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Introduction

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1.1 INTRODUCTION

A pecuniary sanction is a widespread criminal penalty and it is hard to think of a jurisdiction that does not have some form of such punishment. The most common pecuniary penalty is undoubtedly the fine. However, when we think about fines, we normally think about the most standard model where the size of the fine mainly depends on the severity of the offence. We refer to those fines as fixed fines, even though they might have other names in different criminal justice systems (for example summary fines, lump sum fines). A common feature of this type of fines is that the financial state of the offender does not play a systematic role in its calculation. This is not to say that the financial information is completely irrelevant. Some jurisdictions require accounting for the offender's income or wealth and more particularly his or her capacity to pay the fine when deciding on its size. However, there is no requirement to account for it systematically and usually there are no guidelines on how the financial capacity should be considered.¹

In contrast, some countries around the world have introduced a different model of a pecuniary sanction – termed 'day fines'. This model can be regarded as a wealth- (or at least income-) dependent fine. It offers a unique calculation system, which enables the fine to reflect independently the severity of the crime, as well as the financial state of the offender. A day fine is meant to be imposed in two stages. First, the sentencer determines a number of days that will be used to calculate the fine based on the severity of the offence (and potentially other relevant factors such as the criminal record of the offender). In the next stage, the sentencer sets the daily unit of the fine, that is the amount the offender needs to pay per day. This unit depends on the income (or wealth)

¹ See Chapter 2.

of the offender. For instance, some jurisdictions set the daily unit to around 50 per cent of the offender's daily income (Finland). The total fine is then the outcome of multiplying the number of days with the daily unit and constitutes the amount the convicted offender has to pay. Consequently, two offenders who committed the same crime but differ in their wealth will receive the same number of days but a different total amount of the fine.

There are multiple advantages of this fine system. First, day fines can increase the fairness of the sanctioning system. Many of the countries, which eventually adopted the wealth-dependent fines, were driven by the perceived inequality created by fixed fines. When fines reflect the severity of the crime and disregard the financial capacity of the offender, low-income offenders bear a heavier burden of punishment than high-income offenders. Moreover, if a country uses imprisonment for fine defaulters, the criminal justice system creates de facto two different sanctions for the rich and the poor: the rich can pay the fixed fine and the poor end up in prison. By reflecting independently the severity of the crime and the financial state of the offender, the day fine has the potential to mitigate the inequality problem. Two offenders who committed the same crime will face the same number of days. However, the amount by which the number of days will be multiplied will differ depending on the income of the offender thus, potentially equalising the relative burden imposed by the fine across offenders with different levels of income.

Second, day fines are also believed to improve deterrence. Fixed fines are often perceived as too low for high-income offenders. They can even simply be regarded as prices wealthy offenders can pay for committing crimes. As a result, fines are usually used only for minor offences. The ability of day fines to be adjusted to the wealth of the offenders opens up an opportunity to tailor the penalty more closely to the income of the offender. Consequently, it can impose a heavier burden of punishment than one size-fits-all fines. This aspect is especially relevant for criminal justice systems which over-utilise short-term imprisonment and search for potential reliable alternatives for the mid-range offences.

Third, day fines can improve uniformity in sentencing. This model of fines offers a clear and straightforward method to calculate the fine. Therefore, different sentencers are expected to impose similar fines in comparable cases and the offender (and public) can clearly see the factors that affected the size of the fine. This is different from the vague obligation not to disregard the financial capacity of the offender in fixed fine systems. Without a structured way of accounting for the wealth, judges are expected to give different weights to the financial aspect. This will result in lack of uniformity in sentencing.

Fourth, day fines can improve transparency in sentencing. When the wealth of the offender is considered in an unsystematic way, a high fine might be imposed on a poor offender who committed a severe offence and on a wealthy offender who committed a minor offence. Hence, the nominal amount of the fine does not express the severity of the crime. With day fines on the other hand, the number of days clearly reflects the severity of the crime, irrespective of the wealth of the offender. In fact, in some countries it is practised to report in the media the number of the imposed days rather than the total amount of the fine (for example Sweden). This not only improves transparency, but also contributes to the censure of punishment. The first element of the day fine – the number of days – explicitly communicates the blameworthiness of the offender who received the fine.

In light of its advantages, an increasing number of countries in Europe² are moving away from a fixed fine system and towards adopting the day fine system. By 2020, already half of the European countries are applying day fines. Yet little is known about the practice of those countries with this model of fines. Given the fact that currently not a single English-speaking country is implementing day fines, the international literature and the information on the different practices with this fine are scarce. This book is the first to offer a comprehensive interdisciplinary and comparative analysis of day fines, their advantages and disadvantages, the practices of the different countries and challenges with implementation.

1.2 DAY FINES AROUND THE WORLD

Wealth-dependent fines are not the invention of the twentieth century. In England already in the thirteenth century, fines were higher for richer offenders.³ This was then theoretically discussed by Montesquieu⁴ in the eighteenth century and by Jeremy Bentham in the nineteenth century.⁵ However, the modern version of such fines – nowadays termed day fines – seems to have emerged only in the twentieth century. Scandinavian countries pioneered the discussion and the adoption of day fines in Europe with Finland being the first to implement the fine in 1921, shortly followed by Sweden (1931) and Denmark (1933). As the country chapters in this book demonstrate, those countries also served as an inspiration for other European jurisdictions to follow through and to adopt similar models of pecuniary sanctions.

² When referring to European countries in this book, we mean the EU Member States and the states of the Schengen Area.

³ Note, 'Fines and Fining – An Evaluation', 1013, 24.

⁴ Montesquieu, *The Spirit of Laws*, p. 108.

⁵ Bentham, *Theory of Legislation*, p. 353.

Over the years, day fines were also introduced in countries outside Europe, such as in Peru (1924), Cuba (1936), Brazil (1969), Costa Rica (1972) and Bolivia (1972).⁶ Furthermore, during the late 1980s, several American counties experimented with this model of fine. Day fines were believed to provide an opportunity for a wider use of pecuniary sanctions and consequently, to reduce the heavy burden on prisons. In particular, wealth-dependent fines were believed to have a sufficient deterrent effect on poor as well as on rich offenders and thus could reduce the reliance on imprisonment sentences.⁷ In those pilot programmes, not only the minimum and maximum number of days were provided, but also tables with guidelines for different categories of offences were constructed which guided the courts about the ranges of days that should be imposed for each category. The daily unit constituted approximately two thirds of the offender's net daily income after deductions.⁸ Evaluations of those programmes yielded positive results in terms of rates of payments, the average imposed fines and the court's perception of the ease of the process.⁹ Despite the perceived success of the experiments, day fines were not retained in all counties where they were piloted and also did not become widespread in the USA.¹⁰ Even though they can be found in some Codes of particular States in the USA¹¹ their use is very limited. One explanation for the failure to further implement day fines in the USA might be the 'wrong' timing. The period between the 1970s and the 1990s was characterised by a punitive turn. People lost faith in the idea of rehabilitation and incapacitation became more widespread. Therefore, the political environment at the time might not have been ripe for a reform that would increase the use of pecuniary sanctions and decrease custodial sentences.¹²

Australia, as well, recognising the inequality created by fixed fines, discussed several times over the years the possibility to introduce day fines in their sentencing system. Although courts seem to be guided to account for the offender's

⁶ Albrecht and Johnson, 'Fines and Justice Administration: The Experience of the Federal Republic of Germany', 3, 6.

⁷ Farrell, 'The Day-Fine Comes to America', 592.

⁸ McDonald *et al.*, *Day Fines in American Courts: The Staten Island and Milwaukee Experiments*, pp. 21–2.

⁹ McDonald *et al.*, *Day Fines in American Courts: The Staten Island and Milwaukee Experiments*, pp. 6–7; Winterfield & Hillsman, 'The Staten Island Day-Fine Project', p. 5; Vera Institute of Justice, 'Structured Fines: Day Fines As Fair And Collectable Punishment In American Courts', pp. 15–16.

¹⁰ Zedlewski, *Alternatives to Custodial Supervision: The Day Fine*, p. 10.

¹¹ ALA. CODE para. 12–25–32(2)(b)(8); OKLA. STAT. tit. 22, para. 991a(A)(1)(y).

¹² Kantorowicz-Reznichenko, 'Day Fines: Reviving the Idea and Reversing the (Costly) Punitive Trend', 333–72.

financial capacity, it was unclear how this information should be incorporated in the setting of the fine. Nevertheless, this initiative was rejected time after time. The main arguments against day fines were the complexity of collecting the information and calculating the fine, which could result in delays. In addition, the potential infringement of privacy was stressed as the court would need to access different sources of information about the offender's financial capacity. Finally, remaining problems of inequality were mentioned such as offenders with low income but with assets and significant potential for high earnings in the future, or concealment of income by wealthy offenders.¹³ Similarly, day fines were considered and rejected in New Zealand and in Canada.¹⁴

The day fine model has faced objections also in Europe. A potential reform was discussed in the Netherlands at the end of the 1960s.¹⁵ The advantages that were emphasised with respect to a wealth-dependent fine were the equality between poor and rich offenders, the transparency of the fine due to its two separate components and the potential increased deterrent effect of tailored fines. Nevertheless, the arguments against day fines eventually outweighed its advantages. First, the possible outcome of disproportionate fines for especially wealthy offenders for minor offences was considered unacceptable. Second, it was unclear how a day fine system should operate alongside a fixed fine system, which was rendered still useful for minor violations. Third, the determination of what should be included in the daily unit and the collection and calculation of the fine were perceived as being too complex.¹⁶ However, in light of its advantages, the increasing number of countries in Europe that introduced day fines and the possibilities that advancements in technology provide, it remains to be seen whether past objections will prevent more European countries from adopting this model.

1.3 SYNOPSIS AND STRUCTURE

This book first, in Chapter 2, offers a theoretical analysis of the day fine model to understand its potential to fit two of the main purposes of the criminal

¹³ See *e.g.* Australian Law Reform Commission, *Sentencing*, ALRC 44 (1988), para. 114; Australian Law Reform Commission, *Sentencing of Federal Offenders*, Discussion Paper No. 70 (2005) at 109–10, paras. 7.10, 7.15. See also, Bartl, 'The Day Fine-Improving Equality before the Law in Australian Sentencing', 47–78.

¹⁴ Warner, 'Equality Before the Law and Equal Impact of Sanctions: Doing Justice to Differences in Wealth and Employment Status', pp. 232–3.

¹⁵ In 1969 an extensive governmental report was prepared on day fines which was then used to make the decisions for the reforms of the Criminal Code which eventually entered into force in 1983.

¹⁶ Kantorowicz-Reznichenko and Luining, 'De Dagboete: Reden voor Nieuwe Overpeinzing?', 6–13.

sentencing system – retribution and deterrence. Even though deterrence seems to be one of the potential advantages of day fines, it is less self-evident that such structure will fit the proportionality principle of retributive justice. Following this analysis, we also discuss the different features of the model that would make it optimal. Such exercise provides a benchmark against which to assess the actual models practiced by the countries.

The theoretical analysis is followed by Chapters 3 to 18 that cover all the European countries¹⁷ that currently (or previously) implemented the day fine system, in chronological order of their introduction.¹⁸ Those chapters are especially important to demonstrate the experience of the countries with this type of fine, the different challenges they face(d) with its implementation and their practices. To allow for a comparative analysis, all the chapters are structured in a similar manner and cover the most important aspects of the model, that is (a) the historical development of day fines in the country and the rationale for introducing it; (b) the legal framework and the structure of the fine, including questions concerning access to financial information of the offender which are important for the optimal calculation of the fine; (c) the practical implementation in terms of how widely it is actually used and for which offences; (d) the public and professional perception of day fines; and finally (e) the special challenges each country faces with respect to this model of pecuniary sanctions. Among the country chapters we also include England and Wales, which is an interesting case study due to the failure of day fines in the country. ‘Unit fines’ (as they were termed in England and Wales) were introduced at the beginning of the 1990s and were abolished only seven months later. We believe this chapter can shed additional light on the complexity of day fines and reasons and circumstances that can lead to its rejection.

Learning from the experience of the countries can prompt research on the topic on the one hand and can assist policy-makers who consider introducing (or improving) the day fine system in their countries on the other hand. Therefore, in Chapter 19 we provide a comparative analysis, based on the country chapters. This analysis integrates the findings and reflects on the strengths and weaknesses of the implementation, with some thoughts on how to overcome the hurdles. In addition, we reflect on issues of legal transplants.

¹⁷ By this we mean the entire Schengen area, rather than just EU Member States. For that reason we also included a chapter on Switzerland. Liechtenstein is the only European country that is not included in the book. They have adopted day fines in 1988, but their model was entirely copied from the Austrian system.

¹⁸ The information in this book includes developments until December 2019. Any legal changes adopted afterwards, are not included. Furthermore, we focus on the system of adult criminal justice. Juvenile legal rules are mostly excluded.

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