



# Punishment of Illegal Fishing Perpetrators in Indonesia in the Perspective of Equality before the Law

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### Abstract

**Introduction:** Equality before the law is one of the important principles in the enforcement of criminal law in Indonesia, so it is important to pay attention to it. The punishment of illegal fishing perpetrators in ZEEI is not on the principle of equality before the law. Although the Fisheries Law adopted the 1982 UNCLOS, UNCLOS itself did not state the prohibition on the application of confinement *instead* of fines. Therefore, the application of fines for illegal fishing in ZEEI does not conflict with the 1982 Fisheries Law and UNCLOS. The fines of imprisonment are also applied to foreign nationals to ensure that the fines paid will be paid.

**Purposes of the Research:** This study aims to analyze and explain the concept of equality before the law in criminal law enforcement and whether the punishment of illegal fishing perpetrators in Indonesia is following the principle of equality before the law, especially related to the application of confinement *instead* of fines for Indonesian citizens and foreign nationals.

**Methods of the Research:** This research belongs to the type of normative legal research with a legal and conceptual approach. The research material used is secondary data derived from primary, secondary, and tertiary legal materials. The research materials were collected *using* a literature study and then analyzed qualitatively and then conclusions were drawn using the deductive method.

**Results of the Research:** Equality before the law is one of the important principles in the enforcement of criminal law in Indonesia, so it is important to pay attention to it. The punishment of illegal fishing perpetrators is not by the principle of equality before the law. Although the Fisheries Law adopted the 1982 UNCLOS, UNCLOS itself did not emphasize the prohibition on the application of confinement *instead* of fines. Therefore, the application of confinement in lieu of fines for perpetrators of illegal fishing in the ZEEI does not conflict with the 1982 Fisheries Law and UNCLOS. The penalty of confinement *instead* of an important fine is also applied to foreign nationals to ensure that the fines imposed will be paid.

## 1. INTRODUCTION

The State of Indonesia is an archipelagic country as confirmed in Article 25A of the 1945 Constitution of the Republic of Indonesia (UUD NRI 1945). Indonesia is an archipelagic country, thus of course making Indonesia included in the category of a country that has a fairly high wealth of aquatic resources and diverse biological resources. This diversity

includes fish resources as well as coral reef resources.<sup>1</sup> Fisheries have an important and strategic role in the development of the national economy, especially in increasing the expansion of employment opportunities, income distribution, and improving the standard of living of the nation in general, small fishermen, small fish cultivators, and business actors in the fishery sector while maintaining the environment, sustainability, and availability of fish resources. This role is constitutionally stated in Article 33 paragraph (3) of the 1945 Constitution of the Republic of Indonesia which affirms that water and the wealth in it are controlled by the state and used for the greatest prosperity of the people.

Indonesia as an archipelagic country has a very strategic geographical situation because it is located in a cross-world position, namely between two continents and two oceans. This geographical position causes the sea between the islands to become a very important sea lane for national and international shipping traffic. Indonesia has the Indonesian Exclusive Economic Zone (abbreviated ZEEI) covering an area of 2.7 million km.<sup>2</sup> Indonesia as an archipelagic country has two-thirds of the territory consisting of marine waters,<sup>3</sup> 70% of which contains fishery potential and other extraordinary marine resources.<sup>4</sup>

The potential of marine wealth in the ZEEI in the form of fishery biological resources is estimated at 6,167,940/ton/year. This potential is the main capital for the realization of a just and prosperous society within the framework of the Unitary State of the Republic of Indonesia. Marine wealth, especially fisheries, consists of 7000 fish species in the world, 2000 of which are found in Indonesian waters,<sup>5</sup> which makes it also prone to fisheries crime.<sup>6</sup> This crime has become one of the global issues of various countries in the world, which is not easy to resolve, especially if the perpetrator comes from a foreign country without the right to enter the waters of another country to illegally catch fish.<sup>7</sup> This has also become a classic problem from the past until now, which is faced by Indonesia in the ZEEI, in the form of the practice of fisheries crimes committed by foreign fishing vessels.<sup>8</sup> In general, the qualification of a fishery crime is an act of catching fish by a foreign fishing vessel in the marine waters of a country without a permit and contrary to the provisions of the laws of the coastal state.<sup>9</sup>

In Indonesia, provisions regarding fisheries crimes that occur in the ZEEI have been regulated in the Republic of Indonesia Law Number 31 of 2004 concerning Fisheries as amended by the Republic of Indonesia Law Number 45 of 2009 (abbreviated as Fisheries Law). The law states that ZEEI is one of the fishery management areas of the Republic of

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<sup>1</sup> Muhammad Insan Tarigan, "Implementation of Countermeasures Effort of Illegal Fishing in Indonesia (Case Study on Sinking the FV Viking Vessel)," *JILS (Journal of Indonesia Legal Studies)* 3, no. 1 (2018): 131–46, <https://doi.org/https://doi.org/doi.org/10.15294/jils.v3i01.23213>.

<sup>2</sup> Marsetio, "Penegakan Hukum Di Perairan Laut Indonesia," Kuliah Umum (Medan, 2015).

<sup>3</sup> Agustina Soebachman, *Sejarah Nusantara Berdasarkan Urutan Tahun* (Yogyakarta: Surya Media Utama, 2014).

<sup>4</sup> Kementerian Kelautan dan Perikanan, "Laporan Kementerian Kelautan Dan Perikanan Republik Indonesia Tahun 2014" (Jakarta, 2015).

<sup>5</sup> Ridwan Lasabuda, "Pembangunan Wilayah Pesisir Dan Lautan Dalam Perspektif Negara Kepulauan Republik Indonesia," *Jurnal Ilmiah Platax* 1, no. 2 (2013).

<sup>6</sup> Slamet Soebiyanto, "Keamanan Nasional Ditinjau Dari Prespektif Tugas TNI Angkatan Laut," *Majalah Patriot* (Jakarta, 2007).

<sup>7</sup> Rohmin Dahuri, "Aspek Hukum Penanganan Tindak Pidana Perikanan," Makalah Diklat Teknis Penanganan Tindak Pidana Perikanan Angkatan II (Jakarta, 2013).

<sup>8</sup> Suryo Sakti Hadiwijoyo, *Aspek Hukum Wilayah Negara Indonesia* (Yogyakarta: Graha Ilmu, 2012).

<sup>9</sup> Suryo Sakti Hadiwijoyo, (2012).

Indonesia for fishing as confirmed in Article 5 paragraph (1) letter b. The criminal threat for illegal fishing actors is stipulated in Article 102 of the Fisheries Law which confirms that this provision for imprisonment does not apply to fisheries crimes that occur in the ZEEI, unless there is an agreement between the Indonesian government and the government of the country concerned.

The provisions of Article 102 of the Fisheries Law show the limited authority of law enforcement in tackling fisheries crimes by foreign fishing vessels as regulated in the UUUP and there is injustice in terms of punishment for Indonesian citizens and foreign nationals who commit TPP. According to these provisions, there is special treatment for foreign nationals, because they cannot be subject to imprisonment and corporal punishment in any form. Meanwhile, for Indonesian citizens, this is not the case because based on Article 93 paragraph (1) of the Fisheries Law, it is stated that everyone who owns and/or operates a fishing vessel with an Indonesian flag, catches fish in the Indonesian fishery management area and/or on the high seas. , who do not have SIPI shall be sentenced to a maximum imprisonment of 6 (six) years and a maximum fine of Rp. 2,000,000,000.00 (two billion rupiah). These provisions have violated the principle of universal law, namely the principle of equality before the law.

Apart from the above circumstances, in practice for imposing criminal fines on illegal fishing perpetrators, there are still differences in the application of imprisonment in lieu of fines between Indonesian citizens and foreign nationals. In this case, if the perpetrator is an Indonesian citizen, he is sentenced to a fine followed by imprisonment in lieu of a fine, while if the perpetrator is a foreign citizen, this is not the case. Therefore, the authors are interested in further research on the punishment of illegal fishing perpetrators which is associated with the principle of equality before the law. This study aims to explain and analyze the principle of equality before the law in the enforcement of Indonesian criminal law and its application in punishing illegal fishing perpetrators.

## 2. METHOD

This research uses normative legal research, which is research conducted on positive law. The approaches used: a legal approach and a conceptual approach. This study uses secondary data sourced from primary, secondary, and tertiary legal materials. The legal materials were collected using library research techniques. The materials that have been collected are then processed and analyzed qualitatively. Furthermore, conclusions are drawn using the deductive method, namely concluding from things that are general to things that are specific. In this case, the discussion regarding the application of confinement instead of fines as a punishment is generally applied specifically to illegal fishing actors

## 3. RESULTS AND DISCUSSION

### 3.1 Equality Before the Law as One of Indonesia's Criminal Law Enforcement Principles

The principle of equality before the law is a principle put forward by an Italian economist, mathematician, and political expert named Cesare Beccaria, who expressly opposes the arbitrariness of the rulers at this time through his book entitled "*Dei delitti e delle pene*".<sup>10</sup> This principle was applied in the 1975 Civil Code of Napoleon in France, which was

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<sup>10</sup> Topo Santoso dan Eva Achjani dalam I Komang Suka'arsana, et.al., "Pengesampingan Prinsip Persamaan Dimuka Hukum Atas Izin Pemeriksaan Pejabat Negara," *Masalah-Masalah Hukum* 45, no. 1 (2016): 11-17.

later adopted by the Dutch and brought to Indonesia as a colony.<sup>11</sup> The idea of equality before the law states that the law should apply equally to all citizens, no one above the law. This idea, which is also one of the meanings of the term rule of law, is the foundation of many current constitutions and is widely seen as a central principle of a fair legal system. Friedrich Hayek saw this principle as the most element of a liberal society, arguing that equality before the law was the greatest goal of the struggle for freedom.<sup>12</sup>

The principle of equality, which usually means the same thing must be treated the same, and those who are different must be treated differently or not the same, is a condition that always exists in one comparison (comparative). Equality is also defined as uniformity, which is a proposition in law and morals that the same person should be treated the same, and correlative unequal people should be treated differently. Thus the statement that the reason a person is treated in a certain way is that he is "equal or equal" or "similar or identical" to other people who receive such treatment.<sup>13</sup>

Ideally, the principle of equality before the law should be able to function as a "controller" against the negative consequences of pluralism. Control is needed because of the opportunity for discriminatory treatment. The existence of this principle in a pluralistic society will result in the recognition that all groups have the same position before the law. To apply the principle of equality, the function of law is very important because it is through the law that all differences can be eliminated so that they can be "equalized" or "close to similarity".<sup>14</sup>

According to Asshiddiqie, equality before the law means that everyone has an equal position in law and government, which is recognized normatively and implemented empirically. In the framework of this principle of equality, all discriminatory attitudes and actions in all their forms and manifestations are recognized as prohibited attitudes and actions, except for special and temporary actions (affirmative actions) to encourage and accelerate certain community groups or certain community groups to pursue progress so that it reaches the same level of development and is on par with the general population who are already much more advanced.<sup>15</sup>

Certain community groups that can be given special treatment through affirmative actions that do not include this definition of discrimination, for example, are isolated tribal groups or certain customary law community groups whose conditions are backward. Meanwhile, certain groups of people can be given special treatment that is not discriminatory, for example, women or neglected children.<sup>16</sup>

Thus, the principle of equality before the law means that everyone must be treated equally before the law, without discrimination. This principle does not apply absolutely, because in certain circumstances different treatment also occurs. This principle also applies in Indonesia because it expressly declares itself as a constitutional state as stated in Article 1 paragraph (3) of the 1945 Constitution of the Republic of Indonesia. Equality before the

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<sup>11</sup> Koesnani Siswosoebroto dalam I Komang Suka'arsana, (2016).

<sup>12</sup> Daron Acemoglu and Alexander Wolitzky, "A Theory of Equality Before the Law," *The Economic Journal* 131 (n.d.): 1429-65.

<sup>13</sup> Dadin E. Saputra, "Hubungan Antara Equality Before the Law Dalam Penegakan Hukum Di Indonesia Dengan Harmonisasi Konflik Antar Lembaga Penegak Hukum," *SYARIAH Jurnal Ilmu Hukum* 15, no. 1 (2015).

<sup>14</sup> Haris Kurnia Anjasmana dan Hernadi Affandi, (2019).

<sup>15</sup> Jimly Asshiddiqie, *Konstitusi Dan Konstitutionalisme Indonesia* (Jakarta: Konstitusi Press, 2005).

<sup>16</sup> Jimly Asshiddiqie, (2005).

law is explicitly stated in Article 27 paragraph (1) of the 1945 Constitution of the Republic of Indonesia, that every citizen of the state has the same position in law and government with no exceptions<sup>17</sup>.

The provisions of Article 27 paragraph (1) of the 1945 Constitution of the Republic of Indonesia contain the meaning that all people as supporters of rights and obligations are equal to their position in law.<sup>18</sup> This is an acknowledgment and guarantee of the equal rights of all citizens in law and government<sup>19</sup>. In this regard, Article 28D paragraph (1) of the 1945 Constitution of the Republic of Indonesia states that everyone has the right to recognition, guarantees, protection, and fair legal certainty and equal treatment before the law. Recognition of equality before the law is also recognized internationally as confirmed in the Arctic 7 Universal Declaration of Human Rights (UDHR). This provision states that all people are equal before the law, and have the right to get the same legal protection, without discrimination in any form<sup>20</sup>.

In criminal law enforcement, equality before the law is one of the important principles that law enforcement officers need to pay attention to. In general, this principle can be found in Article 4 of Law Number 48 of 2008 concerning Judicial Power which states that courts judge according to law without discriminating against people. Specifically for criminal law enforcement, the principle of equality before the law is contained in Article 5 paragraph (1) General Elucidation point 3a of the Criminal Procedure Code which formulates, equal treatment of everyone before the law without making any difference in treatment<sup>21</sup>. Following this explanation, the principle of equality before the law must be considered in the enforcement of criminal law.

### **3.2 Punishment of Illegal Fishing Perpetrators From the Perspective of Equality Before the Law**

According to Sudarto, quoted by Prasetyo and Barkatullah, the provision of punishment in *abstracto* is to determine the system of criminal sanctions relating to legislators, while the provision of punishment in *concreto* involves various bodies, all of which support and implement the system of criminal sanctions.<sup>22</sup> Barda Nawawi Arief stated that if the notion of "punishment" is broadly defined as a process of giving or imposing a crime by a judge, then it can be said that the criminal system includes all of the statutory provisions that regulate how the criminal law is enforced or operationalized concretely so that a person is sanctioned (criminal law). This means that all laws and regulations regarding substantive criminal law, formal criminal law, and criminal law enforcement can be seen as a single functional punishment system in a broad sense.

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<sup>17</sup> Ni Gusti Agung Ayu Mas Triwulandari, "Problematika Pemberian Bantuan Hukum Struktural Dan Non-Struktural Kaitannya Dengan Asas Equality Before the Law," *Jurnal Ilmiah Kebijakan Hukum* 14, no. 3 (2020).

<sup>18</sup> Mien Rukmini dalam Arhjayati Rahim, et.al., "Eksistensi Lembaga Bantuan Hukum Sebagai Perwujudan Asas Equality Before the Law," *Al-Mizan Jurnal Pemikiran Hukum Islam* 14, no. 2 (2018).

<sup>19</sup> Julita Melissa Malukow dalam Edwar, et.al., "Kedudukan Notaris Sebagai Pejabat Umum Ditinjau Dari Konsep Equality Before The Law," *Jurnal Hukum & Pembangunan* 49 (2019).

<sup>20</sup> Beny Yunianto & Tomy Michael, "Keberlakuan Asas Equality Before the Law Bagi Pejabat Pelaksana Kebijakan Penanganan Covid-19," *Mimbar Keadilan* 14, no. 1 (2021).

<sup>21</sup> Andi Hamzah, *Hukum Acara Pidana Indonesia* (Jakarta: Sinar Grafika, 2014).

<sup>22</sup> See Ramiyanto, "Penjatuhan Pidana Penjara Bersyarat Dalam Tindak Pidana Perbankan (Kajian Putusan Nomor 1554 K/Pid.Sus/2014)," *Jurnal Yudisial* 9, no. 3 (2016): 317-38.

Meanwhile, in a narrow sense, it only covers material (substantive) criminal law rules/stipulations.<sup>23</sup>

This discussion is included in the punishment or provision of in *concrete* crimes by the judge as one of the law enforcement officers against the perpetrators of illegal fishing in the ZEEI. As explained on the previous page, the punishment of illegal fishing perpetrators still distinguishes between Indonesian citizens and foreign nationals who commit fisheries crimes in the ZEEI, especially in the application of substitute confinement. With this distinction, it is deemed that the punishment of illegal fishing perpetrators has not applied the principle of equality before the law. In this case, Indonesian citizens who are sentenced to a fine are always accompanied by substitute imprisonment, while foreign citizens are not. This difference occurs because the punishment of illegal fishing actors in ZEEI always relates to Article 73 paragraph (3) of the United Nations Convention on the Law of the Sea (abbreviated as UNCLOS 1982).

UNCLOS 1982 is one of the legal sources for the formation of the Fisheries Law because Indonesia has ratified it through Law Number 17 of 1985 concerning Ratification of the United Nations Convention on the Law of the Sea.<sup>24</sup> Concerning to the fisheries crime that occurred in the ZEEI, the Fisheries Law has also adopted the 1982 UNLOS, especially Article 73, whose complete formulation is:

- (1) The coastal State may, in the exercise of its sovereign rights to explore, exploit, conserve and manage the living resources in the exclusive economic zone, take such measures, including boarding, inspection, arrest, and judicial proceedings, as may be necessary to ensure compliance with the laws and regulations adopted by it in conformity with this Convention.
- (2) Arrested vessels and their crews shall be promptly released upon the posting of reasonable bond or other security.
- (3) Coastal State penalties for violations of fisheries laws and regulations in the exclusive economic zone may not include imprisonment, in the absence of agreements to the contrary by the States concerned, or any other form of corporal punishment.
- (4) In cases of arrest or detention of foreign vessels the coastal State shall promptly notify the flag State, through appropriate channels, of the action taken and of any penalties subsequently imposed.

The debate that took place regarding the application of confinement instead of fines related to the interpretation of the words "imprisonment" and "corporal punishment" in Article 73 paragraph (3) of UNCLOS 1982. Mochtar Kusumaatmadja interpreted the word "imprisonment" as "*pidana penjara*".<sup>25</sup> While the word "corporal punishment" is simply defined as "*hukuman badan*". Thus, UNCLOS 1982 prohibits coastal states from imposing imprisonment or other corporal punishment on illegal fishing perpetrators in the ZEEI. Imprisonment or other corporal punishment can only be applied by the coastal state with the consent of the state concerned. This means that the perpetrators of TPP in the ZEEI cannot be sentenced to imprisonment or other corporal punishment if the coastal state has not made an agreement with the country of origin of the perpetrator concerned.

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<sup>23</sup> Ramiyanto, (2016).

<sup>24</sup> Ruth Shella Widyatmodjo, Pujiyono, dan Purwoto, "Penegakan Hukum Terhadap Tindak Pidana Pencurian Ikan (Illegal Fishing) Di Wilayah Zona Ekonomi Eksklusif," *Diponegoro Law Review* 5, no. 3 (2016).

<sup>25</sup> Mochtar Kusumaatmaja, *Hukum Laut Internasional* (Bandung: Bina Cipta, 1986).

Theoretically, confinement instead of a fine can be applied and does not conflict with Article 73 paragraph (3) of UNCLOS 1982 and Article 102 of the Fisheries Law. This is based on the interpretation of the words "imprisonment" and "corporal punishment" which are associated with the word "imprisonment" in Article 102 of the Fisheries Law. The provisions of UNCLOS and its annexes do not explain the scope of the meaning of "imprisonment" and stipulate provisions for alternative punishments when the convict is unwilling or unable to pay a fine. In other words, imprisonment can be categorized as an "imprisonment sentence" as is the concept of impromptu in several criminal laws in several countries, such as Article 1 paragraph (1) letter a number 1 of the Dutch Criminal Code, Article 38 and Article 39 of the German Criminal Code, and Article 13 paragraph (1) French Criminal Code. While corporal punishment is a punishment in the form of direct physical punishment or physical contact<sup>26</sup>.

Maronie emphasized that imprisonment instead of a fine does not include imprisonment and corporal punishment. Article 73 paragraph (3) of UNCLOS 1982 and Article 102 of the Fisheries Law do not include any prohibition against imposing imprisonment in lieu of fines, wherein these provisions only include prohibitions on imposing imprisonment and other corporal punishment. By paying attention to the benefits of the law in the execution of court decisions, a subsidiary punishment in the form of imprisonment instead of a fine can be an alternative to court decisions so that the decision brings benefits when the perpetrator refuses or is unable to pay.<sup>27</sup> The benefits of using confinement instead of a fine are illustrated in the provisions of Article 30 paragraph (2) of the Criminal Code which states that if the fine is not paid, it is replaced with imprisonment. Then in Article 31 paragraph (2) of the Criminal Code, it is emphasized that the convict is always authorized to free himself from confinement by paying the fine. This provision implies that the benefit of using imprisonment instead of a fine is to ensure that the convict pays the fine imposed on him.

Thus, it can be stated that in the perspective of equality before the law, imprisonment instead of a fine can also be applied to foreign nationals who do illegal fishing in the ZEEI. Imprisonment instead of fines do not only apply to Indonesian citizens as perpetrators of illegal fishing. In the principle of equality of law, although a distinction can be made as an exception and must be regulated by national law or under international law and international custom<sup>28</sup>, this cannot be applied to illegal fishing actors in the ZEEI. This is because Article 73 paragraph (3) of UNCLOS 1982 which was adopted by Article 102 of the Fisheries Law does not explicitly prohibit the application of imprisonment instead of fines for perpetrators of illegal fishing by coastal countries. In addition, the imprisonment instead of a fine also needs to be applied to the perpetrators of illegal fishing because it is a guarantee that the fine is paid.

#### 4. CONCLUSION

Indonesia as a state of law needs to pay attention to the principle of equality before the law in law enforcement, including sentencing by judges to perpetrators of illegal fishing. In

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<sup>26</sup> Serief Serief Maronie, "Penanganan Tindak Pidana Perikanan Di Wilayah Zona Ekonomi Ekslusif Indonesia Dan Qua Vadis Surat Edaran Mahkamah Agung Nomor 3 Tahun 2015" (Balai Besar Riset Sosial Ekonomi Kelautan Dan Perikanan Jakarta, n.d.), <http://kmsv2.sosialekonomi.com/cpm-repository/bunga-rampai-penanganan-pelanggaran-di-bidang-kelautan-dan-perikanan-melihat-kelautan-dan-perikanan-dari-perspektif-penegakan-hukum>.

<sup>27</sup> Serief Maronie.

<sup>28</sup> Andi Hamzah dan R.M. Surachman, *Pre-Trial Justice & Discretionary Justice Dalam KUHAP Berbagai Negara* (Jakarta: Sinar Grafika, 2015).

such a context, the substitute confinement sentence must also be applied equally between the color of the Indonesian state and foreign nationals. In the principle of equality before the law, a distinction can also be made as an exception, but it must be regulated in national law or international law and international custom. The difference in the application of imprisonment instead of fines in Indonesia is because there are different interpretations of the words "imprisonment" and "corporal punishment" Article 73 paragraph (2) of UNCLOS 1982 which was adopted by Article 102 of the Fisheries Law. In UNCLOS, there is no further explanation regarding the scope of "corporal punishment", or whether it includes imprisonment instead of a fine. The application of imprisonment instead of fines is important for foreign nationals who do illegal fishing in the ZEEI to ensure that the convict pays the fine as has been confirmed in the Criminal Code

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