fairness of Criminal Penalties for the Socially Disadvantaged Class and Enhancing Confidence in the Judicial Procedure

- It is expected to secure the fairness of the criminal penalty system by enhancing confidence in the judicial procedure and promoting great national unity through enacted criminal penalties that consider both rich people and the socially disadvantaged class. Moreover, fair penalty systems should prevent the negative effect of the conversion of a fine into imprisonment, thus protecting the socially disadvantaged class and poor people from being detained in a workhouse because of a default in the payment of a fine.