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## **Money as Punishment: A Review of *Day Fines in Europe***

*Elena Kantorowicz-Reznichenko & Michael Faure (Eds.), Day Fines in Europe: Assessing Income-Based Sanctions in Criminal Justice Systems. Cambridge University Press 2021, 404 pages, hardcover € 126,70, paperback € 49,94, eBook € 27,71. ISBN 978-1-108-79643-9.*

*Day Fines in Europe: Assessing Income-based Sanctions in Criminal Justice Systems* is an edited volume by Elena Kantorowicz-Reznichenko and Michael Faure, in cooperation with Marianne Breijer, about day fines in 16 European countries<sup>1</sup> that have adopted the system. “Day fines” refers to setting punitive financial penalties for minor offences according to the fined person’s financial circumstances. This is in contrast to flat fines, or fines that are set according to the nature and seriousness of the offence, without a systemic tailoring to the person’s financial circumstances.

The two editors of the book are legal scholars. Elena Kantorowicz-Reznichenko is a Professor of Quantitative Empirical Legal Studies at the Rotterdam Institute of Law and Economics, Erasmus School of Law, Erasmus University Rotterdam. Michael Faure is a Professor of Comparative and International Environmental Law at Maastricht University and Professor of Comparative Private Law and Economics at Erasmus School of Law. They also cooperated with Marianne Breijer, Erasmus University, Rotterdam.

The edited volume brings to an English-reading audience an overview of the legal frameworks of day fines systems in use across Europe today. The volume shows the diversity in these legal frameworks. In a day fines system, fines are calculated according to a person’s financial circumstances first by setting a number of units corresponding to the nature and severity of the offence (“units” or “days”). In a second step, an amount is calculated corresponding to how much a person is assessed to be able to pay per unit/day of punishment (“daily unit” or “daily rate”). Across jurisdictions, there is great variety in how the amount the person has to pay per day is calculated; what information is used; whether there are upper and lower limits on the units (and therefore seriousness of the offences that can be sentenced with day fines); and on the amount per unit a person can be charged. The edited volume provides practitioners and researchers a useful starting place for understanding the different ways in which these questions (and others) have been addressed across countries. Before this volume, researchers of day fines would have had to make a serious effort to learn about each jurisdiction.

The volume comes at a good time because the number of countries adopting day fines has been increasing over time and so research on day fines has taken on increased scholarly and policy

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<sup>1</sup> The editors suggest the book covers all European day fines countries, with the exception of Liechtenstein (they include England and Wales, which implemented day fines for seven months before abolishing the system). Drapál (2017) counted 21 European day-fines systems; he included Bosnia-Herzegovina, Estonia, Macedonia, San Marino, Serbia and Turkey.

relevance. Indeed, the editors set out the goal of being relevant to policymakers considering day fines (p. 6), and further clarify in the final chapter an implicit goal of helping policymakers introduce day fines successfully: “the day fine system is a fascinating penalty system, which can potentially have a highly important social function (...) which could at the same time better serve both the retributive and deterrent function of punishment” (pp. 387 f.).

## 1. Day fines in theory

As the editors explain *in the first of two introductory chapters*, there are three main theoretical benefits or advantages of day fines, and as the book’s research shows, many countries were motivated by some combination of these purported benefits in adopting day fines. One is that day fines would be fairer to low-income people who otherwise would be disproportionately harmed by unaffordable financial sanctions (p. 2). Second, and closely related, is the idea that fines should be tailored to also deter people with resources. The theory is that tailoring fines in this way would also make it possible to use fines as punishment for a greater variety of offences because society could trust that the punishment would have the sufficient deterrent or retributive impact on the person being fined. (p. 2) Finally, day fines could increase transparency and uniformity because decision makers are required to separately calculate and explain how they arrive at a final fine amount. In this way we can better understand the adjudicator’s assessment of guilt, and the significance of the imposed amount (pp. 2-3).

In the *second introductory chapter*, Kantorowicz-Reznichenko adds to this account of the theoretical benefits of day fines by assessing the extent to which day fines further the goals of different theories of punishment (retribution and just desserts, pp. 9 ff. and deterrence, pp. 14 ff.). She considers some of the thorny issues for implementing a “theoretically optimal day fine model” (pp. 18 ff.), or a day fines system that most advances theoretical justifications for punishment. The first issue is whether income and/or wealth should be included in calculating the fine (p. 18 ff.). She argues for including wealth because taking into account income alone does not accurately reflect a person’s ability to pay. Second, she discusses whether there should be an upper limit to how high a daily rate can be (p. 19) and reaches the conclusion that there should be no limit. She also considers the sources of information about the person’s “financial state” the court must have to calculate the fine (p. 21) and concludes that ideally the court would have perfect access to information, e.g., all available financial records.

The book then turns to the country chapters, ordered according to the date day fines was implemented. Each chapter is written by a local legal expert on day fines, and each is organized similarly and includes the following sections: history, legal framework, practical implementation; challenges, public perception, and conclusions. In this review we draw on our readings of the chapters about Finland, Sweden, Germany, Austria, Portugal, and Czech Republic, selected for a diverse sample of implementation date, geography, and how widespread the use of day fines is.

## 2. Country overviews

The chapter on *Finland* is authored by Raimo Lahti. Finland was the first country to adopt day fines, in 1921 (p. 24). Interestingly, since then, there have been proposals and implemented

changes to make the system less harsh, including by reducing incarceration as a consequence for non-payment (pp. 24-25). The account in this chapter speaks to the challenges of day fines implementation, including their impact on low-income people and people facing other hardships. The changes in Finland's system over time have been dramatic: Reforms in the late 60s reduced the number of people jailed for non-payment from 9,075 in 1962 to 539 in 1974. (p. 25) Since then, the number of people incarcerated for non-payment has risen, with about 8,000 in 2010. The article notes, "[t]he majority of those who serve their conversion sentence are users of intoxicants, have health problems or are otherwise socially vulnerable" (p. 33), and people with lower incomes are less likely to pay their fines (p. 33). The chapter provides a useful account of the experiences of a country who has continued to try to expand the use of fines through amendments to address inequities. Other changes included amendments to sentencing low-level cases with low flat fines (pp. 26-27) and increasing protections in summary proceedings (p. 29). The author also includes data on the distribution of penalties number and amount of day fines, and the distribution of day fine amounts—useful context for understanding the role of fines in the country (pp. 32-35).

In his chapter on *Sweden*, Öberg introduces the inventor of the day fine system Johan Thyrén, who proposed the system in 1927. Thyrén's ideas resulted in the introduction of the system in 1931 – not least as an answer to the high number of prisoners. Thyrén proposed basing punishment on two components (p. 46): 1) proportionality to the severity of the offence; 2) the financial situation of the person. At the time of adoption of day fines in Sweden, there were concerns that people with financial resources would have to disclose too much about their personal finances and that people with lower incomes would not be deterred because they could not pay anyway. But, proponents of the system argued for its benefits. For one, the day fine system has "the advantage that it invited the court to express explicitly [in setting the number of units] its judgment about the seriousness of the crime and to thus communicate censure" (p. 47). Further, it was thought that the application of day fines would "visibly demonstrate that rich and poor are treated alike by the legal system and [are] indeed equal before the law." (p. 47). The legal framework of day fines in Sweden (pp. 48-54) is based on the principle that people should only pay what they are "able to dispense on a daily basis without being deprived of the necessities in life" (p. 49). Öberg explains how an order for summary proceedings is used to sentence people through written "proceedings". One difference to some other countries is that people have to agree to summary proceedings (p. 53). Another noteworthy feature is that it is only possible to convert fines into a prison sentence, if the person "intentionally has failed to pay" (p. 55).

Hans-Jörg Albrecht explains the day fine system in *Germany*, which was introduced in 1975. Day fines in Germany were inspired by the Swedish system, and motivated by mistrust in short prison sentences because of their criminogenic potential (p. 85-6). They were also meant to "compensate for (...) unequal treatment of rich and poor" people (p. 87). Since their adoption, about 80 % of punishment in Germany have been fines. Albrecht explains that "[d]ay fines may be considered the backbone of the system of penal sanctions in Germany" (p. 90), in part because fines and prison are the only available sentences under the law (p. 91). Yet, despite their widespread use, there are few empirical studies on the implementation and impact of the system (p. 87). One significant difference between Germany and some other day fines systems is that the daily rate is set according to the "net income principle", which means that it is calculated as a person's entire take-home income, with some deductions. This can be contrasted with Sweden, for example, where more deductions are made for living expenses. The chapter

follows with statistics on implementation (pp. 102 ff.) and delves into the impact of this model on specific groups, including people experiencing poverty, homelessness or with substance use issues (p. 97). Most people who are fined are low-income: the daily units in 30 % cases are 10 Euros or less (p. 106). The chapter also gives an overview on the collection of fines, and the consequences of non-payment. Albrecht concludes the chapter noting how short-term incarceration for non-payment is prevalent – citing a study on North Rhine-Westphalia, 8 % of day fines end in imprisonment (p. 108) – and therefore a major problem for Germany's system (p. 115 ff.).

Christopher Kahl and Verena Weinberger describe the day fine system in *Austria* which was also introduced in 1975. The prior flat fine system was perceived as socially unjust because “the economic background was only one of several factors determining the fine, it was not transparent why similar offences led to unequal treatment” (p. 122) Another reason for introducing day fines was to reduce short-term prison sentences by providing decision makers an alternative to imposing prison. Interestingly, Austrian law provides little guidance about how to set the number of daily units: “[n]either the Criminal Code itself nor other legal acts or documents contain official sentencing guidelines” (p. 124). Though there are no clear guidelines, it is understood that the amount of the daily unit is usually calculated on actual or potential income, reduced “by the subsistence minimum” (p. 126). Until reforms in 2000 introducing alternative sentences such as diversion, fines were the most used sanction in Austria. Day fines now make up only 28 % of sentences (p. 137), with about half of fines set between 60 to 120 daily units (p. 139).

*Portugal* adopted day fines in 1995 as a means to reduce incarceration. In this chapter by Maria Fernanda Palma and Helena Morão, we learn about the legal framework of day fines in Portugal, including later amendment to increase the uptake of fines (p. 190) and reduce incarceration for fine-default, including through allowing for instalment payments and community service (p. 191). The chapter also includes some discussion of the scholarly literature and public response weighing the benefits of day fines, noting some concern that fines against people with lower incomes serve only a retributive purpose (p. 185). We also learn about changes in the prevalence of day fines sentences. Peaking in 2006 at 75 % of total sentences, Portugal has since seen a reduction in day fines sentences, with an increase in suspended prison sentences and community service (pp. 190-191).

Jiri Kindl and Jan Kupcik describe day fines in the *Czech Republic*, the second latest addition to the ‘European day fines community’. The Czech Republic implemented day fines in 2009 (and for juveniles in 2004). Day fines are understood as an alternative sanction to prison and the aim is to achieve restorative justice (p. 325). Since 2010 “the only possibility to impose a fine as a criminal sentence in the Czech Republic has been a day fine” (p. 326). In its judgment setting fines, the court “has to determine the specific substitute sanction of imprisonment that shall be served if the fine is not paid. [...] The imprisonment period shall not exceed four years” (p. 328). The law does not provide a specific ratio of conversion from fine units to days in prison, and prior to jailing a person, “the court shall decide on the conversion to house arrest or community service obligation” (p. 338). The authors do not explain how this works in practice. But any alternatives (house arrest, community service, or jail) are only on the table if the person intentionally did not pay – otherwise “the court shall forgive the sanction” (p. 338). The fine is only minimally used in the Czech Republic (making up about 5 % of criminal sentences in 2010; p. 337). According to an empirical study, the reason day fines are used so infrequently is because judges preferred the old criminal code, which did not require proportionate fines

(p. 339). “Moreover, it was complained that the obligatory enforcement of day fines [through first considering alternatives to jail] is time-consuming and ineffective. Judges and public prosecutors prefer having a direct conversion of the day fine, if not duly paid, into imprisonment” (p. 339). A study is cited, which showed that “judges do not, in fact, follow the rule of a calculation of the fines as day fines. (...) The individualisation of the fine is generally still based on the judges’ opinion as to how high the overall fine should be” (p. 340). Judges stick to the idea that fines should reflect the offence rather than the person’s financial situation (p. 340). Though the chapters are structured similarly, they vary in the extent and nature of information about implementation they include – information that helps readers and policymakers better understand day fines in practice. The legal framework provides information about the theoretical or intended use of day fines in each place, but less about the functioning of day fines today. In most jurisdictions, day fines are/will be used to punish low-level cases, and it would be valuable to assess day fines within this context. First, this would mean understanding the offences sentenced with day fines and available alternatives – including other sanctions or decriminalization, as may make sense for low-level cases. The decision for policymakers may not be between day fines or incarceration (as was the case with earlier adoptions) or even day fines and flat fines but rather a broader analysis of sentencing for cases of low-medium seriousness. Second, as some of the chapters discuss, day fines are often imposed on people with low incomes, and/or people with other concerns such as homelessness, mental health issues, and more. This is because of the offences and people who are policed and criminalized in these countries, including people without economic resources and/or otherwise marginalized (Germany, p. 109-110; Finland p. 31) Given this reality, it is important to assess day fines systems’ ability to set fines that are fair for people with little or no income, and to understand the impact of financial sanctions on these groups. The stakes for people are high: As the concluding chapter points out, “all countries mention that the default on the day fine can result in imprisonment” (p. 372).

### 3. Learning by comparisons

In the final chapter, Kantorowicz-Reznichenko and Fauvre provide readers with a comparative discussion of the previous chapters and analyse the extent to which the countries differ from the optimal model that Kantorowicz-Reznichenko introduced in chapter 1. We learn, for example, that in Finland, 88 % of convictions are fines (p. 375), while the authors say that the fine is underused in Poland and Croatia (p. 378) (without stating the number). The chapter also discusses the differences in procedure before a person is jailed for non-payment of a fine: in some places, people’s cases are not reassessed by a judge; in other places the court has discretion to reevaluate all cases.

As is the case with some of the chapters, the introduction would be all the more helpful to practitioners with more about implementation and context – in addition to considerations of theoretical benefits. For example, the chapter discusses a theory-practice gap in the book’s findings about how income and wealth factor into setting fines. We learn that there is no limit to the daily unit in Finland and Denmark, and that there are differences in whether (as in Sweden) or not (as in Germany) judges are to consider wealth. These are differences in the letter of the law worth mentioning, but the reality is that the vast majority of people sentenced to day fines are low income. Therefore, a focus on what makes for theoretically interesting questions

at times is at the expense of speaking to additional pressing questions of implementation—in this case, the problems of calculating fines for lower income people. Similarly, more context would help a reader in some places. For example, we learn that in Germany and Denmark, one daily unit equals one day of prison upon non-payment. In Finland, the ratio is one to three (p. 372). This information would be better understood with more detail: How many units are typically imposed for specific cases? And how is the daily rate calculated? It may well be that Finland is harsher, depending on the math.

The editors note, “[a] general conclusion of the various chapters is that (although there are a few positive exceptions) the number of empirical studies (and generally data collection) is relatively limited.” That may well be true, but some data is available in these countries that could have deepened the analysis (and indeed some chapters include some of this information). First, countries likely have some research on the *impact of fines on people*, including collateral consequences (as in the chapter on Germany).

While some chapters speak to the perceptions of decision makers and the public of fines, less present are the impacts on and experiences of the people being punished. Two, more of the chapters *could have included available criminal justice data*, including: offences fined with day fines; fines imposed by offence (or example cases); day unit ranges imposed; daily rates imposed. Third, helpful would have been *additional information about the demographics of who is sentenced*. Finally, while some countries may not have research about day fines specifically, they may, for example, have *research on procedural issues in low-level proceedings* or the misdemeanour system as a whole which would be relevant. Not all of this information is available everywhere, but some most certainly is, and the structure and focus of the book seemed to not draw upon these bodies of study.

The editors include an interesting discussion cautioning and guiding practitioners on implementing legal transplants. They see that “[t]he day fine system seems to work well in countries like Germany, Austria and Finland, but is perceived quite negatively (...) in some countries where judges literally try to avoid applying the day fine” (p. 373). The editors reason that “the novelty and complexity of this fine, lack of understanding might lead to antagonism towards this model while missing its advantages” (p. 379). In England and Wales, the public and the judges rejected the system and abolished it within months. They argue that a lack of training in judges might lead to rejection. Day fines have started in Sweden and might be by other countries as “legal transplants” (p. 380) which are given to a host country by a donor country. But, “transplants may only work if they are based on local demand and ownership and if there is a large receptivity of the transplant within the existing legal culture of the host country” (p. 381). Therefore, they argue that involvement and information of public and judges is crucial – otherwise the day fine may remain a “Fremdkörper” (p. 386).

#### 4. Conclusion

In general, the edited volume furthers the comparative knowledge of day fines. It is a great and needed book which will be valuable to researchers and practitioners alike when wanting to learn more about the system (maybe even the one in their respective country).

The editors’ agenda (advocating for the day fine system) is openly communicated and therefore legitimate. Nevertheless, it does taint the book. For example, in the end of their chapter the editors/authors provide recommendations for reforms to day fine systems, including using day

finer to sentence all offences, including administrative ones; using day fines to set fines against legal entities; and making community service a more widely used alternative (pp. 384 ff.). Underlying these suggestions is an assumption of the benefits of the system and the necessity to expand its use. Yet, the book itself tells a more complicated story about day fines in practice such that it is not always obvious more day fines is better. For example, we hear that day fines are not fully implemented in many of the featured countries; that in Germany, a “success story”, over 50,000 people are jailed every year for non-payment of fines.

Before recommending and promoting the idea, it needs to get more granular and more situated in the contexts. Are the changes one that will really fix what is wrong, or are day fines entrenching issues such as disparate impact on low-income people? Second, what should social policy responses to low-level crimes be – is the way to go a different kind of punishment or should it be decriminalization? As recent social movements, including Black Lives Matter have raised, policing and low-level punishment are often racialized and/or disparately impact low-income people and people facing other hardships. Already jurisdictions are reconsidering the sanctioning of many low-level cases including prostitutions, drugs, and fare evasion. This broader context should be a part of any complete assessment of day fines.

The book focuses on legal and legal theoretical analysis – most authors have a law background – and do not always integrate studies that have been done on the impacts on people of being jailed for non-payment and on the perception of day fines, among other research (with some exceptions, as described above). Maybe this calls for a second edition – which then should include criminological, social scientist and economic studies.

## Reference

Drápal, J. (2017). Day fines: A European comparison and Czech malpractice. *European Journal of Criminology*, 15(4), 461-480. <https://doi.org/10.1177/1477370817749178>

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