

## **Penal Proportionality in the Protection of Sustainable Food Agricultural Land Law**

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### **Abstract**

This study explores the penal proportionality in the Protection of Sustainable Food Agricultural Land Law. It is argued that the severity of criminal sanction must correspond to the offense's seriousness. Using doctrinal legal research, this study employed a statute and conceptual approach with the literature study to collect the data. The finding of this study shows that the PLP2B Law violates the penal proportionality principle when it determines the threat of a criminal consequence. Even though they are considered minor infractions, several of them carry relatively significant criminal penalties that even outweigh the possibility of punishment for more serious acts. The objective of matching the seriousness of the offense to the severity of the criminal sanction has not been fully achieved. The determination of such threats of criminal sanctions does not, on a large scale, reflect the importance of social justice for all Indonesians. By taking into account the rank of offenses in the environmental harm-based criminalization model, Article 73 of the PLP2B Law must be proportionate to the magnitude of the offense. The determination of criminal sanction threats in the Law needs to be considered and compared to the determination of criminal sanction threats in other environmental laws.

**Keywords:** Crime seriousness; Environmental harm; Penal Proportionality; Legislation.

### **Introduction**

The central focus of this article is on the determination of proportional criminal sanction in Law Number 41 of 2009 concerning the Protection of Sustainable Food Agricultural Land (PLP2B Law). The results of this study will have an impact on how criminal law enforcement operates. When applied to actual cases, the decision of unreasonable criminal sanction made at the legislative stage leads to injustice. As a result, it is expected that the legislatures can include justice in the formulation of the severity of criminal sanctions (Bagaric, 2016).

The theory of criminal proportionality is relevant in this study since the goal of this theory is to meet the demands of fairness, the severity of criminal sanction is based on the seriousness of the offense (Faure, 2009). The principle of criminal proportionality is also the most fundamental aspect of the modern legal system.

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(Goh, 2013). The more serious an offense is, the more severe the crime threatened, and vice versa. (McSherry, 2005). To proportionate/commensurate the severity of criminal sanction with the seriousness of the offense, then the offenses formulated in Article 72 to Article 74 of the PLP2B Law need to be grouped based on their category/seriousness. To produce this categorization, the theory of criminal proportionality is not sufficient enough to solve the problem. Hence, this study also accommodates the models of criminalization based on environmental harms; abstract endangerment, concrete endangerment, concrete harm, and serious environmental pollution. The four models reflect the rank-ordering of the environmental offenses, ranging from the most serious offense to the least serious offenses, and are relevant to analyse the focus of this study.

This study specifically examines a few of the PLP2B Law's offense categories. People who convert agricultural land to serve as a sustainable food source come first. The maximum punishment for this offense is 5 (five) years in prison and IDR1,000,000,000 (one billion) in fines (Article 72 paragraph (1) and Article 44 paragraph (1)). Second, those who refuse to take on the responsibility of bringing Sustainable Food Agricultural Land back to its prior condition. According to Articles 72, 50, and 51, committing this offense carries a maximum sentence of 3 (three) years in jail and a fine of IDR 3,000,000,000.00 (three billion rupiah). Third, officials from the government continue to convert agricultural food land. According to Articles 72 paragraph (3) and 44 paragraph (1), violating this law has a maximum sentence of 5 (five) years in jail plus 1/3 (one third) and a maximum fine of IDR1,000,000,000 (one billion) plus 1/3 (one third). Fourth, public servants who fail to fulfil their duty to bring Sustainable Food Agricultural Land back to its prior condition. According to Articles 72 paragraph (3), 50 paragraph (2), and 51, violating this law has a maximum sentence of 3 (three) years in jail plus 1/3 (one third) and a maximum fine of IDR 3,000,000,000.00 (three billion rupiah) plus 1/3 (one third).

Fifth, government officials who authorize the conversion of land that has been classified as sustainable food agricultural land are given legal protection. A fine of at least IDR 1,000,000,000 (one billion rupiah) and at most IDR 5,000,000,000 (five billion rupiah) and/or imprisonment for a maximum of 1 (one) year and 5 (five) years are the maximum penalties for violating this law (Article 73 jo Article 44 paragraph (1)). Sixth, businesses that convert agricultural land to serve as a sustainable food source. A management member who breaches this law faces a fine of at least IDR2,000,000,000 (two billion rupiah) and at most IDR7,000,000,000 (seven billion rupiah), as well as a maximum prison sentence of 2 (two) years and a maximum of 7 (seven) years. According to Articles 74 paragraphs (1) and (2) and 44 paragraph (1), corporations may be subject to fines of at least

IDR2,000,000,000.00 (two billion rupiah) and up to IDR7,000,000,000.00 (seven billion rupiah).

Seventh, corporations that do not carry out the obligation to restore the condition of Sustainable Food Agricultural Land to its original state. Management who violates this offense is punished with a prison sentence of not less than 2 (two) years and a maximum of 7 (seven) years and a fine of at least IDR 2,000,000,000.00 (two billion rupiah) and a maximum of IDR 7,000,000,000.00 (seven billion rupiah). For corporations, the penalty that can be imposed is in the form of a fine of at least IDR2,000,000,000.00 (two billion rupiah) and a maximum of IDR7,000,000,000.00 (seven billion rupiah) (Article 74 paragraphs (1) and (2) jo Article 50 paragraph (2) and Article 51). Therefore, this article is aimed at examining the severity of criminal sanction under the PLP2B Law based on the penal proportionality. This study is beneficial as a guidance for the preparation of substantial change to the content of criminal sanction threat in the PLP2B Law.

### **Research Method**

This study employed doctrinal legal research that mainly focus on the statutory legal norms promulgating the threats of criminal sanction to offenses in the PLP2B Law. The primary legal source of this study was the formulation of offenses and their criminal sanctions in the PLP2B Law particularly stipulated in Article 44 paragraph (1), Article 50 paragraph (2), Article 51, Article 72, Article 73, and Article 74. To find out and answer the research objective, the use of both statutory and conceptual approaches was combined. The first approach dealt with the PLP2B Law as the primary legal sources, while the second related to principles of proportionate punishment and models of criminalization based on environmental harms written by the legal scholars in the books and/or journals. The legal sources were collected through literature studies. Meanwhile, such sources were analyzed prescriptively through legal source reduction, presenting the explanation, and conclusion.

### **Penal Proportionality and Models of Criminalization Based on Environmental Harms.**

The theory of criminal proportionality requires that the severity of threat of criminal sanction at the legislation stage be based on the seriousness of offense. The more serious the offense, the more severe the crime threatened. The severity of the criminal sanction is considered proportionate if it takes in to account the seriousness of the criminal act or considers the loss/damage caused and the culpability of the actor. (Herlin-Karnell, 2010). The principle of proportionality in

criminal sanctions is also the most fundamental aspect of the modern legal system (Goh, 2013).

The theory of criminal proportionality has two variants: ordinal proportionality (ordinal/relative proportionality) and cardinal proportionality (cardinal/nonrelative proportionality). The first variant requires that the rank of the severity of the threat of criminal sanction must reflect the severity of the offense's seriousness and culpability of the actor. Crimes are arranged by scale so that the relative severity of the crime is related to the comparison of the seriousness of the crime. Cardinal proportionality requires that it is necessary to maintain a rational proportion between the highest level of the criminal and the seriousness of the crime. (Ali, 2022) Barbara A. Hudson defines ordinal proportionality as "... ranking offences according to seriousness and then establishing a scale of penalties of commensurate severity". A person who commits a crime of comparable seriousness should receive a punishment that is comparably severe. (Hudson, 1996). A person who commits a criminal act that is different in severity/seriousness, the threat of criminal sanction related or assessed based on their seriousness. (Hirsch, 1992)

Ordinal proportionality still requires three things, namely parity, rank-ordering, and spacing of penalties. Parity occurs when a person has committed several crimes similar in seriousness, then they deserve a crime whose severity can be compared. Rank-ordering related to crime should be arranged based on the scale of crime so that the severity of criminal threats that relatively reflect the rank of seriousness of crime. In this study, rank-ordering refers to 4 (four) models of criminalization based on environmental harm. Spacing of penalties depends on how precisely the severity of the criminal threat being compared can be adjusted. (Hirsch, Censure and Proportionality, 1992) (Skolnik, 2019) (Gopalan, 2016) Penal proportionality in this study refers to the proportionality between the seriousness of the offense and the severity of the threat of criminal sanction. A marker of the seriousness of the offense is the blameworthiness of the conduct and the culpability of the actor. (Hirsch A. V., 1983) A threat of criminal sanction is said to be proportionate to the seriousness of the offense if it meets the requirements of parity, rank-ordering, and spacing of penalties (Dagan, 2019).

In this context, the rank-ordering refers to the four models of criminalization based on the environmental harms by Michael Faure. The primary basis for classifying the models is environmental interest and harm. The first model, abstract endangerment, criminalizes environmental damage/pollution indirectly. The criminal law limits the enforcement of pre-existing administrative laws. Criminalization according to this model is only aimed at violations of administrative obligations (Nisser, 1995) (Faure M. , 2017). This model is limited to crimes that do not involve direct contact between polluted materials and the

environment (Faure M. , Towards a New Model of Criminalization of Environmental Pollution: The Case of Indonesia , 2006). This first model contains some of the lightest offenses to environment.

The second model, concrete endangerment, does not require that actual harm must be proven, but it is sufficient to prove the threat of harm and unlawful acts. This model also protects ecological values directly, although its existence remains dependent on administrative regulations (Cho, 2001). The offense in the second model is more serious than the first model. The concrete harm, the third model, requires that environmental harms must be tangible environmental losses, such as actual harms to humans, the environment, and even future generations even though the criminal law has not yet extricated from administrative dependence (Skinnider, 2011). This model relies on proving causation in criminal law. This third model is more serious than the second model because the offense already requires the emergence of consequences in the form of pollution or environmental damage.

The last model has completely detached itself from the administrative dependence of criminal law. This model has been characterized in two ways. First, the elimination of permissions as protectors. Even if a person has permission from an administrative official, but if his actions cause serious harm to the environment, then the act is still categorized as a criminal offense. Second, the elimination of unlawful nature as an element of environmental crime. Criminal law can still be used if it causes very serious harm even if the act is not against the law, in the sense that it is carried out in accordance with the requirements of permits or administrative regulations. This fourth model is the most serious compared to the previous three models. In addition to requiring pollution or environmental damage, criminal law has also broken away from dependence on administrative law.

#### **The Seriousness of Offenses and Their Sanction Severities in the PLP2B Law**

The offenses regulated from Article 72 to Article 74 of the PLP2B Law are all formulated as *formal delicts* namely offenses that have been proven by the commission of prohibited acts. This offense is different from material offense which requires the emergence of effects prohibited by law. As long as the prohibited effect has not arisen, then an offense has not occurred. The formulation of actions in the form of 'carrying out the conversion of Sustainable Food Agricultural Land', 'not carrying out the obligation to restore the condition of Sustainable Food Agricultural Land to its original state', and 'issuing permits for the conversion of Sustainable Food Agricultural Land on land that has been designated as protected Sustainable Food Agricultural Land' shows that the most important element of an offense is the commission of a prohibited act. The threat of criminal sanction in formal offenses is lighter than that of *material delicts*.

It is also argued that the offenses in the PLP2B Law are in the form of commission acts and omission acts. The first act is conduct in the form of violating a prohibition or doing something prohibited. This offense criterion is in the presence of bodily movement. The phrases 'carrying out the conversion of Sustainable Food Agricultural Land', and 'issuing permits for the conversion of Sustainable Food Agricultural Land on land that has been designated as protected Sustainable Food Agricultural Land' constitute the commission's offenses. The offense of omission is a violation of the command, that is, not doing something that is told. A person is obliged to do an act or deed, but that person is silent or ignores his obligation. In short, a person only should act when one is under a legal obligation. The offense of omission is limited to offenses expressly formulated in law as an implication of the principle of legality.

According to Clarkson, there are four circumstances in which the crime of omission takes place, and each of these circumstances places an obligation on the individual to act, making their inaction a criminal infraction. First, when two parties have a particular relationship, one of them has obligations toward the other. A mother has a duty to breastfeed or otherwise nourish her child. A woman is deemed to have committed an omission offense when she (deliberately) fails to nurse or feed the baby, which results in the baby's death. Second, a legal obligation to that person arises in this situation when one person voluntarily takes on responsibility for another, and that other person expects that person to be there for them if they need it. Third, when two parties have a contractual relationship with one another, they are obligated to help one another. If a lifeguard at a recreational facility fails to assist a child who has drowned while swimming in the pool, that individual is considered to have committed an omission violation. In fact, the individual has a duty to preserve the safety of young children swimming in the pool in accordance with the employment contract he signed with another party (business). Fourth, the one who causes a situation that puts others in danger is responsible for reducing it. If a person fails to take specified measures to lessen the risk, this is referred to as an omission violation (Clarkson, 1998).

Four circumstances that lead to emission violations were also mentioned by Mike Molan, Duncan Bloy, and Denis Lanser. These include: (1) the existence of a connection built on trust, in which one party depends on the other for survival. As an illustration, a mother has a legal obligation to nurse her child. One party creates a situation that puts the other in danger; (2) the infant dies because of the non-breastfeeding mother's silence; (3) a legal obligation to act or perform an active act arises from a contract or agreement; and (4) transmission offenses occur in the practice of medicine. As an illustration, a physician must treat a patient in

accordance with the law. The act of omission occurs when the patient dies due to the doctor's silence (Mike Molan, 2003).

Table 1 below summarizes the classification and seriousness of offenses under the PLP2B Law based on 4 (four) models of criminalization based on environmental harms and criminal sanction threats as follow:

**Table 1.**  
**Crimes Seriousness and their Penal Severity in PLP2B Law**

<b>Criminalization model</b>	<b>Offenses</b>	<b>Penal Severity</b>	
<b>Abstract endangerment</b>	Government officials who issue permits for the conversion of Sustainable Food Agricultural Land on land that has been designated as Sustainable Food Agricultural Land are protected	Imprisonment for a minimum of 1 year and a maximum of 5 years and/or	At least 1 billion and at most 5 billion
<b>Concrete endangerment</b>	Individuals Carrying Out the Conversion of Sustainable Food Agricultural Land	5 years of imprisonment and	1 billion
	Individuals who do not undertake the obligation to restore the condition of Sustainable Food Agricultural Land to its original state	3 years of imprisonment and	3 billions
	Government officials who carry out the conversion of Agricultural Food Land Sustainability	5 years of imprisonment added 1/3 and	1 billion added 1/3
	Government officials who do not undertake the obligation to restore the state of Sustainable Food Agricultural Land to its original state	3 years of imprisonment added 1/3 and	3 billion added 1/3
	Corporations that carry out the conversion of Sustainable Food	Imprisonment for a minimum of 2 year and a	At least 2 billion and at most 7 billion



	Agricultural Land	maximum of 7 years and	
	Corporations that do not undertake the obligation to restore the condition of Sustainable Food Agricultural Land to its original state	Imprisonment for a minimum of 2 year and a maximum of 7 years and	At least 2 billion and at most 7 billion

Source: processed by author

Based on the table 1 above, it is argued that of the 7 offenses in the PLP2B Law, there are only two models of criminalization based on environmental losses that has been met, namely the abstract endangerment and concrete endangerment model. The first model has only found in one type of offense, namely 'government officials who issue permits for the conversion of Sustainable Food Agricultural Land on land that has been designated as protected Sustainable Food Agricultural Land'. Issuing permits is purely administrative scheme and there it has the potential to damage or pollute the environment. Such acts are purely administrative violations since there is no direct contact between polluted materials and the environment. They also protect ecological values indirectly through the provision of intervention mechanisms for the government to prevent environmental harms (Faure, 2009)

The second model in detail amounts to 2 (two) offenses committed by six different perpetrators in the form of 'carrying out the conversion of the function of Sustainable Food Agricultural Land', and 'not carrying out the obligation to restore the condition of Sustainable Food Agricultural Land to its original state'. The two offenses are categorized as the second model because they are carried out unlawfully/in violation of permits or administrative regulations (transferring functions and not performing obligations) and threatening both environmental damage/pollution and health, safety. (Faure, 2009) In this sense, the theory of criminal proportionality requires that the offenses be ranked first, and then the threat of criminal sanction is determined. The determination of the severity of criminal threats is based on the rank of each offense seriousness. Once that is met, then there must be a spacing of penalties between criminal sanction threats on light, moderate, severe, and serious offenses. This spacing of penalties is important to prevent/arrange to prevent/avoid severe criminal threats in groups/ranks of light offenses or the presence of criminal threats that are equally light or equally severe in offenses of different levels of delicts.

The table 1 also shows that the offense in the first model (abstract endangerment) in the form of 'government officials who issue permits for the conversion of Sustainable Food Agricultural Land on land that has been designated as protected Sustainable Food Agricultural Land' is threatened with relatively severe criminal sanction, namely imprisonment for a minimum of 1 year and a maximum of 5 years and/or at least 1 billion and a maximum of 5 billion of fine. There is a specific minimum criminal threat for offenses that fall into the lightest category, although the minimum criminal threat is only necessary for serious offenses. The length/weight of the threat of imprisonment and fines is precisely the same or even more severe than the criminal threat on more serious offenses (concrete endangerment). The more severe criminal threat in the second model of offense is found only in two offenses specifically directed at corporations.

The PLP2B Law does not regulate the rules for the enforcement of fines for both corporations and individual perpetrators. If an individual does not pay the fine imposed by the judge, the PLP2B Law lacks this formula so the provision of Article 30 paragraph (2) of the Criminal Code applies, which is replaced by a maximum of 6 months imprisonment. In a case where the corporation does not pay the fine imposed by the judge, the provisions of Article 30 paragraph (2) of the Criminal Code are not applicable because it specifically apply to individual perpetrators. Therefore, even the threat of large fines will not be effective for corporations if they do not follow by rules for enforcing fines for offenses committed by corporations or individuals.

Data on the determination of threats of criminal sanction in the PLP2B Law infringe the principle of penal proportionality leading to injustice as the primary purpose of this formulation. On a macro scale, the indicator of the value of social justice for all Indonesians in the form of 'policies and laws and regulations to realize justice and welfare for all Indonesian people both born and mental' has not been achieved with the disproportionate criminal sanction. In addition, disproportionate punishment in legislation policies (the formulation of offenses and criminal threats in the PLP2B Law) have the potential to cause injustice in the practice of handling cases, especially by judges when sentencing defendants who commit offense. In addition, the amount of fine that can be imposed for an individual perpetrator is very high and, hence, it opens the possibility to be ineffective. In the case where the Conversion of Sustainable Food Agricultural Land belongs to 100 m<sup>2</sup>, the owner of the land will never pay the maximum fine of 3 billion. As the result, this criminal sanction threat is not executable.

## **Conclusion**

The determination of the threat of criminal sanction in the PLP2B Law infringes on the principle of penal proportionality. There are minor offenses that are threatened with relatively severe criminal sanction, even weighing more than the threat of criminal sanction in offenses that are even more severe. The implication is that justice as the goal of commensurate between the severity of criminal sanction and the seriousness of offense has not been fully met. On a macro scale, the determination of such criminal sanction threats is not under the value of social justice for all Indonesians.

This study recommends the following:

1. Offense in Article 73 of the PLP2B Law is included in the group of light offenses (abstract endangerment) so that the determination of criminal threats is adjusted/commensurate with the categorization of the offense.
2. The threat of imprisonment or fines in Article 73 of the PLP2B Law needs to be commensurate with the seriousness of the offense by considering the rank of offenses in the environmental harm-based criminalization model.
3. The determination of criminal sanction threats in the PLP2B Law needs to consider and compare to the determination of criminal sanction threats in other environmental laws to create horizontal harmonization and synchronization and to prevent disparity of sentencing in criminal convictions by judges.
4. When setting the severity of the fine, the legislatures must ascertain that it can be applicable to enforce and be paid by the defendant.

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