

The Policy on Illegal Oil Palm Plantation Reform in Forest Area during Jokowi's Presidency

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Abstract: Indonesia is the largest oil palm producer. The area of oil palm plantations is approximately 3.4 million. However, this large potential is not part away from legal issues such as illegal oil palm plantations. It is also implied by overlapping regulations and permits. This study aims to examine the policy of illegal oil palm plantations reform and the rooted regulation problem in forest areas during Joko Widodo era. This research relies on a normative legal approach. Data was collected through the investigation of legal material regarding oil palm policies. The results of this study indicate that the overlapping regulation contributes negatively to the reformation attempt. Yet, there are no legal products and policies regarding the dispute settlement of illegal oil palm in forest areas. Repressive implementation of criminal law does not solve the problem at the grassroots. The establishment of Job Creation Law provides new hope for the settlement of oil palm plantations problem by mainstreaming the nonlitigation mechanism, namely administrative sanctions.

Keywords: Environment; Forestry; Natural Resources; Palm Oil

1. Introduction

Indonesia is the largest oil palm producer in the world. According to Databoks, in 2020, the export rate of Indonesian oil palm reached US\$ 20.3 billion (13.3% of total non-oil and gas in the year). It is equal to 275 trillion in the Indonesian curse. Indonesia's oil palm production touched 44.05 million tons in 2019 and the export value reached USD 19 billion. Therefore, oil palm has been the prima donna of the country's foreign exchange from the plantation sector.¹ Nevertheless, oil palm plantations are never part away from legal issues, one of which is illegal oil palm plantations in forest areas. In 2020, Auriga claimed that the area of oil palm plantations located in forest areas is proximately 3.4 million hectares, covering 115,000 hectares in nature reserves, 174,000 hectares in protected forest, 454,000 hectares in limited production forest areas, 1.4 million hectares

¹ Arifin Maruf, 'Legal Aspects of Environment in Indonesia: An Efforts to Prevent Environmental Damage and Pollution', *Journal of Human Rights, Culture and Legal System*, 1.1 (2021), 2807–12 <<https://doi.org/10.53955/jhcls.v1i1.4>>.

in production forest areas, and 1.2 million hectares in conversion production forest areas.²

The large sector of oil palm plantations in forest areas is not followed by good regulations which leads to the overlapping of management and permit systems. This overlapping regulation is exacerbated by the many laws and regulations that violate constitutional provisions. Thus, it requests a process that evaluates both the regulations and the permit system. Overlapping policies related to oil palm plantations negatively hinder the fulfillment of public welfare and prosperity as what has been mandated in Law Number 39/2014 concerning Plantations (ACT 39/2014).³ The issue of oil palm forests usually has been resolved according to Law Number 18/2013 about the Prevention and Eradication of Forest Destruction (ACT 18/2013), namely with a criminal law approach. In addition to the criminal law mechanism, Article 8 paragraph (1) of Law 18/2013 also regulates administrative sanctions, such as government coercion, forced money, and/or revocation of permits. Nonetheless, in this regard the enforcement mechanism is not regulated in detail therefore the appropriate regulations are necessary.⁴

The regulation above substantively prohibits forest destruction in the form of illegal logging, illegal mining, and plantations without permits that cause state losses, socio-culture damage, environmental degradation, and the increase of global warming. This regulation clearly forbids oil palm plantations in forest areas. It is because all regulations related to forestry, including Law 18/2013, which has not permitted the cultivation or management of oil palm plantations in forest areas. The establishment of Law Number 11/2020 concerning Job Creation, provides fresh hope for the settlement of oil palm plantations in forest areas with a non-litigation procedure, namely with a humanist approach, in which structuring forest areas and providing administrative sanctions.⁵

The obligation to have land rights for plantation companies signifies significant reform. It is stated in Article 29 point 12 that the Plantation plant cultivation business activities and/or plantation product processing business can only be carried out if the companies have obtained rights on land and fulfill the business permit from the Central Government. Further provisions regarding Business licensing as referred to in paragraph (1) are regulated in a Government Regulation.⁶

² Arifin Ma'ruf, 'Application of Timber Legality Verification System (SVLK) Policy as Ecolabel Implementation in the Indonesian Timber Industry', *Journal of Human Rights, Culture and Legal System*, 1.2 (2021), 2807–12 <<https://doi.org/10.53955/jhcls.v1i2.10>>.

³ John D. Watts and others, 'Challenges Faced by Smallholders in Achieving Sustainable Palm Oil Certification in Indonesia', *World Development*, 146 (2021), 105565 <<https://doi.org/10.1016/j.worlddev.2021.105565>>.

⁴ Elías Cisneros, Krisztina Kis-Katos, and Nunung Nuryartono, 'Palm Oil and the Politics of Deforestation in Indonesia', *Journal of Environmental Economics and Management*, 108 (2021), 102453 <<https://doi.org/10.1016/j.jeem.2021.102453>>.

⁵ Rini Astuti, 'Governing the Ungovernable: The Politics of Disciplining Pulpwood and Palm Oil Plantations in Indonesia's Tropical Peatland', *Geoforum*, 124.March (2021), 381–91 <<https://doi.org/10.1016/j.geoforum.2021.03.004>>.

⁶ Ward Berenschot and others, 'Anti-Corporate Activism and Collusion: The Contentious Politics of Palm Oil Expansion in Indonesia', *Geoforum*, 131.February (2022), 39–49 <<https://doi.org/10.1016/j.geoforum.2022.03.002>>.

The newer policy also requires that the companies should operate no later than two years since the land right was issued. If there are lands that are not or not cultivated yet after two years, the lands will be taken over by the state. This breakthrough is expected to be the solution to the rampant neglect of land by unscrupulous plantation companies. Thus, the regulation in the Job Creation Act (JCA) confirms the Constitutional Court's Decision No. 138/Judicial Review-XIII/2015 where the legality of the land is the basis for the operation of the plantation business and the basis for granting the legality of the plantation business.⁷

The new policy could be seen from the new strategy in resolving community oil palm delays in forest areas. Article 17 paragraph (2) letter b expressly asserts regarding the prohibition of carrying out plantation activities without a business permit from the Central Government in forest areas and Article 92 paragraph (1) confirms that plantation without a permit is a crime and is threatened with criminal penalties. However, Articles 17A and 110B provide opportunities to settle smallholder oil palm through a policy strategy for structuring forest areas. Article 17A paragraph (1) stipulates the provision of administrative sanctions. Interestingly, the provision of administrative sanctions in Article 17 paragraph (2) is not aimed at the people who have oil palm plantations in forest areas with the condition that they reside in and/or around forest areas for a minimum of 5 (five) years continuously and are registered in the forest area management policy.

2. Method

This research relies on a legal normative approach. This legal normative approach prioritizes library research. Data is collected through the investigation of various laws and policies as primary sources. This legal normative research focuses on the study of legal policies, legal principles, legal systematics, and legal synchronization. This study uses primary and secondary data. Primary data includes policies, laws, and regulations. Secondary data is generated from books, literature, and so on through library studies.⁸ Data is then analyzed qualitatively.

3. The Inconsistency of Licensing Policy for Oil Palm Plantation

Inconsistency amongst regulations certainly is inhibition in achieving the objectives of the establishment of any regulations. In general, the objective of law is to regulate and organize the life of people in a country. It is constructed by establishing certainty, advantage, and justice between state and society. Thus, one of the main pillars in the administration of government is the formation of good, harmonious, and applicable laws and regulations.⁸ The overlapping of regulations is seen as detrimental in the middle of society and it also hinders national economic development. In that case, regulatory arrangement plays a significant role. Thus, the creation of the regulations ideally is based

⁷ Herry Purnomo, Beni Okarda, Ahmad Dermawan, and others, 'Reconciling Oil Palm Economic Development and Environmental Conservation in Indonesia: A Value Chain Dynamic Approach', *Forest Policy and Economics*, 111.January 2019 (2020), 102089 <<https://doi.org/10.1016/j.forpol.2020.102089>>.

⁸ Farida Patittingi. "New Paradigm in Natural Resources Management: Securing Indigenous Peoples Rights." *Hasanuddin Law Review* 6, no. 1 (2020): 56-65 <<http://dx.doi.org/10.20956/halrev.v6i1.2267>>.

on actual legal reasoning. It is an asynchronous indication that causes disharmony between the rules with one another.⁹

One of the asynchronous rules can be seen in the regulations related to the issuance of Plantation Business Permits, both PBP-C (Cultivation) and PBP-P (Processing). The PBP that has been used so far does not require land legality in the form of a cultivation right (CR). In fact, in running an oil palm plantation business, the existence of land legality is certainly clear cut. The absence of this CR requirement is the root of the problem and has even become an entry point for the perpetrator in the company to create illegal oil palm plantations in forest areas and later cause forest damage. In fact, all Indonesian citizens are allowed to use forest areas to realize social equity, provided that they must be based on applicable laws.¹⁰

The ownership of a cultivation right certificate (CR certificate) refers to Article 1 point 3 of ministerial regulation ATR/BPN 7/2017. Its position is a mandatory document that becomes the legal basis for cultivating land, one of which is for agricultural or plantation businesses. As the legal basis for the CR certificate, it is further reaffirmed in Article 39 of Ministerial Regulation ATR/BPN 7/2017. In this article, it is stated that CR holders are entitled to the legal protection and certainty guarantee over the granted Cultivation Rights. The clause "legal basis to cultivate" contained in Article 1 point 3 must be interpreted that ownership of a CR certificate is a basic document for any activities toward the land. Thus, the existence of a cultivation right certificate should be the basis for issuing permits from other agencies including the Ministry of Agriculture in providing Plantation Business permission. This is because the non-forestry land objects/Other Use Areas (OUA) are the authority of the Ministry of AAASP/HONLA, while on forestry land is the authority of the Ministry of Environment and Forestry.¹¹

Before the land is issued a plantation permit and cultivated by the community and the company, initially they have the legality over the land in the form of a land certificate. The issuance of CR by the Ministry of AAASP/HONLA is not allowed in the forest area, because the authority of the forest area is under the Ministry of Environment and Forestry (MEF). However, if there is already a Decree of the Minister of Environment and Forestry regarding the release of forest area, then the land object is no longer a forest area but has become an area of other use (AOU) which can be encumbered with land rights, and CR can be issued by the Ministry of AAASP/HONLA. Thus, the position of the

⁹ Nicola K. Abram and others, 'Oil Palm–Community Conflict Mapping in Indonesia: A Case for Better Community Liaison in Planning for Development Initiatives', *Applied Geography*, 78 (2017), 33–44 <<https://doi.org/10.1016/j.apgeog.2016.10.005>>.

¹⁰ Samantha S.K. Scholte and others, 'Willingness to Offset? Residents' Perspectives on Compensating Impacts from Urban Development through Woodland Restoration', *Land Use Policy*, 58.2016 (2016), 403–14 <<https://doi.org/10.1016/j.landusepol.2016.08.008>>.

¹¹ Kamna Patel, 'Encountering the State through Legal Tenure Security: Perspectives from a Low Income Resettlement Scheme in Urban India', *Land Use Policy*, 58 (2016), 102–13 <<https://doi.org/10.1016/j.landusepol.2016.07.016>>.

CR becomes a determined document for land-based business activities such as oil palm plantations.¹²

However, the regulations of plantations do not regulate it. A concrete example is mentioned in the provisions of Article 21, Article 22, and Article 23 Agriculture Ministerial Regulation 98/ agriculture ministerial regulation /OT.140/9/2013 in issuing Plantation Business Permits Both PBP-B, PBP-P, and PBP do not require ownership of Cultivation Rights. This is also emphasized by Article 40 paragraph (2) of Ministry of Agriculture 98/ agriculture ministerial regulation/OT.140/9/2013 that plantation companies that have PBP-B, PBP-P, or PBP in accordance with this regulation are required to complete the process of acquiring land rights in accordance with statutory regulations. The provisions of Article 40 paragraph (2) implicitly emphasize that the issuance of a plantation business permit does not wait for the long process of acquiring land rights.¹³

The regulation is based on Article 42 of Law Number 39/2014 concerning plantations. It is stated that the business activities of Plantation Crops cultivation and/or Plantation Product Processing business as referred to in Article 41 paragraph (1) can only be carried out by the Plantation Company if it has obtained land rights and/or Plantation Business Permits. This provision is openly interpreted that the development of oil palm plantations or processing can be carried out if the company already has land rights (CR) and/or Plantation Business Permits (PBP) (one) or both.¹⁴

The regulations in the plantation sector above have resulted in conflicts of authority and many overlapping permits, such as overlaps between PBP and CR as well as with other permits. The provision of Article 42 in Law 39/2014 is considered legal smuggling to facilitate permits. However, it is against other regulations in the agrarian and forestry sectors, because they do not heed the legality of the land. In addition, the provision in Article 42 seems to juxtapose the position of PBP and CR on an equal position in terms of proving the legality of land tenure. In fact, between CR and PBP is different. Business Permit is a form of legality for their business activities, both production and processing businesses, while Cultivation Rights are showing the legality of the land.¹⁵ Thus, the PBP cannot be used as a justification for the legality of the land controlled/managed. Related to the regulatory problems above, the legality management of oil palm plantations follows the figure 1.

¹² Eko N. Setiawan and others, 'Opposing Interests in the Legalization of Non-Procedural Forest Conversion to Oil Palm in Central Kalimantan, Indonesia', *Land Use Policy*, 58 (2016), 472–81 <<https://doi.org/10.1016/j.landusepol.2016.08.003>>.

¹³ Andreas Niedermayr, Martin Kapfer, and Jochen Kantelhardt, 'Regional Heterogeneity and Spatial Interdependence as Determinants of the Cultivation of an Emerging Alternative Crop: The Case of the Styrian Oil Pumpkin', *Land Use Policy*, 58 (2016), 276–88 <<https://doi.org/10.1016/j.landusepol.2016.07.033>>.

¹⁴ Rini Astuti and others, 'Making Illegality Visible: The Governance Dilemmas Created by Visualising Illegal Palm Oil Plantations in Central Kalimantan, Indonesia', *Land Use Policy*, 114 (2022), 105942 <<https://doi.org/10.1016/j.landusepol.2021.105942>>.

¹⁵ Herry Purnomo, Beni Okarda, Ade Ayu Dewayani, and others, 'Reducing Forest and Land Fires through Good Palm Oil Value Chain Governance', *Forest Policy and Economics*, 91.March 2017 (2018), 94–106 <<https://doi.org/10.1016/j.forpol.2017.12.014>>.

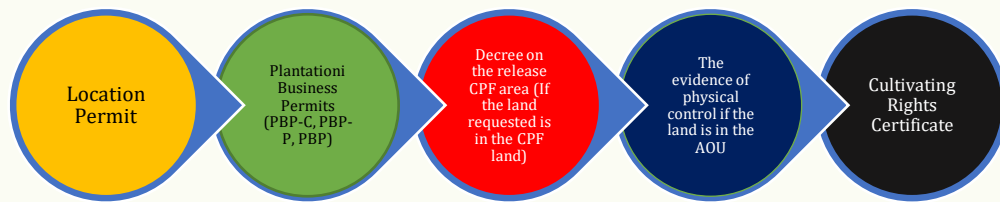


Figure 1: Palm Oil Plantation Legality Management Until 2017

In 2015, several provisions in Act Number 39/2014 concerning Plantations (Act 39/2014), one of which was Article 42, were subject to judicial review at the Constitutional Court of the Republic of Indonesia. Through the Constitutional Court Decision No. 138/PUU-XIII/2015, decided to change the sentence and substance of Law no. 39/2014 concerning Plantations, one of which was in Article 42, which removed the word “or” in the article. Before it was changed, the article was "The development of oil palm plantations or processing can be carried out if you already have land rights (CR) and/or Plantation Business Permits (PBP)". The substance tells that in creating palm plantations, it can have only PBP or only CR. This means the CR does not become a requirement in the PBP application. After the Constitutional Court's decision, the substance of Article 42 changed to “the development of oil palm plantations or processing can be carried out if it already has land rights (CR) and Plantation Business Permits (PBP)". It means that the company must have both PBP and CR as the minimum requirements.¹⁶

After the Constitutional Court Decision No. 138/PUU-XIII/2015, it turned out that the government, in this case, the Ministry of Agriculture, was quite slow in responding to the decision. Only in 2018, the Ministry of Agriculture responds by issuing regulation number 29/Permentan/PP.210/7/2018 concerning Procedures for Business Licensing for the Agricultural Sector. which was subsequently revoked and invalidated by Regulation of the Minister of Agriculture Number 5/2019 concerning business licensing in the agricultural sector. In this new regulation, specifically in Article 9, Article 11, Article 28, it is stated that the right to cultivate (CR) is used as a requirement in the issuance of a Plantation Business Permit so that without a CR, a plantation business permit cannot be issued. Thus, the procedure of oil palm licensing is as follows:

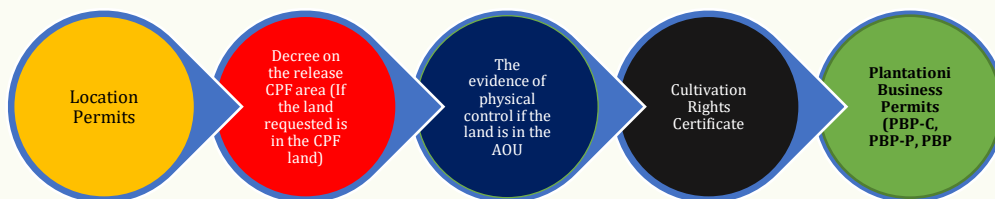


Figure 2: Palm Oil Plantation Legality Management 2018-2019

¹⁶ Tim Cadman and others, ‘The Role of Fiscal Instruments in Encouraging the Private Sector and Smallholders to Reduce Emissions from Deforestation and Forest Degradation: Evidence from Indonesia’, *Forest Policy and Economics*, 108, (2019), 101913 <<https://doi.org/10.1016/j.forpol.2019.04.017>>.

After the issuance of this new regulation, the licensing scheme that became sequential and correct, namely the location permit, was used as the basis for land acquisition. If the land is on AOU land, there must be evidence of physical control of the applicant witnessed by community leaders and known by the village head or another name similar to that. If the land is in the CPF (Conversion Production Forest) area, then it is obligatory to apply for the release of the forest area, after having a decree on the release of forest area, then apply for CR and the last one takes care of business legality, namely by applying for PBP.¹⁷

Plantation licensing policies in 2013-2018 have clearly created a lot of overlap amongst permits. The overlap is not only among Plantation Business Permits and CR but also between plantation business permits and forest areas. This is supported by a spatial analysis of the Ministry of Environment and Forestry which recorded 10,244 hectares of oil palm plantation business permits which indicated overlap with forest areas in South Sumatra. Currently, Indonesia has an enormous forest potential, reaching 133,694,685 Ha which must be maintained and utilized in accordance with good regulations.¹⁸

Although the new regulation, namely the Minister of Agriculture Regulation Number 5/2019 concerning business licensing in the agricultural sector has just been published, it still shows an error. The error is stated in Article 9 paragraph (1) letter e and Article 11 paragraph (1) letter e. It is regulated that one of the requirements for applying plantation business permit is the existence of a forest area release permit document. This can be seen in the Minister of Forestry Regulation which regulates the procedures for releasing convertible forest areas, namely in the Minister of Forestry Regulation P. 33/*Menhut-II/2010 Juncto P.17/Menhut-II/2011 Juncto P.44/Menhut- II/2011 Juncto P.28/Menhut-II/2014*. During the Jokowi-Jk administration, there was also the Minister of Environment and Forestry Regulation Number P.51/*Menlhk/Setjen/KUM.1/6/2016* regarding the procedure for releasing forest areas which was later revoked and replaced by Minister of Environment and Forestry Regulation Number P. 96/*Menlhk/Setjen/KUM.1/11/2018* regarding the procedures for releasing the forest area. None of these regulations mentions anything related to Forest Area Release Permits.

In the aforementioned regulations, what is known and regulated is the Decree on the Release of Forest Areas. Legally, the nomenclature of the "decision" on releasing forest areas is correct, because the legal consequence of releasing forest areas is releasing areas that were previously forest to become non-forest or Other Use Areas and are no longer under the authority of the Ministry of Environment and Forestry. However, if the nomenclature is "permit" then it is temporary in nature and should neither be able to transfer nor to remove authority.¹⁹

¹⁷ Diana Córdoba and others, 'Understanding Local Perceptions of the Impacts of Large-Scale Oil Palm Plantations on Ecosystem Services in the Brazilian Amazon', *Forest Policy and Economics*, 109.September (2019), 102007 <<https://doi.org/10.1016/j.forpol.2019.102007>>.

¹⁸ Rijal Ramdani and Anu K. Lounela, 'Palm Oil Expansion in Tropical Peatland: Distrust between Advocacy and Service Environmental NGOs', *Forest Policy and Economics*, 118.April 2019 (2020), 102242 <<https://doi.org/10.1016/j.forpol.2020.102242>>.

¹⁹ Marissa Malahayati and Toshihiko Masui, 'The Impact of Green House Gas Mitigation Policy for Land Use and the Forestry Sector in Indonesia: Applying the Computable General Equilibrium Model', *Forest Policy and Economics*, 109.September (2019), 102003 <<https://doi.org/10.1016/j.forpol.2019.102003>>.

4. Legal Vacuum for the Settlement of Oil Palm Dispute in Forest Areas

Based on the records of the Ministry of Environment and Forestry, in the last three years, there have been thousands of reports of public complaints related to environmental and forestry damage. In 2017 there were 1113 reports, in 2018 there were 1322 reports and as of March 2019 there were 425 reports. One of the many reports was the result of land clearing for oil palm plantations. However, it turns out that from the many cases of environmental and forestry destruction, not all of them have been successfully resolved through litigation.²⁰

The data above shows that the settlement of oil palm forests should not always be carried out in criminal law approach, especially for marginal communities living in and around forest areas. Most of them have depended on oil palm plantations in forest areas, although Law 18/2013 strictly prohibits illegal plantation activities. Central Bureau of Statistics (BPS) data shows that the Indonesian population living around forest areas is around 32,447,851 people. In addition, the number of villages in the forest is about 2,037 villages, and around the forest are 19,247 villages.²¹

Communities living around the forest area depend on the product of the forest, including oil palm plantations as the main source of livelihood. If the solution for such case uses criminal law enforcement approach, many Indonesian people could be sentenced or given other sanctions on charges of destroying forests. The government, in this case the Ministry of Environment and Forestry, takes a policy to criminalize corporate individuals who make illegal oil palm plantations in forest areas, but smallholder oil palm plantations in forest areas can be resolved specifically with a social and humane approach. Moreover, if we take a look at the provisions Article 3 of Law no. 41 of 1999, forestry operations are aimed at the greatest prosperity of the people in a just and sustainable manner.²²

In the case of smallholder palm oil in forest areas, it must be resolved specifically, not by criminalizing the community, but by helping the community to gain legal access to forest resources. The establishment of Presidential Regulation Number 88/2017 concerning Settlement of Land Tenure in Forest Areas is one of the government's efforts to resolve forestry problems in Indonesia through non-litigation channels. Presidential Decree 88/2017 was established to resolve and provide legal protection for the rights of communities in forest areas that control land. Article 8 of Presidential Regulation 88/2017 asserts that settlement patterns for land that are controlled and utilized after the lands are designated as forest areas are in the form of (a) removing plots of land in forest areas

²⁰ Herry Wahyudi, Azhari Setiawan, and Alfajri, 'The Post-ASEAN's Haze-Free Roadmap 2020 and Implementation of Precautionary Principle in Indonesia's Environmental Diplomacy: Riau's Perspective', *Berumpun: International Journal of Social, Politics and Humanities*, 4.1 (2021), 15–39 <<https://doi.org/10.33019/berumpun.v3i2.52>>.

²¹ Armida S. Alisjahbana and Jonah M. Busch, 'Forestry, Forest Fires, and Climate Change in Indonesia', *Bulletin of Indonesian Economic Studies*, 53.2 (2017), 111–36 <<https://doi.org/10.1080/00074918.2017.1365404>>.

²² Iswantoro Iswantoro, 'Strategy and Management of Dispute Resolution, Land Conflicts at the Land Office of Sleman Regency', *Journal of Human Rights, Culture and Legal System*, 1.1 (2021), 2807–12 <<https://doi.org/10.53955/jhcls.v1i1.3>>.

through changes to forest area boundaries, (b) exchanging forest areas (c) provide access to forest management through social forestry programs, or (d) perform resettlement.²³

The issuance of Presidential Decree 88/2017 needs to be appreciated, although there are remain provisions that do not specifically regulate "oil palm plantations in forest areas", especially the term '*lahan garapan*' [cultivated land] in Article 5 paragraph (4) which is still multi-interpreted. The provisions of Article 5 paragraph (4) of Presidential Regulation 88/2017 writes 'cultivated land' is a plot of land in a forest area that is worked on and utilized by a person or group of people which can be in the form of rice fields, fields, mixed gardens and/or pond". The word 'can' in Article 5 paragraph (4) of Presidential Regulation 88/2017 to express the scope of the term '*lahan garapan*' is interpreted as being open and opening up opportunities to enter people's oil palm plantations or plantations into the scope of cultivated land.

From the elaboration above, according to us, first, the government should take discretionary steps in order to further the regulation, namely by interpreting the provisions of Presidential Regulation 88/2017 by including smallholder oil palm plantations in the scope of cultivated land. Second, the issue of illegal forest land tenure should not only be seen in criminal law perspective as mentioned in Law 18/2013, but also as a social phenomenon, which means forests are a source of livelihood for people living in and around the forest areas.²⁴ Thus, the solution does not only use law enforcement mechanisms but also employs non-litigation policy that supports the creation of economic justice and ecological justice for all Indonesian people.

5. The Newest Policy on Illegal Oil Palm Plantation Reform: Jokowi's Job Creation Law

The chaotic legality of plantations in Indonesia should be resolved immediately. If it continues, it draws new problems. The ambiguity of legality is allegedly a factor leading to the overlapping of permits and land legality. The unclear legality of plantations was obviously caused by unclear regulations. We can find this in previous policies, for example, in Article 21, Article 22, Article 23 of the Ministry of Agriculture regulation 98/Permentan/OT.140/9/2013, the provision stipulates that in the issuance of Plantation Business Permits, both PBP-B, PBP-P, and PBP does not require the ownership of cultivation rights. Even though CR is a form of land legality, the question is how a land-based plantation company can be allowed to operate even though it does not have a CR.²⁵

Referring to other policies, namely Article 1 point 3 of the Minister of ATR/BPN 7/2017, ownership of cultivation rights (CR) is the legal basis for cultivating land. The clause "legal basis for undertaking" in Article 1 point 3 can be interpreted that ownership of the CR

²³ Devi Triasari, 'Right to Sanitation : Case Study of Indonesia', *Journal of Human Rights, Culture and Legal System*, 1.3 (2021), 147–63 <<https://doi.org/10.53955/jhcls.v1i3.20>>.

²⁴ Imamulhadi. "The Sustainable Environmental Protection Deregulation Concept During the Covid-19 Pandemic." *Padjadjaran Journal of Law* 8, no. 3 (2021): 379-400 <<https://doi.org/10.22304/pjih.v8n3.a4>>.

²⁵ Grace Y. Wong and others, 'Social Forestry in Southeast Asia: Evolving Interests, Discourses and the Many Notions of Equity', *Geoforum*, 117.March (2020), 246–58 <<https://doi.org/10.1016/j.geoforum.2020.10.010>>.

certificate being the basic document for carrying out activities on the land. Thus, the existence of a right to cultivate certificate should be the basis for issuing permits from other agencies including the ministry of agriculture in issuing Plantation Business Permits.

The unclear regulation pertaining to the legality of plantation land is also written in Article 42 of Law Number 39/2014 concerning plantations (ACT 39/2014) that "plantation plant cultivation business activities and/or plantation product processing business as referred to in Article 41 paragraph (1) only can be carried out by the plantation company if it has obtained cultivation rights and/or a plantation business permit" (translated). Instead of improving the previous arrangement, the enactment of Law 39/2014 actually exacerbated the ongoing illegality of plantation land. This provision can be interpreted that the development of oil palm plantations or processing can operate if they already have cultivation rights and/or Plantation Business Permits (PBP). Such an arrangement will clearly result in a conflict of authority and overlapping permits such as overlapping between PBP and CR or PBP with other permits.²⁶

The provisions of Article 42 in Law 39/2014 are legal smuggling to facilitate licensing but contradict other regulations in the agrarian and forestry sectors, because they do not heed the legality of the land. In addition, the regulation in Article 42 likely wants to juxtapose the position of PBP with CR on an equal position in terms of proving the legality of land tenure. In fact, CR and PBP are different legal instruments. PBP is a legality form of its business activities, both production and processing businesses, while CR is to show the legality of the land. In conclusion, the PBP cannot be used as a justification for the legality of the land being controlled or managed.

In 2015, there were several provisions in Law Number 39/2014 concerning Plantations (ACT 39/2014), one of which was Article 42, was subject to judicial review at the Constitutional Court of the Republic of Indonesia. Through the Constitutional Court Decision No. MK No. 138/PUU-XIII/2015, it is decided to change the sentence and substance of Law no. 39/2014 concerning Plantations, namely eliminating the word "or" in the article. After the Constitutional Court's decision, the substance of Article 42 changed into "the development of oil palm plantations or processing can be carried out if cultivation rights (CR) and Plantation Business Permits (PBP) have already owned" (translated). Thus, the company must have both.

The issuance of Presidential Instruction Number 8/2018 in regard to Suspension and Evaluation of Oil Palm Plantation Permits and Increasing Productivity of Oil Palm Plantations (*Inpres Moratorium*) became the beginning for the settlement of problematic oil palm plantations in Indonesia. Unfortunately, at the end of 2021, the *Inpres Moratorium* was expired and was not extended anymore. The government then included important substances in the Presidential Instruction on the Moratorium in the job creation bill. The hope is that the agenda for the settlement of oil palm in forest areas can be continued.²⁷

²⁶ Tessa Toumbourou, 'Using a Delphi Approach to Identify the Most Efficacious Interventions to Improve Indonesia's Forest and Land Governance', *Land Use Policy*, 99, July 2016 (2020), 102768 <<https://doi.org/10.1016/j.landusepol.2017.05.017>>.

²⁷ Soo Min Lee and others, 'Forests, Fuelwood and Livelihoods-Energy Transition Patterns in Eastern Indonesia', *Energy Policy*, 85 (2015), 61–70 <<https://doi.org/10.1016/j.enpol.2015.04.030>>.

The government, together with the House of Representatives (DPR RI), has ratified Law Number 11/2020 in relation to JCA (Job Creation Act). One of the Laws that were amended by JCA was Law Number 39/2014 concerning Plantations. Several important reforms, especially those related to plantations, include the obligation to have land rights for plantation companies. This is asserted in Article 29 number 12 which explains "the provisions of Article 42 of the Plantation Law are amended so that it reads plantation plant cultivation business activities and/or plantation product processing business as referred to in Article 41 Paragraph: (1) can only be carried out by plantation companies if they have obtained land rights and fulfill plantation-related business permits from the Central Government; (2) Further provisions regarding Business licensing as referred to in paragraph (1) shall be regulated in a Government Regulation" (translated).

Another interesting policy in the JCA from the plantation sector is that there is an obligation for companies that already have land rights to operate no later than 2 years from the issuance of land rights. If there is land that is not/not yet cultivated after two years, the land will be taken over by the state. This policy breakthrough is expected to be a way out of the rampant neglect of land by unscrupulous plantation companies. Thus, the regulation in this JCA confirms the Constitutional Court's Decision No. 138/PUU-XIII/2015 where the legality of the land is the basis for the operation of the plantation business and is the basis for granting the legality of the plantation business.²⁸

The establishment of JCA also amends Law Number 18/2013. JCA cluster ACT 18/2013 stipulates a new strategy in resolving the progress of smallholder oil palm in forest areas. Although in Article 17 paragraph (2) letter b is expressly stated regarding the prohibition of carrying out plantation activities without a Business Permit from the Central Government in forest areas and Article 92 paragraph (1) confirms that plantations without a permit are a criminal offense and are punishable by criminal penalties. However, Articles 17A and 110B provide opportunities to settle smallholder palm oil through a policy strategy for managing forest areas.²⁹

Article 17A paragraph (1) stipulates the provision of administrative sanctions. Interestingly, the provision of administrative sanctions in Article 17 paragraph (2) is exempted for people who have oil palm plantations in forest areas with the condition that they reside in and/or around forest areas for a minimum of 5 (five) years continuously and are registered in the forest area management policy. The clause "registered in the forest area management policy" as contained in Article 17A paragraph (2) is further explained in Article 110B paragraph (2) that what will be completed through the management of forest areas are gardens owned by residents who live around or in a forest area for a minimum of 5 (five) years with a maximum area of 5 (five) hectares. Thus, the provisions in Article 17A paragraph (2) and 110B paragraph (2) provide an

²⁸ Feja Lesniewska and Constance L. McDermott, 'FLEGT VPAs: Laying a Pathway to Sustainability via Legality Lessons from Ghana and Indonesia', *Forest Policy and Economics*, 48 (2014), 16–23 <<https://doi.org/10.1016/j.forpol.2014.01.005>>.

²⁹ Mohamad Nasir. "Protecting Forested Areas in Non-Forest Zone through The Ecological Fiscal Transfer Scheme in Indonesia: A case study from Kutai Timur district." *Forest and Society* 6, no. 1 (2022): 399-421.

opportunity for the settlement of smallholder palm oil in forest areas with a non-litigation mechanism, namely the forest area management policy.³⁰

The existence of good policies, without good implementation, will certainly end to nothing. However, the existence of this policy reform in the plantation sector must be seen as a breakthrough to resolve the issue of legality and plantation permit disputes that have not been completely resolved this far. In a fairly popular legal system theory introduced by Friedman, there are three important legal system components including legal substance, legal structure (legal apparatus), and legal culture.³¹ In this theory, it is emphasized that the law as a system can work only if the three components move simultaneously to form coherence. If we relate to the subject of this discussion, that there are already good legal regulations in the field of plantations as well as legal regulations for settling oil palm in forest areas, it's just a matter of how to build a strong apparatus in enforcing these rules, and build legal subjects, both community planters and companies to comply those rules. Thus, the government needs to immediately develop a strategy to resolve the illegality of plantation land and immediately disseminate the policy to the wider community, so that the community can study, follow and implement the policy.

6. Conclusion

As the highest foreign exchange contributor in the non-oil and gas sector, oil palm plantation is the sector that is widely cultivated by the communities and companies in Indonesia. But behind the huge profits, it turns out that oil palm plantations in Indonesia remain unclear legality issues, both business legality and land legality. This research shows that there is an overlap between policies issued by government agencies. This overlap causes legal uncertainty in the plantation sector. In addition, the absence of laws and policies for resolving oil palm in forest areas are two of the problems that lead to the unfinished problem of oil palm in forest areas. In addition, the repressive settlement with a criminal law approach does not in fact solve the problem at the grassroots. The establishment of Law Number 11/2020 concerning Job Creation provides new hope for the settlement of oil palm plantations in forest areas with a non-litigation mechanism, namely structuring forest areas and providing administrative sanctions. Therefore, although there are many pros and cons of the establishment of JCA, there is a legal breakthrough regarding the settlement of oil palm in forest areas.

³⁰ Sudarwanto, A L Sentot, Lego Karjoko, I. Gusti Ayu Ketut Rachmi Handayani, and Abdul Kadir Jaelani. "Position Of Freedom Of Contract Principle In Forestry Partnership Policy." *Journal of Legal, Ethical and Regulatory Issues* 24, no. 5 (2021): 1-11.

³¹ Wiener, Richard L., Bruce J. Winick, Leah Skovran Georges, and Anthony Castro. "A testable theory of problem solving courts: Avoiding past empirical and legal failures." *International Journal of Law and Psychiatry* 33, no. 5-6 (2010): 417-427.

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