



KEHATI
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POLICY BRIEF



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Legal Certainty on Smallholder Oil Palm Plantations in Forest Area

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The Government of Indonesia has issued a Presidential Regulation No. 88/2017 on Resolution for Land Occupation in Forest Area (hereinafter referred to as “Perpres 88”) and Regulation of Ministry of Environment and Forestry No. P.83/ MenLHK/Setjen/KUM.1/10/2016 on Social Forestry (hereinafter referred to as “PermenLHK P.83”). The two regulations serve as a part of the efforts to solve the issue on land occupation in forest area. However, the implementation of those two regulations will face serious challenge on the ground particularly for the oil palm smallholders. The contents of the regulations imply that there is a potential that the smallholders who have planted their oil palm in forest might not be able to obtain legal right over the land. Based on the most recent research by Institute for Research and Empowerment (IRE) and Java Learning Center (JavLec), the current situation faced by the community might not be their mistake, but a lack of clarity on the overlapping forests maps. In addition to that, the land occupation by the smallholders are largely done to merely fulfill the basic needs of their

family. According to the Ministry of Agriculture (2017), the number of oil palm smallholders is estimated to be 1.5 million people with 4.7 ha of plantations.

The oil palm smallholders who do not have legal document over the land they are working on would not be able to meet the qualification of the Indonesian Sustainable Palm Oil (ISPO). This would result in their inability to export their product and compete within the global market. The regulation of Ministry of Agriculture No.11/Permentan/OT. 14 0/3.2015 on the ISPO Certification Scheme stipulates that one of the requirements to obtain ISPO certificate is by having a proof on land tenure. This clause would not only put the oil palm smallholders at an unfavorable situation but also would harm the potential of state revenues from oil palm sector. Therefore, it is advised that the government should make a new regulation issued by the Coordinating Minister of Economic Affairs to provide further explanation on the terms of “cultivated land (*lahan tergarap*) and mixed-species plantation (*kebun campuran*)”. If further explanation is not possible,

the government could try another option by revising the PermenLHK P.83 particularly the Article 56 (5) and the Article 65 (h), in order to make agroforestry management with mixed-species plantation legally possible for the resolution of smallholder oil palm plantations case. Both options aim to legitimize the smallholder oil palm plantations located in the forest area.

Policy and Regulation of Land Occupation in the Forest Area

The resolution for land occupation in the forest area has become a part of National Development Plan, particularly in the Medium-Term Development Plan (RPJM) 2015–2019. The plan is further elaborated in a Strategic Plan of Ministry of Environment and Forestry (Renstra KLHK), Strategic Plan of Ministry of Agrarian and Spatial Planning/ National Land Agency (Renstra ATR/BPN), National Strategy of President's Staff Office (Stranas KSP). All of the documents agree to view the re-solution for land occupation in the forest area as a part to improve access of the local community to forest resource, leading to the improvement of their welfare. According to the RPJM 2015 – 2019, 12.7 and 4.1 hectares of land in the state forest

area have been prepared respectively for the social forestry and the agrarian reform, to expand local community access to the forest resource.

Perpres 88 and PermenLHK P.83 are both instruments to legitimize the government action to enforce the policies aiming to improve local community welfare through access provision to forest re-source. Perpres 88 is able to clarify the confusion on the location of land object for agrarian reform. The confusion occurs when the Renstra KLHK mentions the land object for agrarian reform is inside the production forest, while Renstra ATR/BPN mentions the land object is inside the production forest and protected forest, and the Stranas KSP allows the land object for agrarian reform can be in all types of forests; production, protected, and conservation forests.

Challenges on the Implementation and Its Impacts

It is estimated that several clauses in Perpres 88 and PermenLHK P.83 will pose as a challenge for the resolution of land occupation by oil palm smallholders case. There are two clauses in Perpres 88 that potentially hamper the resolution. The first one is the clause about the

meaning of “cultivated land (*lahan garapan*)” and “mixed-species plantation (*kebun campuran*)”. According to Perpres 88 Article 5 paragraph 1, land occupation in forest area *may* be utilized for settlement, social/public facility, forests managed by indigenous people and/or cultivated land. In addition, the Perpres 88 Article 5 paragraph 4 explains that the cultivated land is “a piece of land inside the forest area which is cultivated or utilized by an individual or a group of individuals which may be a rice field, farm, mixed-species plantation and/or fish farm.” However, oil palm plantation is not included in the terminology of “cultivated land”. There is not any explanation either that the oil palm plantation can be included in the “mixed-species plantation” definition. With the lack of clarity in the regulations, the smallholders who have been cultivating the forest land with oil palms have the potential to lose their plantations as they are not classified as an entity for the resolution.

The second issue in Perpres 88 which might have the potential to pose a future challenge is about the duration of land occupation in the forest area. Perpres 88 Article 11 paragraph 1 (c) and (d) stipulates that land occupation in production or protected forests occurring over 20 years consecutively in an area where

forests needed to remain standing is >30%, can be solved through forest release. Furthermore, it also stipulates if the land occupation is less than 20 years, the resolution is through social forestry.

With the assumption of small-holder oil palm plantation is included in the “cultivated land” or “mixed-species plantation”, the clause about the duration of land tenure would make the resolution option through forests release impossible. This is because, according to the reports of fieldwork by Javlec, IRE and Auriga (2017), the majority of land occupation in forest area by oil palm smallholders in Aceh, North Sumatra, and East Kalimantan has only started from early 2000s, meaning land occupation is less than 20 years. Thus, remaining option for the resolution is only through the social forestry.

In addition to the two clauses mentioned above, Perpres 88 also has a clause mentioning land occupation in conservation forest area. Without considering the size of forest required to remain standing in a watershed, an island or a province for the resolution justification, the Perpres 88 forbids any form of land occupation, including cultivated land, and obliges the regional government to conduct a resettlement for the forest land occupants. This regulation also does

not take into account the duration of physical ownership with good intention of the forest land occupants.

Similar with Perpres 88, the PermenLHK P.83 also does not tolerate the smallholder oil palm plantation in the forest. PermenLHK P.83 Article 56 paragraph 5 basically prohibits oil palm crops within the land permitted for the social forestry. The government provides lenience for those who have planted the oil palm to keep their plantations for 12 years (start from the beginning of their planting period), under the condition that it is mandatory for them to also plant woody plants of a minimum 100 trees per hectare in between oil palms. The challenge is similar with the previous explanation that many smallholders have started their oil palm plantations in the beginning of 2000s. If they started their work in 2005, when PermenLHK P.83 was issued in 2017, they are not allowed to keep their oil palm anymore. When PermenLHK P.83 comes into effect, the oil palm smallholders will give high resistance particularly for those whose livelihoods rely on oil palm commodity.

If the government, particularly the related ministries, enforces Perpres 88 and PermenLHK P.83 without giving some adjustments, it can be guaranteed that

the objective of the regulation to improve the welfare of the people by expanding access to forest resources would not be met. To carry out those regulations without the additional adjustments means to diminishing access or right of hundreds of thousands of independent oil palm smallholders to the land they have cultivated before the Perpres 88 and PermenLHK P.83 were issued. The government offers for the famers to cut down their oil palm plantations (resettlement) or to provide opportunity to cultivate the land for the period of 12 years should they choose social forestry might not be accepted by the people. This is because not only it is more economically profitable for them to work on the oil palm plantation, but also because the oil palm has been a part of the local community's agroforestry system or culture. In the past few years, in several regions in Indonesia, oil palm smallholders have planted the oil palm crops together with coconut, durian, and banana in one area. The other regulations which will be impacted if the Perpres 88 and PermenLHK P.83 are enforced without additional adjustments are the oil palm plantation replanting program and the ISPO certification scheme. The government has targeted to replant 2.7 hectare of smallholder oil palm plantations.

Recommendation on Implementation Strategy

In order to solve the land occupation issue in the forest, Perpres 88 and PermenLHK P.83 are required to make some adjustments based on the condition and empirical situation of oil palm smallholders. The adjustment is required for three purposes. The first one is to include the smallholder oil palm plantation as an object of the resolution. The second one is to allow the oil palm crops to be inside the social forestry area with a condition for them to follow the requirements in the agroforestry system. The third one is to provide another resolution option other than resettlement for those who are in the conservation forest. The first adjustment is related to Perpres 88, whilst the second and third adjustments are related to PermenLHK P.83.

The most realistic strategy to adjust the Perpres 88 is by issuing an operational guideline based on discretion principle through a Regulation of Coordinating Minister for Economic Affairs (hereinafter referred to as "Permenko"). Referring to the Law No. 30 of 2014 on the Government Administrative Article 22 paragraph 2, discretion is required, in this case, in order to fill the lack of legal guidelines

pertaining to the smallholder oil palm plantation in the forest area. Thus, discretion will also serve as a further clarification for the legal basis of smallholder oil palm plantation. Discretion stipulated in Permenko appears in two ways: through a further explanation on the Perpres 88 on the term "cultivated land" and "mixed-species plantation"; and through a further explanation on the terminology "in a long period of time (*dalam waktu yang lama*)."

The definition of cultivated land in Perpres 88 needs to be further elaborated in Permenko. If oil palm plantation is not yet mentioned in the definition of cultivated land, it does not mean that it could not be classified as one. The term "cultivated land" can have an open interpretation because the law maker uses the word 'may' while providing example on what cultivated land may be. It means that in order to include the smallholder oil palm plantation, the government can have two options by adding the "smallholder oil palm plantation" equal to the rice field, farm, mixed-species plantation and/or fish farm or by issuing a new regulation which stipulates that one of the plants in the mixed-species plantation is oil palm. The following table provides the form of proposed writing for explaining those terminologies:

Tabel 1: Strategy to Further Explain the Terminology

Options on Implementation Strategy	Method	Proposed Writing Form
<p>To further explain the terminology of '<i>cultivated land</i>' and '<i>mixed-species plantation</i>'</p>	<p>Adding the word 'smallholder oil palm plantation' equal to the rice field, farm, mixed-species plantation and / or fish farm</p>	<p><i>Cultivated land is a piece of land in the forest area cultivated and used by an individual or a group of individuals which may be a rice field, farm, smallholder oil palm plantation, mixed-species plantation and/or fish farm</i></p>
	<p>Issuing a new regulation which stipulates that one of the plants in the mixed-species plantation is oil palm</p>	<p><i>Cultivated land is a piece of land in the forest area cultivated and used by an individual or a group of individuals which may be a rice field, farm, mixed-species plantation and/or fish farm</i> Dan <i>Mixed-species plantation stipulated in paragraph ... can be oil palm.</i></p>

Permenko also needs to revise the mainstream interpretation of the phrase "in a long period of time" which is widely used in the regulation on Land and Perpres 88n. This phrase refers to the duration of physical land ownership effectively, by taking into account the following aspects:

The first one is the law doctrine on land which postulates that 'good intention' can be examined through three objective measures which are: ownership is carried out in an open manner; witnessed

by trustworthy people; and there is not any objection from the citizen of the local village (Jennie 2007).

The second one is the jurisprudence of Supreme Court (No.783K/Sip/1973) which determines three legal measures of land tenure as for a long period of time (*untuk waktu yang lama*), undisturbed (*tanpa gangguan*), and act as an honest owner (*bertindak sebagai pemilik jujur*).

The third one is the land administrative regulation and enforcement which determine 3

or 5 years as the duration of physical ownership to issue the land right,

The fourth one is within 3 to 5 years, the oil palm smallholders have spent their energy and cost before the first harvest in the fourth or fifth year since the planting period, and

The fifth one is the Regulation of Ministry of Agri-

culture and Spatial Planning / National Land Agency No. 3/1997 on Land Registration Article 61 paragraph 1 stipulates that the period of time on land ownership is measured since the predecessor of the land rights applicant,

Thus, the Permenko can further elaborate the duration of land ownership with the following options mentioned on the table:

Table 2. Strategy to Revise the Explanation

Option on Implementation Strategy	Method	Proposed Writing Form
<p>To revise the explanation on the 'land tenure duration'</p>	<p>To continue using 20 years as the land tenure duration but to interpret is a cumulative years of the current owner and his predecessors</p>	<p><i>Cultivated land owned by a current owner and his predecessor for a duration of more or less 20 years respectively</i></p>
	<p>To define 5 years or more respectively as the duration limit of physical ownership by the most recent owner with other requirements; (i) carried out with good intention and openly (ii) witness from trustworthy people (iii) there is not any objection or resistance</p>	<p><i>Cultivated land owned by the current owner and his predecessors for 5 years respectively</i></p>

	from the community in the local village	
	Not to use the time limit but to use qualitative measures such as (i) carried out in a long period of time (ii) carried out with good intention and in an open manner (iii) there is a witness from trustworthy people, and (iv) there is not any objection or resistance from the community in the local village	<i>Cultivated land owned by the land owner and his predecessors in a long period of time</i>

It is advisable to opt for the strategy of adjustment related to the implementation of PermenLHK P.83 if the adjustment strategy in Perpres 88 is not implemented (see Table 1 and 2). It is also advisable to do the adjustment strategy on PermenLHK P.83 through the regulation amendment. It is different from the adjustment strategy on Perpres 88 through the method of further explanation. There are two main considerations as follow:

The first one is PermenLHK P.83 does not have a rational explanation on the exemption of

oil palm plantation as a non-forestry plantation in a social forestry area with a duration of 12 years. This shows that PermenLHK P.83 is not an evidence-based policy, and

The second one is that there is an agroforestry system currently being developed which uses forest plants (trees) as an intercrop for oil palms. It is advisable to do amendment on PermenLHK P.83 Article 56 paragraph 5 into the following:

The owner of Right of Forest Village Management (HPHD), Permit for Utilization of Community

Forest (IUPHKm), Permit for Logging Concession on Community Plantation Forest (IUPHHK-HTR), and Forestry Partnerships may plant oil palms within their right or permit area by following the regulations on agroforestry management (mixed-species plantation) explained further in the Regulation of related Ministry.

in the meantime, it is advisable to change the Article 65 (h) into the following:

In the case of the oil palm plantation has existed in the Social Forestry area or in the newly proposed of Social Forestry area since this regulation comes into effect, it is mandatory for the permit holder to build a mixed-species plantation (agroforestry) in a line or mosaic form by planting woody plants at the minimum of 100 (a hundred) trees per hectare.

In the case of land tenure settlement in a conservation

forest, the government can opt for the adjustment strategy by enforcing PermenLHK P.83 in lieu of Perpres 88. Even though cultivated land can only be in the utilization, traditional, and rehabilitation zones in the National Park, and in utilization block in Nature Park and Forest Park, cultivated land in conservation forest can be carried out. It should be noted that the land tenure in conservation forest utilized for smallholder oil palm plantation can use the Forestry Partnership scheme (skema Kemitraan Kehutanan). Therefore, it is required that the government issue the Permenko or the revision of PermenLHK P.83 which revokes the Article 56 paragraph (5) and Article 65 (h) in PermenLHK P.83. The stipulation will then be enforced in the content of Partnership Agreement between Forest Manager (National Park Management Office) and local community by stipulating it as one of the rights of the local community. Community can exercise those rights by planting the oil palms in the partnership area.

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