Challenges to implementing oil palm plantation legislation in Indonesia

Nasir, M.; Bakker, L. ; van Meijl, T.

DOI
10.1080/20508840.2024.2435776
Publication date
2025
Document Version
Final published version
Published in
The Theory and Practice of Legislation

THE THEORY AND PRACTICE OF LEGISLATION
https://doi.org/10.1080/20508840.2024.2435776

Routledge
Taylor & Francis Group

Challenges to implementing oil palm plantation legislation in Indonesia

Mohamad Nasir [a,c], Laurens Bakker[b] and Toon van Meijl[c]

[a]Faculty of Law, Balikpapan University, Balikpapan, Indonesia; [b]Department of Anthropology, University of Amsterdam, Amsterdam, The Netherlands; [c]Department of Anthropology and Development Studies, Radboud University, Nijmegen, The Netherlands

ABSTRACT

This article examines two key issues in oil palm plantation legislation in Indonesia. First, the relation of authority in governing oil palm plantation licensing to other sectors of legislation, such as land, spatial planning, environment, and forestry. Second, the various kinds of legal uncertainty that arise due to the complexity of legislation and its implications for the permitting process. In studying these two issues, we found that the complexity of the governance of oil palm plantation licensing leads to ambiguity, inconsistency, and incompleteness of legal provisions. We identify that ambiguous clauses give rise to different interpretations by government officials and plantation companies. Inconsistent provisions cause confusion as to which rules should be applied, while incompleteness of regulations frequently occurs because technical rules that are required for implementation are not available, thus creating a legal vacuum. These three factors create legal uncertainty in implementing regulations.

KEYWORDS Legal uncertainty; license governance; oil palm; plantation law; Indonesia

1. Introduction

Worldwide, tensions and contestations have emerged in resource-rich areas due to diverse and competing natural resource interests.[1] The various uses of resources, e.g. for individual livelihoods, large-scale industrial exploitation, or for nature conservation, have led to overlapping claims and disputed usage rights. These conflicts often stem from issues related to resource ownership, access, decision-making in resource management, and the distribution of resource revenues.[2] Furthermore, it is problematic that some

CONTACT Mohamad Nasir mohamad.nasir@uniba-bpn.ac.id Jl. Pupuk Raya, Balikpapan Selatan, Balikpapan, Kalimantan Timur, 76114

[1]See Thomas F Homer-Dixon, 'Environmental Scarcities and Violent Conflict: Evidence from Cases' (1994) 19 International Security 5; Thomas F Homer-Dixon, *Environment, Scarcity, and Violence* (Princeton University Press 2001); Jay K Rosengard and Joseph Stiglitz, *Economics of the Public Sector* (4th edn., W W Norton & Company 2015); Thomas Bernauer, Tobias Böhmelt and Vally Koubi, 'Environmental Changes and Violent Conflict' (2012) 7 Environmental Research Letters. doi:10.1088/1748-9326/7/1/015601.

[2]UNEP, *Natural Resources and Conflict: A Guide for Mediation Practitioners*, vol 62 (United Nations Environment Programme [UNEP] 2014).

economies have become heavily reliant on exploiting a single or more raw resources, which makes them susceptible to fluctuations in global market prices.[3]

Both situations – local contestations and economic dependency on the exploitation of natural resources – hold for oil palm plantations, one of the main pillars of Indonesia's economic development. The industry contributed an average of 3.7 percent to the country's Gross Domestic Product (GDP) between 2019 and 2023,[4] while it employs over 16,2 million workers.[5] The sector is seen as crucial for the development process and the alleviation of poverty in Indonesia.[6] In terms of land area, according to the Ministry of Agriculture (MoA), until December 2023, Indonesia's oil palm plantations reached 16.834 million hectares, spanning 34 provinces.[7]

With the global demand for palm oil projected to expand, rapid oil palm plantation growth will continue to significantly impact land use and generate change in Indonesia, with far-reaching consequences for the natural environment.[8] In recent years, for example, both the Ministry of Environment and Forestry (MoEF) and the Audit Board of the Republic of Indonesia have reported that the total area of oil palm plantations in forest areas in Indonesia has reached 3.4 million hectares. Out of this total, around 2.9 million hectares did not have forestry permits.[9]

An extensive and international literature associates the sector with such problems as deforestation, carbon emissions, and land rights conflicts.[10] An estimated 80 percent of the nation's greenhouse gas emissions are

[3]Richard Auty, *Sustaining Development in Mineral Economies: The Resource Curse Thesis* (Routledge 1993); Ramez Abubakr Badeeb, Hooi Hooi Lean and Jeremy Clark, 'The Evolution of the Natural Resource Curse Thesis: A Critical Literature Survey' (2017) 51 Resources Policy 123. https://doi.org/10.1016/j.resourpol.2016.10.015; Robert T Deacon, 'The Political Economy of the Natural Resource Curse: A Survey of Theory and Evidence' (2012) 7 Foundations and Trends in Microeconomics 111. http://dx.doi.org/10.1561/0700000042.

[4]BPS, *Statistik Indonesia 2024* (Badan Pusat Statistik [BPS] 2024).

[5]Bayu Saputera, 'Industri kelapa sawit RI serap 16,2 juta tenaga kerja pada 2022' *Antaranews.com* (Surabaya, 25 October 2023) <https://www.antaranews.com/berita/3791259/industri-kelapa-sawit-ri-serap-162-juta-tenaga-kerja-pada-2022> accessed 25 September 2024.

[6]Maesti Mardiharini and others, 'Palm Oil Industry towards Sustainable Development Goals (SDGs) Achievements' (2021) 892 IOP Conference Series: Earth and Environmental Science 012068. doi:10.1088/1755-1315/892/1/012068; Eusebius Pantja Pramudya, Otto Hospes and CJAM Termeer, 'Governing the Palm-Oil Sector through Finance: The Changing Roles of the Indonesian State' (2017) 53 Bulletin of Indonesian Economic Studies 57. https://doi.org/10.1080/00074918.2016.1228829.

[7]Direktorat Jenderal Perkebunan Kementerian Pertanian, *Statistik Perkebunan Jilid I 2022–2024* (Direktorat Jenderal Perkebunan Kementerian Pertanian 2024).

[8]Yu Xin, Laixiang Sun and Matthew C Hansen, 'Biophysical and Socioeconomic Drivers of Oil Palm Expansion in Indonesia' (2021) 16(3) Environmental Research Letters.

[9]BPK, *Ikhtisar Hasil Pemeriksaan Semester (IHPS) II Tahun 2021* (Badan Pemeriksa Keuangan [BPK] 2022).

[10]Krystof Obidzinski and others, 'Environmental and Social Impacts of Oil Palm Plantations and Their Implications for Biofuel Production in Indonesia' (2012) 17 Ecology and Society. https://doi.org/10.5751/ES-04775-170125; Pablo Pacheco and others, 'The Public and Private Regime Complex for Governing Palm Oil Supply: What Scope for Building Connections and Enhancing Complementarities?' CIFOR Info Briefs (2017) 174. https://doi.org/10.17528/cifor/006464.

generated by land use and land cover change, much of it driven by oil palm expansion.[11] Such land use conversion threatens biodiversity and contributes to climate change.[12]

Another major concern is the increase in conflicts around oil palm plantations. Oil palm plantation expansions have limited the land available for local communities and triggered land conflicts between communities and companies.[13] The Consortium for Agrarian Reform (*Konsorium Pembaruan Agraria*/KPA), an organisation that aims to struggle for fairer agrarian policies and laws in Indonesia, noted 108 plantation conflicts in Indonesia throughout 2023. Of that number, 88 cases (82%) cases concerned the oil palm plantation sector, with an area of conflict reaching 103,133 hectares and resulting in as many as 29,486 households affected.[14]

Several studies have investigated the extent to which policies and regulations in the field of oil palm plantations have an impact on the benefits and losses incurred by the sector's operations. Handayani[15] explored the national laws and regulations concerning the cultivation of oil palm in Indonesia, and the mitigation of its environmental impacts. That study also seeks to highlight legal obstacles and inconsistencies, and to identify 'problem' areas in the law. Daemeter Consulting,[16] examining a similar topic, found that palm oil governance in Indonesia is legally and institutionally complex, involving multiple bodies of law and government agencies holding authority over land, forests, plantations, spatial planning, environmental management, and regional government. Soedomo et al.[17] showed that the weakness of regulations, long bureaucratic chains, and non-transparent and unaccountable licensing processes had generated overlapping plantation licenses with forestry and community land. Naturally, these lead to land conflicts. Yet while these studies clearly established the uncertainty of the law of oil palm regulations, they did not examine why such uncertainty of the law occurs.

[11] Daemeter Consulting, *Indonesia's Evolving Governance Framework for Palm Oil: Implications for a No Deforestation, No Peat Palm Oil Sector* (Daemeter Consulting 2015).

[12] Erik Meijaard and others, *Oil Palm and Biodiversity. A Situation Analysis by the IUCN Oil Palm Task Force* (IUCN 2018); Chelsea Petrenko, Julia Paltseva and Stephanie Searle, *Ecological Impacts of Palm Oil Expansion in Indonesia* (International Council on Clean Transportation [ICCT] 2016); Varsha Vijay and others, 'The Impacts of Oil Palm on Recent Deforestation and Biodiversity Loss' (2016) 11 PLoS One e0159668 <https://dx.plos.org/10.1371/journal.pone.0159668>.

[13] Coalition of Civil Societies for Indonesian Palm Oil Moratorium, *Making Moratorium and Evaluation of Palm Oil Permits Work* (Coalition of Civil Societies for Indonesian Palm Oil Moratorium 2018); Human Rights Watch, *Why Our Land? Oil Palm Expansion in Indonesia Risks Peatlands and Livelihoods* (Human Rights Watch 2021).

[14] KPA, *Dekade Krisis Agraria: Warisan Nawacita Dan Masa Depan Reforma Agraria Pasca Perubahan Politik 2024* (Konsorsium Pembaruan Agraria [KPA] 2023) .

[15] Arum Pawestri Handayani, *Oil Palm, Biodiversity and Indonesian Law Part 1: Legal Review* October 2010 (WCS Indonesia Program 2010).

[16] Daemeter Consulting (n 11).

[17] Sudarsono Soedomo and others, *Tata Kelola Perkebunan Sawit Indonesia* (Forci Development Fakultas Kehutanan Institut Pertanian Bogor 2018).

For that reason, too, it is crucial to thoroughly investigate the factors contributing to legal uncertainty in regulating oil palm plantations. We posit that uncertainty surrounding legal norms can lead to uncertainty in enforcement, potentially leading to conflicts among stakeholders in the oil palm plantation sector. Consequently, a comprehensive understanding of these aspects of uncertainty will empower policymakers to improve legislation within the industry.

In addressing these issues, this article explores the causes of legal uncertainty in oil palm regulations by examining, first, how the layers of the authority of the plantation sector and their relation to other legislation in land, spatial planning, environment, and forestry create legal uncertainty. Second, we identify the types of legal uncertainty that arise due to the issues identified and the implications for the governance of permitting in oil palm plantations.

The following section outlines our approach to exploring and defining the governance challenges associated with oil palm plantations. In section three, we delve into the layers of authority within the plantation sector and their interplay with legislation from other sectors, which can lead to legal uncertainty. Section four focuses on identifying the specific types of legal uncertainty that stem from these issues and their implications for regulating governance in oil palm plantations. In the conclusion, we present the significant impact of legal uncertainty and the parties that stand to gain the most from the current state of affairs.

2. Method

We adopted a doctrinal approach to discover and describe the problem of governance of oil palm plantation permits through an analysis of legislations.[18] By applying this approach, we clarify ambiguities, inconsistencies, and incompleteness within rules, place them in a logical and coherent structure and describe their relationship to other rules.[19] This study starts by exploring the legal framework of government authority concerning oil palm plantations. Hutchinson and Duncan convey that the doctrinal method is a two-part process.[20] The first is to locate the sources of the law. We attempt to determine an 'objective reality', that is, a statement of the law encapsulated in legislation on plantations and other related sectors. The second step is interpreting and analyzing the text to identify legal uncertainties within laws and regulations. We based

[18]Suzanne Egan, The Doctrinal Approach in International Human Rights Scholarship (29 November 2017). UCD Working Papers in Law, Criminology & Socio-Legal Studies Research Paper No. 19/17. https://doi.org/10.2139/ssrn.3082194.

[19]Paul Chynoweth, 'Legal Research' in Andrew Knight and Les Ruddock (eds), *Advanced Research Methods in The Built Environment* (Blackwell Publishing 2008).

[20]Terry Hutchinson and Nigel Duncan, 'Defining and Describing What We Do: Doctrinal Legal Research' (2012) 17 Deakin Law Review 83. https://doi.org/10.21153/dlr2012vol17no1art70.

the content of this analysis on information collected through a systematic review of the available laws and regulations regarding the governance of oil palm plantations permits.

The analysis of the legislation in this study follows the hierarchy of statutory regulations, as specified in Law Nr. 12 of 2011 concerning Lawmaking, as last amended by Law Nr. 13 of 2022. In this thesis, the analysis was carried out in two stages: vertically and horizontally. We adopted a vertical analysis to examine the relationship between the 2014 Plantation Law and its implementation of regulations, such as government regulations, ministerial regulations, and regional (provincial and district) regulations.

We applied a horizontal analysis to assess the relationship between regulations at the same level and regulating a similar object, such as between laws, government regulations, ministerial regulations, or regional regulations. In this regard, we studied the 2014 Plantation Law, the 2009 Environmental Law, the 2007 Spatial Planning Law, the 1960 BAL, and the 1999 Forestry Law. Subsequently, we analysed MoA, MoEF, and MoAASP/NLA regulations at the government and ministerial regulations level.

These analyses intend to investigate the inconsistencies and incompleteness of the regulations, both vertically and horizontally. In the vertical stage, we analysed the conflict of norms using the *lex superior* principle (*lex superior derogat legi inferior),* meaning that a higher-level regulation overrules a lower one. In a case of conflict of norms in the horizontal analysis, we based our examination on the *lex specialis* principle (*lex specialis derogate legi generali*), which rules that a more specific regulation overrules a more general one. The *lex posterior* principle (*lex posterior derogate legi priori*) states that a later regulation overrules an earlier one.[21]

We utilised various interpretive approaches to make sense of ambiguous or unclear legal standards. We employed a literal or textual interpretation to comprehend the linguistic meaning. This approach relies on the ordinary language of written statutes to establish the law.[22] The second method involved an authentic interpretation of a legal explanation. For instance, when determining the meaning of a term in a provision, the first step is to review the article's explanation or general provisions that encompass crucial terms in a regulation.[23] However, understanding the meaning of a

[21]Mathieu Carpentier, 'Legal constitutionalism and the *Ius/Lex* distinction' (2024) Revus [Online], 52, Online since 25 March 2024, connection on 28 September 2024. <http://journals.openedition.org/revus/10130>; https://doi.org/10.4000/revus.10130; Samuel Meira Brasil, 'Rules and Principles in Legal Reasoning. A Study of Vagueness and Collisions in Artificial Intelligence and Law' (2021) 10(1) Information & Communications Technology Law 67–77. https://doi.org/10.1080/13600830124910.

[22]Odille Ammann, 'The Interpretative Methods of International Law: What are They, and Why Use Them?' in Odille Ammann (ed), *Domestic Courts and the Interpretation of International Law* (Issue n994) (Brill | Nijhoff 2020) https://doi.org/10.1163/9789004409873.

[23]Jimly Asshiddiqie, *Pengantar Ilmu Hukum Tata Negara* (Sekretariat Jenderal dan Kepaniteraan Mahkamah Konstitusi RI 2006).

word in a statute is only possible by considering the purpose of the law.[24] For that reason, we also utilised purposive interpretation, which uses the 'purpose' of the text as the criterion for determining the legal meaning of semantic interpretations. The relationship between the subjective and objective purposes, the original intent of the text's author, the interpretation of a reasonable author, and the legal system at the time of interpretation collectively determine the ultimate goal and, consequently, the legal meaning.[25]

Finally, we have adopted a systemic interpretation to analyze the relationship and significance of a term or article in a regulation with other regulations. This approach involves establishing the meaning of a word or rule by considering it within its statutory or other legal context, such as in one or several legal acts of the same legal system.[26] This method aims to interpret an article in conjunction with another article of one law or between one law and another.

In order to investigate regional regulations in governing plantations, we selected the East Kalimantan province. This province is one of seven provinces with more than one million hectares of oil palm plantations.[27] Although the area of oil palm plantations is currently around 1.2 million hectares, the province, in its spatial planning document, has allocated 3,269 million hectares or around 25 percent of the land area of East Kalimantan to oil palm plantations.[28] Furthermore, this sector is central to the post-oil, gas, and coal economic transformation strategy (*Kaltim Maju Vision* in 2030).[29]

3. Plantation regulations in Indonesia: tiered and sector-based legislation

Under Article 33 (3) of the 1945 Constitution, the land, waters, and natural resources in it shall be under the state's control and used for the greatest

[24]Susanna Lindroos-Hovinheimo, 'What the Law Says? Reflections On Literal Interpretation' (2006) (2) No Foundations: Journal of Extreme Legal Positivism 55–65. http://www.helsinki.fi/nofo.

[25]Tanasije Marinković, 'Barak's Purposive Interpretation in Law as a Pattern of Constitutional Interpretative Fidelity' (2016) 9(2) Baltic Journal of Law & Politics 85–101. https://doi.org/10.1515/bjlp-2016-0013; Aharon Barak, *Purposive Interpretation in Law* (Princeton University Press 2005).

[26]Ivan L. Padjen, 'Systematic Interpretation and the Re-systematization of Law: The Problem, Co-requisites, a Solution, Use' (2020) 33(1) International Journal for the Semiotics of Law – Revue Internationale de Sémiotique Juridique 189–213. https://doi.org/10.1007/s11196-019-09672-x.

[27]The seven provinces are Riau (3,5 million hectares), Central Kalimantan (2 million hectares), North Sumatera (2 million hectares), West Kalimantan (1,8 million hectares), and South Sumatera (1,4 million hectares), and East Kalimantan (1,3 million hectares), Jambi (1,2 million hectares). See: Direktorat Jenderal Perkebunan Kementerian Pertanian (n 7).

[28]Heni Herdiyanto, 'Upaya Penurunan Emisi Dari Sub-Sektor Perkebunan Melalui WEb Geospatsial Bun' (2018) <http://ditjenppi.menlhk.go.id/reddplus/images/resources/festival_iklim_2018/kontribusi_NPS_kaltim/heni-Disbun-Kaltim_Festival-Iklim_16012018.pdf> accessed 19 December 2022.

[29]Rusmadi Wongso, 'Transformasi Ekonomi Kalimantan Timur: Dinamika dan Dampak Terhadap Kesejahteraan Rakyat' (2017) <http://untag-smd.ac.id/files/ORASI_ILMIAH_SEKDA_WISUDA_2017.pdf> accessed 7 April 2022.

prosperity of the people. The phrase 'under the state's control' (*hak menguasai negara*) means that the state holds the public authority to make policies, administration, regulation, management, and supervision on land and natural resources.[30] It is incumbent upon the state to guarantee the equitable utilisation of natural resources, which means safeguarding the interests of citizens, protecting the environment and natural resources, and preventing excessive or unjust exploitation by private entities.[31] Concurrently, the state must ensure legal certainty for businesses and investments. To accomplish this, it should formulate regulations that delineate the government's authority, especially concerning permit issuance and supervision, outlining permit holders' rights and responsibilities and establishing mechanisms for ensuring compliance with these regulations.[32]

In order to implement this right of the state to control, the peoples' representative council, along with the government at the central and regional level (i.e. provincial, district or municipal), have the authority to carry out the policy-making and regulatory functions of the state. As a result, natural resource control and management are delegated to different levels of government,[33] creating a multi-level or tiered legislative system. In the oil palm plantation industry, for example, regulations are established by the central, provincial, and district/municipal governments based on their respective jurisdictions.

In this regard, there are two distinct approaches to manage the natural resources. The *first* approach is regional autonomy, which assigns management responsibilities to administrative units such as provincial, district, or municipal governments. This approach grants each level of government the authority to manage natural resources. These multiple levels of authority are justified by the hierarchy of laws in the Indonesian legal system, as outlined in Article 7 of Law 12 of 2011 on Lawmaking (The 2011 Lawmaking Law), which is depicted in Table 1.

Table 1 illustrates that legislation is organised in vertical layers, consisting of legal norms. Within this legal framework, we consider three foundational principles. Firstly, the principle of lex superior (lex superior derogat legi inferiori), asserting that when laws of differing hierarchical levels conflict, the legislation of a higher authority will prevail over that of a lower authority. Secondly, the principle of lex specialis (lex specialis derogat legi generali), which maintain that a more specific law takes precedence over a more

[30]Constitutional Court Decisions Case Numbers 002/PUU-I/2003; 058-059-060-063/PUU-II/2004 and 008/PUU-III/2005.
[31]Samuel Mermin, *Law and The Legal System: An Introduction* (Little, Brown and Co 1982).
[32]Marcela Barón Soto and Alejandro Gómez Velásquez, 'An Approach to the State Responsibility by an Omission in The Inter-American Court of Human Rights Jurisprudence' (2015) 6 Revista CES Derecho 3.
[33]Kuntana Magnar, Inna Junaenah and Giri Ahmad Taufik, 'Tafsir MK Atas Pasal 33 UUD 1945: (Studi Atas Putusan MK Mengenai Judicial Review UU No. 7/2004, UU No. 22/2001, dan UU No. 20/2002)' (2010) 7 Jurnal Konstitusi 111.

Table 1. Hierarchy of laws in the Indonesian legal system.

Type of legislation	Authority	Reason(s)
1945 Constitution (*Undang-Undang Dasar 1945*)	People's Consultative Assembly (*Majelis Permusyawaratan Rakyat/MPR*)	
People's Consultative Assembly Decision (*Ketetapan Majelis Permusyawaratan Rakyat*)	People's Consultative Assembly (*Majelis Permusyawaratan Rakyat/MPR*)	• To accommodate and provide legal certainty for several MPR decisions enacted before the *reformasi* era that are still in effect. • To stipulate the inauguration of the elected president and vice president.
Law (*Undang-Undang*)	House of Representatives (*Dewan Perwakilan Rakyat/DPR*) and President	• To follow up on the provisions of the 1945 Constitution. • To follow up on an order from an act. • To ratify certain international agreements. • To follow up on the decisions of the Constitutional Court. • To fulfil legal needs in society.
Government regulation in lieu of Law (*Peraturan Pemerintah Pengganti undang-Undang*)	President	To address the emergency situation (*Dalam ihwal kegentingan yang memaksa*)
Government Regulation (*Peraturan Pemerintah*)	President	To follow up on a law
President Regulation (Peraturan Presiden)	President	To follow up on higher regulations or to exercise government authority
Provincial Regulation (*Peraturan Daerah Provinsi)*	Provincial House of Representative (*Dewan Perwakilan Rakyat Provinsi/DPRD Provinsi)* and Governor	• To carry out regional autonomy and assistance tasks; • To further implementation of provisions of higher laws and regulations; • To fulfil legal needs in regional society
District/Municipal Regulation (*Peraturan Daerah Kabupaten/Kota*)	District/Municipal House of Representative (*Dewan Perwakilan Rakyat Kabupaten Kota/DPRD Kabupaten/Kota)* and Regent/Mayor	

general one when both apply to a particular situation. Lastly, the principle of lex posterior (lex posterior derogat legi prior), stating that in conflicting statutes, the most recent law takes precedence over earlier legislation.[34]

[34]See, for instances, Zainal Arifin Mochtar, 'A Notion of Regulatory Reform' (January–March 2022) 16(1) Fiat Justisia: Jurnal Ilmu Hukum 65–80; Massimo La Torre, 'The Hierarchical Model and H. L. A. Hart's Concept of Law' (2013) Revus [Online], 21 | 2013, Online since 25 February 2014, connection on 01 October 2016 <http://revus.revues.org/2746>; https://doi.org/10.4000/revus.2746.

In addition to the regulations within the hierarchy, Article 8(1) of The 2011 Lawmaking Law also recognises types of regulations issued by 'legitimate authority' such as the People's Consultative Assembly (MPR), the House of Representatives (DPR), the Supreme Court, the Constitutional Court, ministers, government institutions and commissions, regional legislatures, governors, mayors, regents, and even village heads. These regulations are acknowledged and have legal binding force, as long as they are required by higher-level laws or are issued under authority to carry out particular government functions. Both listed and unlisted laws in the hierarchy pose a significant challenge because Indonesia is known for having inconsistent laws issued by various institutions and individuals. This situation leads to considerable confusion regarding which laws should be followed.[35] Furthermore, the phrase 'authorized (institution) to exercise a particular government function' is also ambiguous as is demonstrated, for instance, by the Indonesian Standard for Sustainable Palm Oil (ISPO) regulation.[36] The ISPO certification for oil palm plantations was initially regulated at the ministerial level in 2011 through MoA Regulation No. 9/Permentan/OT.140/3/2011. This regulation was later replaced by MoA Regulation No. 11/Permentan/OT.140/3/2015. However, in 2020, the ISPO regulation was carried out at the presidential regulation level through Presidential Regulation No. 44 of 2020. This instance highlights ambiguities surrounding the authorised institution responsible for implementing the ISPO regulation, specifically regarding whether this issue falls under the purview of the ministerial or presidential level.

Besides the regional approach, the *second* is the ecosystem-based approach. This perspective argues that promoting integrated natural resource management should not be limited by administrative boundaries; it should be ecosystem-based.[37] Both approaches are often in opposition to each other. For instance, according to the Academic Draft of the 2014 Regional Government Law (prepared by BPHN in 2011), during the decade of implementing regional autonomy, natural resource management will be more effective and efficient if it is based on an ecological approach rather than government administrative boundaries. As a result, the central government has withdrawn regional governments' authority in forestry,

[35]Tim Lindsey and Simon Butt, *Indonesian Law* (Oxford University Press 2018).

[36]Regulations regarding ISPO are not explicitly mandated by the Plantation Law (either the 2004 Plantation Law or the 2014 Plantation Law). The ISPO regulation is more aimed at addressing the demands of institutions, needs and the international community, which require more sustainable palm oil industry practices. See: Nia Kurniawati Hidayat, Astrid Offermans and Pieter Glasbergen, 'Sustainable Palm Oil as a Public Responsibility? On the Governance Capacity of Indonesian Standard for Sustainable Palm Oil (ISPO)' (2018) 35 Agric Hum Values 223–242. https://doi.org/10.1007/s10460-017-9816-6; Gersom van der Elst, *Creating Legitimacy for the Indonesian Sustainable Palm Oil Certification Scheme* (Wageningen University 2018).

[37]Efendi, 'Kewenangan Pengelolaan Sumber Daya Alam Pada Era Otonomi Khusus Di Aceh' (Mei–Agustus 2014) 3(2), Yustisia 108–117.

maritime, and mining. After all, this situation has often resulted in overlapping policies. For instance, in the forestry and maritime sectors, the revitalisation programme for ponds in the Mahakam Delta in East Kalimantan, launched by the Ministry of Marine Affairs and Fisheries, clashes with the Peat and Mangrove Restoration Agency's initiatives to rehabilitate mangroves in the region.[38]

Legislation concerning oil palm plantations is also complex due to its sectoral basis, as it intersects with other areas such as the environment, forestry, spatial planning, and land. The issuance of sectoral laws and regulations is driven by a pragmatic approach, which aims to facilitate investment in the context of development oriented towards economic growth.[39] In the oil palm plantation industry, a company must obtain a suitability confirmation of spatial utilisation activities (*Konfirmasi Kesesuaian Kegiatan Pemanfaatan Ruang*: KKKPR) and suitability approval of spatial utilisation activities (*Persetujuan Kesesuaian Kegiatan Pemanfaatan Ruang*: PKKPR), as regulated in GR Nr. 21 of 2021 concerning Spatial Planning. KKKPR is a document certifying the conformity between spatial utilisation activity plans with detailed spatial planning. In the case of a district or municipality that does not yet have detailed spatial planning, PKKPR is applied. Besides, the company should also apply for a Right of Cultivation (*Hak Guna Usaha*/HGU) to the Ministry of Agrarian Affairs and Spatial Planning/National Land Agency (MoAASP/NLA).[40] Additionally, the company must comply with the regulations set by the Ministry of Environment and Forestry (MoEF) to provide an environmental impact analysis.[41] The company must also fulfil its obligation to perform corporate social responsibilities to the surrounding community per the requirements set by the Ministry of Agriculture (MoA), such as facilitating the development of plantations for smallholder farmers. When a company intends to establish its operations in a forest area, it must seek approval from MoEF by applying for a forest area release (FAR).[42] Furthermore, the company must obtain Timber Utilization

[38]Fahriza Dwi Indahyati, Aindra Wahyu Saputra and Ana Salsabila, *Tumpang Tindih Pengelolaan Mangrove Antara KLHK, KKP, dan BRGM* (LindungiHutan 2024).

[39]Arditya Wicaksono and Romi Nugroho, 'Harmonisasi Hukum Pengelolaan Sumber Daya Alam Di Indonesia Dan Pengelolaan Tanah Di Negara' (November 2015) 1(2) Bhumi 123–134.

[40]This obligation is regulated in Government Regulation No. 18 of 2021 concerning Management Rights, Land Rights, Flat Units, and Land Registration and Minister of MoAASP/NLA Regulation No. 18 of 2021 concerning the Procedures for Determining Management Rights and Land Rights. It is also stated in the MoA Regulation No. 5 of 2019 concerning Procedures for Business Licensing for the Agricultural Sector.

[41]See Law No. 32 of 2009 concerning the Environmental Protection and Management and Government Regulation No. 22 of 2021 concerning the Implementation of Environmental Protection and Management.

[42]Forest area release (FAR) is the alteration of the allocation of convertible production forests to be a non-forest area. This obligation (FAR Approval) is stated in Government Regulation No. 23 of 2021 concerning Forestry Management and MoEF Regulation No. 7 of 2021 concerning Forestry Planning, Changes in Forest Area Designation and Changes in Forest Area Functions, and Use of Forest Areas.

Permits (*Izin Pemanfaatan Kayu/IPK*) from the MoEF to clear the land in the forest area for oil palm cultivation.[43]

This set of policies from various sectors indicates that a plantation company must hold permits across multiple areas, including the environment, forestry, spatial planning, and land. Consequently, its obligations become increasingly complex and may overlap, as illustrated in Figure 1.

Subsequently, this sector-based legislation is also divided into multiple levels of government based on their respective jurisdiction, making it a challenging issue to navigate, as shown in Table 2.

The passage above highlights the close connection between oil palm plantations and other sectors, necessitating compliance with a wide array of sector-specific legislation. This encompasses laws governing land use, spatial planning, environmental protection, and forestry. Although these laws were intended to complement each other, they can also lead to legal uncertainty. In addition to meeting the obligations of a plantation permit holder, a palm oil company is also required to adhere to the standards set by ISPO and HGU certificate holders, as well as environmental permit/approval holders. When an environmental violation occurs, it is crucial to ascertain whether it contravenes the plantation permit, environmental permit/approval, ISPO, or HGU certificates. Depending on the outcome, the responsibility and authority to investigate lie with the issuer of the plantation or environmental permit/approval, or with the entity responsible for the ISPO or HGU certificates. The comparable obligations of the license and certificate holders are depicted in Table 3 below:

This study indicates that this tiered and sector-based legislation of plantations leads to ambiguity of rules. The word ambiguity, or ambiguous refers to the uncertainty surrounding the meaning or intention of a contractual term or statutory provision[44], or uncertainty or doubtfulness of the meaning of language.[45] Whenever a term is interpreted in multiple ways, ambiguity arises.[46] Furthermore, Sennet[47] asserts that ambiguity in the law can weaken its application and hinder compliance. It is crucial to be precise and devoid of any vagueness or ambiguity in drafting rules.[48] Vague or ambiguous norms can be subject to various interpretations, potentially

[43]See MoEF Regulation Nr. 58 of 2009 concerning Replacement of Stand Value from Timber Utilization Permits or Land Preparation in Plantation Forest Development.
[44]Bryan A Garner, *Black's Law Dictionary* (9th edn., West Thompson Reuters 2009).
[45]Donna Batten, 'Ambiguity' in *Gale Encyclopedia of American Law* (3rd edn., Gale Cengage Learning 2010).
[46]Ralf Poscher, *Ambiguity and Vagueness in Legal Interpretation* (Oxford University Press 2012).
[47]Adam Sennet, 'Ambiguity' *The Stanford Encyclopedia of Philosophy* (Spring 201, 2016) <https://plato.stanford.edu/cgi-bin/encyclopedia/archinfo.cgi?entry=ambiguity> accessed 20 September 2023.
[48]Helen Xanthaki, *Thornton's Legislative Drafting* (Bloomsbury Professional 2022); Benjamin van Rooij, 'Bargaining about the Land Bill: Making Effective Legislation to Protect Arable Land in China' in Julia Arnscheidt, Benjamin van Rooij and Jan Michiel Otto (eds), *Lawmaking for Development* (Leiden University Press 2008) 145–169.

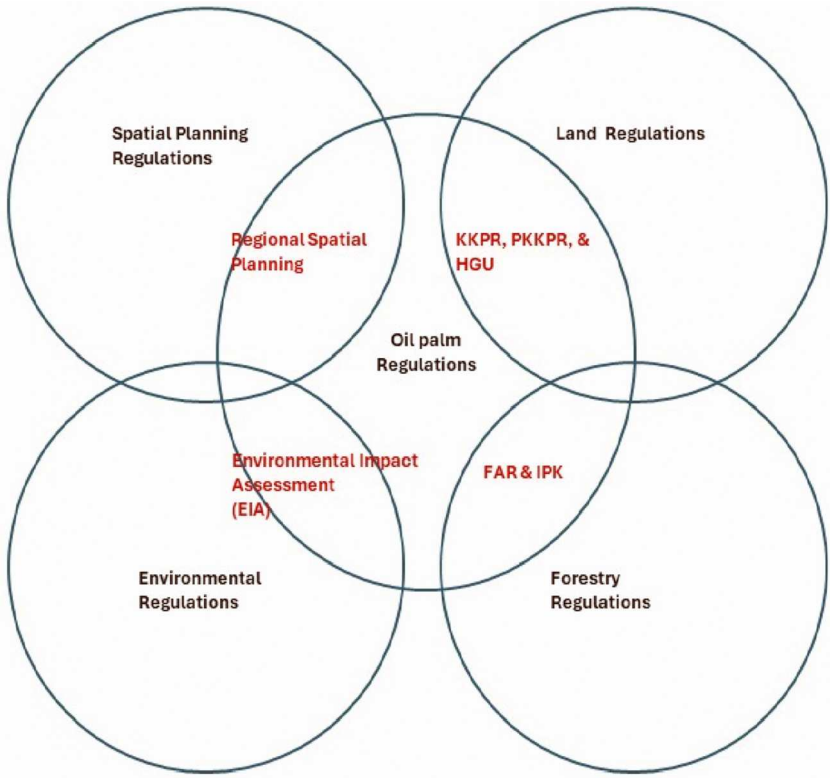

Figure 1. Overlaps in sectoral-based regulation in oil palm plantations.

Table 2. Sectoral licensing related to plantation.

No.	Sectors	Government's Authority		
		Central Gov.	Provincial Gov.	District/City Gov.
1.	Plantation	MoA	Plantation Agency	Plantation Agency
2.	Land	MoAASP/ NLA	Regional Office of NLA Province	Regional Office of NLA District/ Municipal
3.	Spatial Planning	MoAASP/ NLA	Spatial Planning Agency	Spatial Planning Agency
4.	Environment	MoEF	Environmental Agency	Environmental Agency
5.	Forestry	MoEF	Forestry Agency	–

resulting in outcomes that deviate from the original intentions of the legislator.[49]

Tiered and sector-based plantation regulations also give rise to inconsistency of norms. Provisions are inconsistent when they contradict each

[49]Ann Seidman, Robert B Seidman and Nalin Abeyesekere, *Legislative Drafting for Democratic Social Change: A Manual for Drafters* (Kluwer Law International 2001).

Table 3. Description of identical obligations of the license and certificate holders.

Sectors	Plantation permit holder	ISPO Certicate holder	HGU Certicate holder	Environmental permit/approval holder
Environment	Implement Environmental Impact Analysis (AMDAL), Environmental Management Efforts (UKL) and Environmental Monitoring Efforts (UPL);	• Carry out obligations as stated in the environmental permit/ approval; • Provide waste management and utilisation; • Maintain the protected areas and areas of high conservation value; • Mitigate of greenhouse gas (GHG) emissions.	Manage, maintain, and supervise the function of high conservation value areas	• Meet the requirements, environmental quality standards or environmental damage standard criteria as stated in environmental documents and statutory regulations • Provide guarantee funds for the restoration of environmental functions.
Plantation	Facilitate the development of community plantations[a] at least 20 percent of the permit area	• Carry out corporate social responsibility; • Empower indigenous or local peoples • Facilitate the development of community plantations at least 20 percent of the permit area	Facilitate the development of community plantations at least 20 percent of the HGU	
Land/Spatial planning	Complete the process of acquiring land rights;	Comply with the laws and regulations in the land and spatial sector	Comply with the provisions on the use of space regulated in the spatial plan	

[a]Community plantations are oil palm plantations for communities around oil palm plantation concessions.

other to the extent that one implies the negation of the other.[50] Intersecting subfields of the law pertaining to plantations contain multiple inconsistencies because subfields are governed by different organising

[50]Jeffrey Lehman and Shirelle Phelps (eds), *West's Encyclopedia of American Law* (2nd edn., Thomson Gale 2005).

principles.[51] Consistency in legislation is crucial for ensuring predictability. It entails ensuring that similar legal provisions yield similar policies across different statutes and that identical words used in laws are meant to have similar meanings.[52]

Furthermore, the sector-based and multi-level government legislation creates incomplete provisions. Pistor and Xu articulate that a law is incomplete if it fails to include all actions it shall cover.[53] When the law is incomplete, it cannot be applied to cases without clarifying the law's meaning. The term 'incomplete' also refers to a situation where implementation regulations or guidelines delegated by higher regulations do not exist, which is described as a legal gap (lacunae juris).[54] In Koszowski's view, there are generally three types of legal gaps, namely extra-legal gaps, technical gaps, and contra-legal gaps. The first occurs because there are no rules related to a case. Other names for this type of gap are extrinsic gap (both meaning 'gaps outside the law') or statutory gap (the legal gap itself). The second, as the name suggests, is usually associated with technical and procedural matters. It means that there are no more technical or procedural rules governing the case, even though the law exists. Therefore, this type of lacunae can be called an intrinsic gap, constructional gap, gap of passivity, vertical gap, or sui generis gap, or even instrumental gap. The third gap is related to a norm that is not in accordance with the purpose of the law. Another term for this lacunae is the axiological gap.[55]

Sector-based and multi-level plantation legislations can create competition between the central and regional governments and among the various ministries responsible for natural resource sectors, such as MoEMR, MoA, MoEF, and MoAASP/NLA. This competition often leads to uncoordinated law-making among levels of the governments and the ministries/sectors. Consequently, it generates legal uncertainty, both in the provisions of legislation and its implementation.[56]

4. Legal uncertainty in oil palm plantations permits governance

The licensing system in natural resource management aims to protect the interests of all public stakeholders, including permit holders entrusted

[51]Christoph Engel, 'Inconsistency in the Law: In Search of a Balanced Norm' (December 2004) 16 SSRN Electronic Journal. https://doi.org/10.2139/ssrn.628387.
[52]Ronan Cormacain, *The Form of Legislation and the Rule of Law* (Hart Publishing 2022).
[53]Katharina Pistor and Chenggang Xu, 'Incomplete Law' (2003) 35 International Law and Politics 931, 931–113 <https://scholarship.law.columbia.edu/faculty_scholarship/1077>.
[54]Alexius Andang Listya Binawan, 'Lacunae Iuris dalam Hukum Kebebasan Beragama di Indonesia' (2023) 8(1) Gema Teologika: Jurnal Teologi Kontekstual dan Filsafat Keilahian 99–120.
[55]Maciej Koszowski, 'Analogical Reasoning in Statutory Law' (2017) 8(2) Journal of Forensic Research 327–372. https://doi.org/10.4172/2157-7145.1000372.
[56]Mohamad Nasir, Laurens Bakker and Toon van Meijl, 'Government Supervision of Oil Palm Plantations in Indonesia: Legal Issues and Proposed Remedies' (2024) Law and Development Review. https://doi.org/10.1515/ldr-2024-0014.

with resource management.[57] The Constitutional Court has expressly upheld licensing as a means through which the state carries out its duties as outlined in Article 33(3) of the Indonesian Constitution 1945.[58] In this regard, awarding a permit to a plantation company implies two things. First, a permit is the main instrument to supervise and control oil palm plantations activities. Second, a license is an instrument used to distribute land for oil palm plantations.[59] Uncertainty in issuing a permit can generate problems in supervising and controlling oil palm plantations and land distribution. In this section, we investigate legal uncertainty concerning the governance of oil palm plantation permits by identifying and discussing ambiguity, inconsistency, and incomplete regulations related to oil palm plantations.

4.1. Ambiguity in terms

We address the ambiguity of law in Article 12 paragraph (1) of the 2014 Plantation Law. The provision states that in the case of land required for the plantation business is land under *ulayat* rights of indigenous peoples, which in Indonesian law is described as a customary law community (*masyarakat hukum adat*), the plantation company should consult with the customary law community holding these land rights to obtain agreement on the transfer of land (*penyerahan tanah*) and the 'reward' (*imbalan*).

Two terms have an obscure meaning in this article. First, the term 'transfer of land'. Does it mean a release of land rights as referred to in GR Nr. 18 of 2021? If referring to the GR, this would mean that upon completion of the land transfer, the land status becomes state land. As the HGU holder, the company is able to transfer the rights to other parties. If the term 'transfer of land' means the release of land rights, this implies then a termination of the legal relationship between indigenous peoples and their land. This may threaten the existence of these people as a 'customary law community' because one of the requirements for recognising them is the existence of their territories. If the rights to their land are handed over, the indigenous people lose not only their territories but the entire foundation of their existence.

The ambiguity of the term 'transfer of land' is also related to the second ambiguity in Article 12 of the 2014 Plantation Law, which concerns the

[57]Muhamad Muhdar, Mohamad Nasir and Juli Nurdiana, 'Risk Distribution in Coal Mining: Fighting for Environmental Justice in East Kalimantan, Indonesia' (2020) 499 Proceedings of the 2nd International Conference of Law, Government and Social Justice (ICOLGAS) 656–664. https://doi.org/10.2991/assehr.k.201209.349.

[58]Sarah Waddell, 'Property Rights for Natural Resources Management in Indonesia: Have They Been Ruled Unconstitutional?' (2012) 2(2) Indonesia Law Review Article 4. https://doi.org/10.15742/ilrev.v2n2.17 <https://scholarhub.ui.ac.id/ilrev/vol2/iss2/4>.

[59]Philipus M Hadjon, *Pengantar Hukum Perizinan* (Yuridika 1993); Mohamad Nasir, *National Law and Regional Riches: Contesting Natural Resources in East Kalimantan, Indonesia* (Radboud University Press 2020) https://doi.org/10.54195/9789493296572.

term 'reward'. If 'transfer of land' is deciphered as the release of land rights, the term commonly used in the legislation of the land sector is compensation (*ganti kerugian*), not 'reward' as used here. The article's explanation stated 'rewards' as, among other things, money or shared ownership. So, the term is inappropriate for this purpose given the construction of the legal relationship between indigenous people and plantation companies that implies a transfer of land rights that have economic value. The meaning of the term 'reward' in this case is also unilateral. The giver (the plantation company) determines the type of reward and its quantity.[60] Regarding the ambiguity of the term 'reward', in its legal review of legislation related to food sovereignty, the Agency of National Law Development (BPHN) recommended replacing the word 'reward' because it provides opportunities for smuggling certain interests and an abuse of authority.[61]

It is challenging to use the term 'reward' in a situation where a company already has a plantation permit and will occupy customary land, but the indigenous people refuse it. An instance of an ongoing issue in this context is demonstrated by the case of the indigenous people of Dayak Modang Long Wai (people of DMLW) and the oil palm plantation company PT Subur Abadi Wana Agung (PT. SAWA) in Long Bentuq village, in the East Kutai district. The conflict emerged when the district government granted a plantation permit to PT SAWA in February 2006, covering approximately 14,000 hectares in the Busang sub-district, including 4,000 hectares of the DMLW traditional territory in Long Bentuq village.

The people of DMLW soon found out that the land acquisition encroached upon their territories. In response, they imposed a customary fine of 13 billion rupiahs. However, the company was only willing to pay 70 million rupiahs, which caused a further escalation of the conflict.[62] During the conflict, the National Land Agency issued HGU to PT SAWA in 2011. The issuance of the HGU implies that the land was legally transferred to PT SAWA. Regarding HGU, the validity period is 35 years and can be extended up to 25 years. After that, the HGU holder has the choice to renew it for a maximum of 35 years, resulting in a total of 85 years. When the HGU expires, the land will become state land. It implies that when the land transfer occurred, the people of DMLW lost their customary land rights.

The ambiguous formulation of the regulation, as explained above, provides opportunities for multiple interpretations that create problems in the

[60] M Nur Sholikin, *Regulasi Eksploitatif Penebar Ancaman* (ELSAM 2016).
[61] BPHN, *Laporan Akhir Analisis Dan Evaluasi Hukum Dalam Rangka Peningkatan Kedaulatan Pangan* (Badan Pembinaan Hukum Nasional [BPHN] 2016).
[62] Nano Susanto, 'Konstelasi Konflik Lokal Dalam Perebutan Klaim Tanah Adat Hutan Desa Antara Masyarakat Lokal Dengan Perusahaan Perkebunan Kelapa Sawit Di Desa Long Bentuk Kecamatan Busang Kabupaten Kutai Timur' (2019) 7(2) eJournal Sosiatri-Sosiologi 165–179.

implementation. Such ambiguity can lead to legal uncertainty that results in conflicts. As a consequence, the administrative court in Samarinda examined eighteen conflicts caused by overlapping claims on land use between 2009 and 2019.[63]

4.2. Inconsistencies in obligations of permit holders

Inconsistencies in permit holder obligations can also cause legal uncertainty, especially regarding regulations. It is problematic when it is unclear what the law stipulates as permit holders are unsure what requirements must be met. At the same time, such inconsistencies generate a grey area for permit holders to avoid unwelcome obligations. The presence of legal inconsistencies creates difficulties because people are unable to comply with or enforce rules that they do not understand.[64]

It is essential to note the significant obligation of plantation permit holders to facilitate the establishment of community plantations. The implementation of this obligation encounters several challenges, given that it extends beyond the plantation sector to encompass various other industries, including land use and forestry, as detailed in Table 4.

Our study has identified at least two instances of legal inconsistency. Firstly, there is a discrepancy concerning the allocation of 20% of land for community plantations. Agricultural sector regulations stipulate that this 20% is calculated based on the area of plantation permits (IUP/IUPB). In contrast, land sector rules dictate that it should be calculated based on the area of Cultivation Rights (HGU). This incongruity creates uncertainty, mainly because, in practice, the area of HGU is often smaller than that of the plantation permit.[65] Additionally, Constitutional Court Decision No. 138 of 2015 explicitly states that plantation companies must possess permits (IUP/IUPB) and HGU to conduct their business activities. However, what happens if the areas of both concessions are different? Which one should be adopted? This will undoubtedly lead to legal uncertainty. Another complicating factor may be that, as shown in Table 4, if the land for plantations originates from the release of forest areas, then the 20% area is calculated from the area of the released forest land. A challenge emerges when discrepancies exist in the areas designated by HGU, IUP, and the released forest area. It is crucial to clarify the basis for calculating the 20%

[63]Mohamad Nasir, Laurens Bakker and Toon van Meijl, 'Coal Mining Governance in Indonesia: Legal Uncertainty and Contestation' (2 March 2022) 22(1) Australian Journal of Asian Law Article 4: 53–67, Available at SSRN <https://ssrn.com/abstract=4047425>.

[64]JBrandon Duck-Mayr, 'Explaining Legal Inconsistency' (2022) 34(1) Journal of Theoretical Politics, 107–126. https://doi.org/10.1177/09516298211061159.

[65]Muhammad Shevy, 'Kewajiban Memfasilitasi Pembangunan Kebun Masyarakat Oleh Perusahaan Perkebunan Kelapa Sawit Pasca Berlakunya Undang-Undang Cipta Kerja' (Maret 2024) 2(1) Jurnal Hukum de lege Ferenda Tri Sakti, 31–43. https://doi.org/10.25105/ferenda.v2i1.19699.

Table 4. Permit holders obligation to facilitate the establishment of community plantations.

Agriculture Regulations	
MoA Regulation No. 26 of 2007	A permit holder must build plantations for the surrounding community, which should account for at least 20% of the total area of plantations managed by the company.
MoA Regulation No. 98 of 2013	A plantation company that applies for 250 hectares or more is obliged to facilitate the development of plantations for the surrounding community with an area of at least 20% of the permit.
The 2014 Plantation Law as amended by the 2020 Job Creation Law Government Regulation No. 26 of 2021	A plantation company that obtains a business permit for cultivation, all or part of whose land originating from an area for other land uses (*areal penggunaan lain*/APL) outside of HGU or originating from the release of forest areas, is required to facilitate the development of plantations for the surrounding community covering 20% of the concession area.
Land Regulation	
The MAASP/NLA Regulation Nr. 18 of 2021	Suppose the applicant is a legal entity in the form of a limited liability company, including state-owned enterprises or regional-owned enterprises, and its use is for plantations; the applicant is required to facilitate the development of community plantations, around 20% of the requested land.
Forestry Regulation	
Article 5 of MoEF Regulation No. 96 of 2018:	The convertible production forest area (HPK), which will be released for plantation development purposes, is regulated with a composition of 80% for a plantation company and 20% for community plantations from the total area of the HPK area, which is released and can be cultivated by a plantation company.

of land for community plantations. Should this percentage be derived from the HGU, the IUP, or the area of the released forest?

The second issue of inconcistency revolves around the location of the 20% plantation land for the community. The legislation in the plantation and land sectors, as well as Constitutional Court Decision No. 138 of 2015, stipulate that this land should be outside the IUP/IUPB and HGU areas. However, regulations in the forestry sector present a different perspective. If the plantation land comes from the release of forest areas, 20% of the land for the community plantations is inside the release area obtained and cultivated by the company. This discrepancy in location has significant implications for both the community and the company.

An investigation conducted by BBC News, the Gecko Project, and Mongabay demonstrates a discrepancy in how plantation companies determine the proportion of land for community plantations. Plantation companies often interpret the community as entitled to one-fifth of the land planted by the company, but sometimes palm oil companies may construe it differently, so they they can manage all plantation concession areas and ask the

community to provide land for community plantations. This, however, was challenging to find because the company already occupied all the land. Or the company plots land for a community plantation in a different location than was given by the community and that is located in a remote and inaccessible place.[66]

To address the challenge of providing 20% of the land for community plantations, the government has proposed alternative methods. According to Article 16 of GR Nr. 26 of 2021 concerning the Implementation of Agriculture Affairs, community plantations can be developed through various partnerships. Articles 7 and 8 of MoA Regulation Nr. 18 of 2021 concerning the Facilitation of the Development of Community Plantations in the Surrounding Areas explain that partnerships can take different forms, such as supporting productive plantation businesses. It includes facilitating land management and legality, providing certified seeds, technical consultants, and land mapping technology, and offering education, training, and guidance to develop human resources. However, considering these alternatives have been recently introduced, they have not yet been implemented in the field, certainly not in East Kalimantan. In 2023, for instance, there were 20 land conflicts related to oil palm plantations in this province. Until February 2024, according to the East Kalimantan Plantation Service, 20 cases of conflict emerged in various districts. Of these, 18 cases were related to the development of community plantations.[67]

4.3. Incompleteness in implementing regulations

Another hurdle in implementing Indonesian legislation is the absence of implementing regulations that are mandated by higher rules. Such a condition can generate a gap in the law that arises from an absence of appropriate legal policy tools in regulations.[68] In the plantation sector, the 2014 Plantation Law mandated 32 implementing regulations, including 21 government regulations and 11 ministerial regulations. According to the law, all implementing regulations must be enacted within two years after its introduction. However, six years since its establishment, out of 21 government regulations, only one has been implemented, namely Government Regulation Nr. 24 of 2015 concerning the Collection of Plantation Funds. At the time of writing, the MoA has not yet established any of the 11 ministerial regulations mandated by the 2014 Plantation Law either.

[66]The Gecko Project, 'Janji kosong kebun plasma: Kisah masyarakat Indonesia yang terpinggirkan dari demam sawit' <https://thegeckoproject.org/id/articles/the-promise-was-a-lie-how-indonesian-villagers-lost-their-cut-of-the-palm-oil-boom/> accessed 26 June 2023.

[67]M Mutawallie Syarawie, 'Konflik Lahan Perkebunan di Kaltim Menurun pada 2023' *kalimantan.bisnis.com* (Balikpapan, 12 February 2024) <https://kalimantan.bisnis.com/read/20240212/407/1740103/konflik-lahan-perkebunan-di-kaltim-menurun-pada-2023> accessed 25 September 2024.

[68]Sarah Waddell, *Environmental Law in Indonesia: A Gap Analysis* (PRO H GTZ 2002).

One of the government regulations mandated by the 2014 Plantation Law is a further arrangement of the mechanisms to facilitate community plantation development, including the imposition of sanctions and the types and numbers of fines. The present absence of such regulations is criticisized by the Indonesian Palm Oil Association (GAPKI). According to this organisation, the absence of such rules causes obscurity around the requirement to develop a community plantation[69] and creates legal gaps regarding the obligation to facilitate community plantation development as well as regarding the enforcement of the obligation.[70]

Regarding the indigenous people, Article 13 of the 2014 Plantation Law states that following the provisions of the legislation customary law communities (*masyarakat hukum adat*) shall be determined. This law does not explicitly refer to which regulations are meant. However, when referring to existing legislation, the arrangements regarding the identification, verification, and determination of customary law communities are regulated in Permendagri No. 52 of 2014 concerning the Recognition and Protection of Customary Law Community. At the same time, related traditional rights are handled in Permen ATR/BPN No. 18 of 2019 concerning Procedures for Administrative Rights of Customary Law Community Units. Furthermore, if it is related to customary forests, the reference is the Minister of Environment and Forestry regulation No. 17 of 2020 concerning Customary Forests and Private Forests.

With regard to the land under *ulayat* rights, three such regulations stipulate that it can only be recognised if the district government has legally acknowledged the customary law community, either through a district regulation or a regent regulation or decision. However, in practice this raises a range of problems. Thus, in 2022 the Customary Territory Registration Agency (BRWA) identified 1,119 maps of customary areas with a total area of 20.7 million hectares, but local governments (provinces, districts, or cities) only recognised 189 customary areas, with a total area of 3,1 million hectares, which is only fifteen percent of the total number of customary areas identified by BRWA.[71]

This outcome, and hence the provision, has triggered conflicts between oil palm plantation companies and indigenous peoples who maintain their claims regardless of governmental recognition. Sawit Watch, for example, stated that

[69]Sawit Indonesia, 'Aturan Pembangunan Plasma Butuh Kepastian' *sawitindonesia.com* (14 January 2019) <https://sawitindonesia.com/aturan-pembangunan-plasma-butuh-kepastian/> accessed 22 March 2022.

[70]Nurmayanti, 'Perkebunan Sawit Swasta Pastikan Patuh Aturan Membangun Plasma' *liputan6.com* (Jakarta, 22 February 2019) <https://www.liputan6.com/bisnis/read/3901705/perkebunan-sawit-swasta-pastikan-patuh-aturan-membangun-plasma> accessed 21 April 2020.

[71]Raden Ariyo Wicaksono, 'Masyarakat Adat Alami Penundukan' *betahita.id* (23 January 2023) <https://betahita.id/news/detail/8372/masyarakat-adat-alami-penundukan.html?v=1674440208> accessed 7 February 2023.

out of 1,061 conflicts between communities and plantations, 115 cases (or 10.8 percent) involved indigenous peoples as claimants of land rights.

In terms of the people involved in the DMLW case, the absence of district regulations or regent decrees that recognise them becomes a significant issue in their efforts to retain and protect their land. Their bargaining position has been weakened since the regent issued decree Nr. 130 of 2015 that defined the administrative boundaries between Long Bentuq Village, Rantau Sentosa Village, Long Pejeng Village, Busang District, and Long Tesak Village in Muara Ancalong District in East Kutai. As a consequence of this decision, a part of the DMLW customary area of Long Bentuq Village was included in another village's administrative area, including the disputed 4,000 hectares claimed by the people of DMLW. The claim of the people of DMLW is accordingly not perceived as legally valid since the land is administratively outside the Long Bentuq village area.

Furthermore, the company and district government have stated that they cannot acknowledge the customary rights of the people of DMLW since their existence has not been officially recognised through a regent decree, as required per the Minister of Agrarian Regulation Nr. 5 of 1999 concerning Guidelines for Handling Customary Law Community's Ulayat Rights Issues.[72]

Against this background, we identify two aspects that generate incompleteness of law. First, when the government did not provide implementing regulations or guidelines as mandated by higher legislation. Second, when existing rules do not comprehensively regulate objects. This incompleteness of law creates legal gaps and a vacuum that leads to legal uncertainty.

5. Conclusion

The governance of oil palm plantation licensing is complex and problematic, which is caused by two factors: the division of authority and shortcomings in the legislation. Three layers of authority govern the process (national, provincial, and district/municipal). Each level of government sets policies and legislation regarding oil palm plantation permits, but frequently these do not take other levels of legislation into account. At the same time, sectoral-based policies and regulations also hold authority in the process. Sectors, such as land, spatial planning, forestry, and the environment contain legislation that impacts or conflicts with palm oil sector legislation. Authority between these various sectors is not clearly defined by the law.

The second factor is a lack of clarity of the regulations. This is evident in three different ways. First, the ambiguity of terms generates multiple

[72]PT Subur Abadi Wana Agung, 'Siaran Pers: PT SAWA Telah Ganti Rugi Lahan Long Bentuq' <https://www.mongabay.co.id/wp-content/uploads/2021/02/dalam-rilis-perusanaan-.pdf> accessed 7 July 2023.

interpretations. Second, the inconsistency of rules, both within regulations and between two or more regulations makes it uncertain which should be applied. Third, the incompleteness of regulations means a delay in their implementation. Detailed or technical regulations are required to ensure general provisions that can be implemented adequately. The absence of these implementing regulations is largely caused by a failure of responsible government entities to meet the stated deadlines for preparing and promulgating them.

All these issues can, in principle,be resolved. The courts could ascertain the meaning of ambiguous provisions, or governments could revise legal texts. To overcome inconsistencies between regulations (central, provincial, and district) is to harmonise all rules governing the same object. Incompleteness could be addressed by the appropriate governments formulating and enacting the required implementing regulations to fill the legal gaps or prevent the vacuum rules.

We wish to highlight two significant consequences of this legal uncertainty. The first is that plantation companies benefit the most from the present situation. For instance, the absence of implementing regulations allows permit holders to delay their obligations to facilitate community plantation development and enforcing this obligation. The second is the lack of laws to protect and develop the welfare of the people living near plantation areas. With regard to indigenous peoples, the absence of implementing regulations makes them struggle for formal recognition by the government to have an equal bargaining position with companies to receive adequate compensation when their land is included in a concession permit or HGU.

Disclosure statement

No potential conflict of interest was reported by the author(s).

ORCID

Mohamad Nasir http://orcid.org/0000-0002-9375-9168