

Tenure Options: Toward the Recognition of Customary and Local Community Rights to Land and Forest¹



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Summary of findings :

1. The recognition of community land and forest tenure provides many benefits to people living in rural areas and within the forest zone. With secure tenure, communities can use their forest as a source of livelihood without fear of criminalization, protect biodiversity and preserve local wisdom in forest management, receive development facilitation from the government; and resolve social conflicts due to overlapping land claims.
2. There are seven legal options that can be employed to protect the rights of customary communities to land. They include **(1) Ownership Rights, (2) Customary Rights, (3) Community or Customary Forests, (4) Social Forestry, (5) Village-Owned Forests, (6) Recognition of Territories, Institutions, and Customary Laws, and (7) Agreements between Communities and Government/Corporations.** The legal bases for these options are spread across several sectors, including forestry, land, villages, and regional autonomy.
3. Although more policy options are now available, the speed with which tenure rights are granted to customary communities has not met expectations. From the government target of 12.7 million hectares of Social Forestry for 2014-2019, only around 2.8 million hectares was achieved, just 21% of the target.
4. The disparity between targets and realization were influenced by the kinds of options chosen, each with its own weaknesses and strengths. The tenure policy options can be assessed using five aspects, namely (1) length of the bureaucratic process; (2) rights granted to rightsholders, (3) need for legal status for rightsholders, (4) implementability, and (5) enforceability.
5. The strongest tenurial security for customary communities is provided through customary rights, people's forest/customary forest, and recognition of territories, institutions and customary law. This is judged based on the existence of private and public authority for an unlimited period of time from the options above.
6. However, the above tenure options are not necessarily the best options to pursue. This is due to the fact that not all of the recognitions received are immediately effective and respected by other parties. Apart from that, the process is also long, complicated, and fragmented between sectors, and the regulations that are available are incomplete.

Recommendations:

This policy paper is intended for government officials who are responsible for the protection of customary communities' rights over land and forest, legislators, customary communities, local communities in rural areas and their accompanying institutions. The following are our recommendations:

For Customary Communities/Supporting Institutions:

- As there is no single effective tenure option that can apply in all situations, the tenure choice must consider the community's characteristics and stamina to achieve the protection of tenure rights.
- Communities must identify the land objects to be covered under tenure rights, specifically whether they are inside or outside the forest zone. Customary communities must then ascertain the subject of the desired rightsholder, whether they are an indigenous community as a collective unit, individuals, or a legal entity. The clarity of objects and subjects of the right will help filter the available options.
- Customary communities are advised to choose an option that would provide immediate enforceability, thus giving rise to obligations for other parties to honour their rights.
- The options chosen by customary communities can be adopted in stages. A community may wish to choose an option that is easy to obtain and able to provide access to use first, such as social forestry or agreement with government or corporations. Later, communities can pursue more robust tenure rights.

For the Ministry of Environment and Forestry (MoEF)

- Recognition of the existence of customary communities, which is the authority of local governments, is the major obstacle for the designation of a customary forest. It is, therefore, appropriate that the Ministry of Environment and Forestry should agree that a decree by a Regent can be accepted as a sufficient requirement to continue the process of stipulating customary forests.
- Social forestry has been the preferred legal option chosen by communities. However, the challenge is in the management of Social Forestry licenses. The Ministry of Environment and Forestry needs to ensure that there will be assistance from the government to optimize community use, and to facilitate cooperation between communities and other parties to promote independent community management.
- The Ministry of Environment and Forestry needs to resolve overlapping social forestry regulations in peatland areas.
- The Ministry of Environment and Forestry and the Ministry of Land and Spatial Planning/National Land Agency need to establish communication and coordination in the designation of customary forests to ensure clarity of customary forest land status.

1. This Policy Brief is a summary of a full report titled 'Self-Determined Land Rights in Indonesia: A Review on Various Tenure Recognition Options' by Rikardo Simarmata and Tody Sasmitha (2021) which was prepared prior to the enactment of Law Number 11 of 2020 on Job Creation which changed some forestry policies.

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For the Ministry of Land and Spatial Planning/National Land Agency

- The Ministry of Land and Spatial Planning/National Land Agency needs to address the regulatory vacuum for implementing customary rights options up to and including the administration of those rights.
- With regard to the customary forest option, efforts need to be made so that applications for designation of customary forests through the Minister of Environment and Forestry are carried out in parallel by communicating about the applications with the Ministry of Land and Spatial Planning/National Land Agency. This strategy will make the process of customary forest designation in the Ministry of Environment and Forestry directly linked to its registration by the Ministry of Land and Spatial Planning/National Land Agency to ensure that customary forest land can immediately obtain clarity of rights.

For Legislators

- Regulations regarding communal tenure by customary communities over land and forest are very complex and sectoral. Therefore, having a legal mechanism that binds and coordinates various sectors is worth considering.

A. Introduction

Protection of the rights of customary communities has gained an increasing share in government policies since the reform era in Indonesia. In 2016, for the first time, customary forest (*butan adat*) designation was issued. The designation of customary forests was a major achievement in the history of customary community protection, and a kind of euphoria ensued. Customary communities flocked to the state palace with their advocating organizations at the invitation of President Joko Widodo. That moment raised the hopes of many in that it seemed that the protection of the rights of customary communities throughout Indonesia were improving.

However, from that first customary forest designation until today, a huge gap between expectations and reality remains for tenurial security for customary communities. Data shows that communities only hold 12% of the total tenure of forest or land held by non-state actors. The remaining 88% is controlled by corporations or the private sector. As a result, the 10.2 million Indonesians who live within the forest zone and have very weak tenure security remain trapped in poverty.

Since the agenda of community tenure in the forest zone became a Development Priority in Nawacita (9 Development Agenda) which targeted to achieve 12.7 million hectares of customary forest, there has been some concrete progress. The Ministry of Environment and Forestry through the social forestry scheme distributed 2.7 million hectares (21% of the target) to communities. Meanwhile, the Ministry of Land and Spatial Planning/National Land Agency has legalized 6.2 million parcels of land; redistributed 262 thousand parcels of land and registered 19 thousand hectares of land under the status of communal lands.

Almost all of the achievements of agrarian reform through legalization and redistribution of land to communities are of individual tenure. Meanwhile, customary rights in non-forest zone areas have so far only been granted to six customary communities (namely, two communities in West Java, and four communities in West Papua). Since 2016, no new customary rights areas have been designated by the Ministry of Land and Spatial Planning/National Land Agency.

In addition to these programs, communities can also obtain tenure from other schemes, such as under Regent (Head of District) Decrees and Regional Bylaws. There are also schemes that do not involve the state, such as agreements between communities and companies or governments, or transfer of rights through buying and selling, or leasing. There are a variety of legal and policy choices, however the pace of recognition of customary communities' tenure remains slow. This indicates that the options available have not brought significant changes in improving the tenure security of customary communities. Mindful of this situation, this policy paper offers an assessment of the strengths and weaknesses of each tenure option.

B. The Importance of Tenure Recognition

First of all, tenure recognition by the state is aimed at providing protection and legal certainty for communities for control of land/forest. The recognition of customary laws, institutions and rights by the state guarantees the (relative) sovereignty of customary communities and stipulates the limits of the application of state law in customary territories. In other words, state law is not the only legal system that applies over customary land; there are also local customary laws whose enforcement can be guaranteed by the state.

Some of the benefits for communities from tenure recognition include:

1. More legal options for communities to resolve disputes, with both state laws and customary laws available.
2. Protection from unilateral expropriation of land, either by the state or by third parties. Other parties may only use customary land with the consent of the customary community.
3. Clarity about what actions are allowed and prohibited in the context of forest utilization. This clarity can reduce the criminalization of communities who use forest within the forest zone.
4. The tenure option in the form of partnerships or agreements, despite providing limited tenure security, can be a temporary option while waiting for the momentum to replace it with more secure customary tenure right options.
5. Formal legitimacy, which is obtained from the recognition of customary rights and institutions also gives confidence to customary communities and third parties when entering into land use cooperation agreements.
6. Improving the welfare and income of tenure rightsholders that can be enjoyed through:
 - a. Income from self-management such as cultivating, using, or selling cultivated products.
 - b. Income from transactions or cooperation with other parties, such as profit sharing, rent, lending and borrowing, and so on.

- c. Income from the distribution of shares or other non-monetary facilities in cooperation with other parties.
- d. Ability to use the right as collateral to obtain loans. Pendapatan dari jasa lingkungan
- e. Revenue from environmental services.
- f. Incentives for private forest rightsholders if the forest is determined to have conservation and protection functions.

C. Understanding the Seven Legal Protection Options for Tenure Rights of Customary Communities

This policy paper discusses seven options for legal protection and the rights of customary communities to their land. The seven options include (1) ownership rights, (2) customary rights, (3) Social Forestry, (4) Community/ Customary Forests, (5) Village-Owned Forests, (6) Recognition of Customary Areas, Customary Institutions and Customary Law, and (7) Agreement between Communities and the Government/Companies.

1. Ownership Right (*Hak Milik*)

Ownership rights are understood in a broad sense. Land with ownership rights in this document not only has a certificate as regulated in the Basic Agrarian Law, but also non-certificate documents, even non-written agreements. Proof of land ownership without a land certificate is called a rights basis. The rights basis can be in the form of sale and purchase receipts, certificate of inheritance, proof of tax payment, sale and purchase deed, or statement signed by the village head and/or sub-district head. The judiciary recognizes rights basis as proof of land ownership, although it may not be considered absolute.

2. Customary Right (*Hak Ulayat*)

Customary rights are regulated in the Basic Agrarian Law. Customary rights (*beschikkingsrecht*) are the authority of a Customary Law Community over a territorial unit that includes both public and private dimensions (Benda Beckmann & Benda-Beckmann, 2011). The public dimension of customary rights is a socio-political right to regulate and determine land use within the Customary Law Community territory, while the private dimension relates to the rights and authority of individuals to manage and utilize land and other natural resources contained within the customary territory. In the 2015 and 2016 Minister of Land and Spatial Planning regulations, the term communal rights is used to refer to customary rights. With the enactment of Ministerial Regulation Number 18 of 2019 concerning the Management of Customary Land, the term customary rights (*bak ulayat*) was restored.

3. Social Forestry

Social Forestry is a government policy that aims to resolve tenure and justice issues for local communities and customary law communities who live in or around the forest zone, in the context of community welfare and environmental preservation. There are various Social Forestry schemes, namely Village Forest (*Hutan Desa, HD*), Community Forest (*Hutan Kemasyarakatan, HKM*), Community Plantation Forest (*Hutan Tanaman Rakyat, HTR*), Social Forestry (*Perhutanan Sosial, PS*) within Perhutani (State Forestry Enterprise) working area, and Forestry Partnership (KK).

All Social Forestry areas are located within the state forest zone. Thus, forest utilization through Social Forestry can only be done by first securing rights, such as in Village Forest, or permits, such as in Community Forest and Community Plantation Forest. The only exception is the Forestry Partnership scheme, which uses an agreement or cooperation contract instrument. The granting of Social Forestry refers to the Social Forestry Indicative Map (PIAPS).

4. People's Forest/Customary Forest (*Hutan Rakyat/Hutan Adat*)

People's forest is another term for private forest, which is forest located on private land, including ownership rights. As a nomenclature, the term "people's forest" has been used since the 1967 Forestry Law and was continued in the 1999 Forestry Law. This is to distinguish it from the state forest zone.

Since the Constitutional Court Decision Number 35 of 2012 which reviewed the 1999 Forestry Law, Customary Forest is included under the category of private forest or people's forest. The difference between people's forest and customary forest is that people's forest is located on private land, whereas customary forest is on customary land. The designation of customary forest can be made after a local bylaw is issued that recognizes the customary law community as the applicant.

5. Village-owned Forest (*Hutan Milik Desa, HMD*)

Village-owned forest is a village original asset which is recorded as a village asset. By being recorded as a village asset, the management under this category is carried out by the village government, starting from planning, utilization, administration, and so on.

The administration is done by granting a village-owned forest certificate on behalf of the village government. The provision concerning this certification stipulates that village-owned forests are outside the state forest zone. This characteristic distinguishes Village-owned Forests (HMD) from Village Forests (HD) in Social Forestry which has the status of state forest.

6. Recognition of Customary Territories, Customary Institutions, and Customary Laws (*Pengakuan Wilayah, Lembaga, Hutan Adat, PWLHA*)

PWLHA is organized by Local Governments. It has two underlying legal foundations, the 2004 Law on Regional Government and

the 2009 Law on Environmental Protection and Management. The 2009 Law includes a series of national laws and regulations protecting the rights of customary communities, customary rights and customary forests.

The local bylaws on PWLHA basically contain the recognition of the existence of customary law communities. Meanwhile, details on territories, institutions and customary law are part of the explanation for the existence of the customary communities.

However, local bylaws from the 2004 Law do not all link legal recognition and customary institutions with customary territories, unlike PWLHA which is based on the second legal basis. In such cases, customary institutions are not imagined as institutions that must have customary territories that they can regulate, so that there is no authority to regulate the control and management of land and forests.

7. Agreement between Communities and the Government/Corporations

As the name implies, this option is derived from agreements made between communities and government or corporations in the form of partnership contracts. The agreed matters may vary, depending on the issue to be addressed. The contents can include government/company recognition of customary/local tenure; law enforcement mechanisms for forestry violations that occur in the agreed area; participatory mapping; granting access to land; conflict resolution; indemnity or compensation; profit sharing; or a combination of the above.

The agreements do not immediately give communities formal tenure rights. However, such agreements provide an option for dispute resolution. In addition, an agreement can be a precursor to formal recognition of stronger tenure.

D. Advantages and disadvantages of customary community tenure rights options

It is not possible to determine one option that is most suitable for all situations considering how society is dynamic and many external factors at play. The most appropriate option would depend on the context of its application. There are five aspects that can be used as benchmarks in determining the tenure rights to be pursued by a community, namely:

1. Bureaucracy (administration of rights acquisition)
2. *Rightsholder authority*
3. Legal Personality
4. Implementability
5. Enforceability

The following is an explanation of each of these aspects.

a. Bureaucracy

Bureaucracy or the administrative stages that must be followed to obtain community rights, which includes the time required and the form of the instrument, are determined by three factors.

1. The nature of recognition

The nature of recognition is divided into two categories, namely declaratory recognition and constitutive recognition. Declaratory recognition does not give rise to new rights but reinforces existing customary rights. Meanwhile, constitutive recognition is intended to create certain rights to customary communities. Constitutive recognition, such as the issuance of social forestry permits and registration of customary forests takes a longer time because there is a need to prove the relationship between the object and the subject of rights.

2. Customary rightsholder subject

The nature of recognition determines which government units need to be informed and will issue the recognition of customary rights. The more government units that must be involved, both vertically and horizontally, the longer the bureaucratic process will be.

Recognition of customary territories that are not intended as part of a process of recognition of the existence of a customary community or as a first step towards obtaining customary rights and customary forest rights, can take place with a relatively simple bureaucratic process. The option of Ownership Right can be obtained without going through a lengthy bureaucracy because it is sufficient to involve only a conveyancer (PPAT), tax office, village government or sub-district offices.

Tenure options that require recognition of the existence of customary communities will most likely take a long time. In addition, for customary rights, social forestry, and customary forest options, a ministerial/head of non-ministerial institution decree is required.

3. Customary rightsholder subject

The tenure option with an individual customary rightsholder subject has simpler procedures. It is sufficient to prove the subject based on a tax payment receipt, sale purchase receipt, or a land ownership statement or title transfer certificate signed by the village head and/or the sub-district head. Meanwhile, in the case that the rightsholder subject is a customary community, the bureaucracy involved includes recognition of their existence as a subject stipulated in local bylaw. Thus, the administrative procedure is longer.

The following is a table describing the bureaucracy:

Table 1. Tenure Bureaucracy

Option	Form of instrument	Time required	Government Institutions involved
Ownership Right	Decree	Minimum 60 business days	<ul style="list-style-type: none"> • Village administration (to sign a statement and rights transfer certificate) • Sub-district office (to sign a statement and rights transfer certificate) • Conveyancer (to sign the sale and purchase deed) • Tax office (to issue land and building tax payment letters) • Land Office, Ministry of ATR/BPN (to issue certificates for former customary land)
Customary Right	Regulation, Decree	No provision	<ul style="list-style-type: none"> • Regent / Mayor or Governor (to make decisions, regional regulations)[5] • Regency/Provincial Parliament (to pass regional bylaws)[4] • Land Office of the Ministry of ATR/BPN (to administer through measurement, mapping and listing in the land register)
Social Forestry	Decree	On average 15-17 business days (HPHD, HKM, HTR)	<ul style="list-style-type: none"> • Village head/Lurah (to validate the list of proponent groups) • Directorate General of Social Forestry and Environmental Partnership (decision to issue rights/social forestry permits) • Regent /Bupati (to issue recommendation) • Company (for forest partnerships and release areas from concessions) • Director general on behalf of the minister or governor (to issue permits)
People's Forest/ Customary Forest	Regulation, Decree	The maximum time for designating customary forest is 29 days. However, the existence/ recognition stage at the local government level is a requirement that takes a long time	<ul style="list-style-type: none"> • District/Provincial Work Units (SKPD) to initiate regional recognition by-laws. • Regent/mayor or governor (to make a decree/regulation or local bylaw) • Ministry of Environment and Forestry (designation of customary forest)
Village-Owned Forest	Regulation, Decree	Not in regulations. Thus far, there has been no village-owned forest	<ul style="list-style-type: none"> • Village-Owned Forest Regulation, Decree Not in regulations. Thus far, there has been no village-owned forest designation Regent / Bupati & Regional Parliament (for Village/Customary Village designation) • District/city government (for inventory and valuation of village assets) • Land office (for registration of village-owned land)
PWLHA	Regulation, Decree	No provision	<ul style="list-style-type: none"> • Regent/mayor (to make a recognition decree or local bylaw) • Regency/city parliament (to pass recognition bylaw)
Agreement	Agreement/ MoU	Determined by the parties to the agreement	

b. Tenure Security Indicators/Authority

The seven rights recognition options provide different levels of protection and extent of authority to rights-holding communities. The strongest and most secure tenure recognition is that which provides private and public rights and guarantees the protection of rights for an unlimited period.

Private rights allow rightsholders to take civil legal actions, for example controlling, exploiting, or transferring their rights to others. Meanwhile, public rights give a customary community the ability and autonomy to govern their own communities and territories with minimal state intervention. All tenure options discussed in this policy paper give communities private rights over the tenure object under their control. However, only some options provide public rights.

The tenure recognition that grants both private and public rights are customary rights, village-owned forests, customary forests,

Table 2. Tenure Option Authority

No.	Option	Private Rights	Public Rights	Unlimited Time
1.	Ownership Right	✓		✓
2.	Customary Right*	✓	✓	✓
3.	Social Forestry	✓		
4.	People's Forest (on Freehold land)	✓		✓
5.	People's Forest (on HGB/Right to Use land))	✓		
6.	Customary Forest*	✓	✓	✓
7.	Village-Owned Forest*		✓ ✓	✓
8.	PWLHA*	✓	✓	✓
9.	Agreement	✓		

Note *) Tenure recognition with the highest level of tenure security.

and PWLHA. Recognition with public rights has an unlimited period of time. Details are described in the following table.

Although private and public rights have been granted, tenure rights are not completely free from the risk of expropriation. Therefore, the third tenure security indicator is contextual, where its enforceability is relative to other national and regional regulations. For example, reasons of public interest can be used to revoke ownership rights and customary rights. This regulation is contained in the Basic Agrarian Law of 1960 and the Papua Special Autonomy Law of 2001. However, the regulation also stipulates that the acquisition must be accompanied by appropriate and fair compensation.

c. The Need for Legal Status of the Subject of Rights (Legal Personality) (*Legal Personality*)

The statutory laws and regulations governing the recognition of customary rights over land and forests use various terms to refer to the subject of rights, as illustrated in the following table:

Table 3. Legal Status of Subjects of Tenure Option Rightsholders

Option	Individuals	Customary Communities	Legal Entity	Group	Village
Ownership Right	✓ (individual/ collectively)				
Customary Right		✓			
Social Forestry	✓ (HTR, Partnerships)		✓ (HD, HKm, HTR)	✓ (HD, HKm, HTR, IPHPS)	✓ (HD)
People's Forest	✓		✓		
Customary Forest		✓			
Village-owned forest					✓
PWLHA		✓			
Agreement		✓		✓	

In the table above, we can see the various legal subjects in land and forest tenure rights. Individuals are the most widely used in protecting customary rights. Customary community is the second choice. Meanwhile, legal entities are not as popular as the previous two legal subjects.

From the available tenure recognition options, several options are available to a variety of legal subjects. However, some options apply specifically to one legal subject only. The Social Forestry option is a flexible choice in accommodating the legal subjects most suitable for communities.

Meanwhile, in the most conservative understanding of the legal subject options, it is not appropriate to take advantage of the social forestry scheme because of the weak recognition level it provides. In this situation, other options such as customary

rights, customary forest, PWLHA are the most ideal. These options can be chosen if the customary territory in question has clear boundaries and meets the requirements and definitions of the government. The consequence of choosing this option is lengthy procedures, especially if the boundaries are not clear and must go through a verification process.

The option of agreement with third parties can also be selected, provided that the customary community has cohesiveness and strong leverage and is thus less vulnerable to being disadvantaged.

Although different, most of the rightsholder subject requirements emphasize the same points: (1) the identity of the rightsholder, (2) information on the object of the right; and (3) the legal relationship between the right subject and the right object.

d. Implementability

There are two aspects that hinder obtaining tenure for customary communities, namely obstacles that come from existing regulations and obstacles that occur during actual implementation.

1. Regulatory Obstacles

This obstacle arises mainly from the lack of adequate implementing technical regulations and the sectoral nature of these regulations.

Regarding the lack of implementing regulations, we can take, for example, Regulation of the Minister of Land and Spatial Planning/Head of National Land Agency Number 18 of 2019. This regulation stipulates the recognition of customary land only up to the listing in the land register. In fact, in the framework of land law, the listing in the Land Register implies a lack of/incomplete juridical data to explain the right subject. Therefore, there is still a need for further norms which determine that listing in the land register in the context of administering customary land is the final stage in determining the customary law community concerned as the holder of customary rights over the land.

Regarding the sectoral nature of regulations, we can take the example of what happened to Community Forests and Community Livelihood Plants (Tanaman Kehidupan) program in peat areas. Communities in peat areas who have this right could not cultivate their land. What stood in the way was another regulation specifically on the peat sector. Minister of Environment and Forestry Regulation Number 37 of 2019 stipulates that peat area is a protected area. Even though utilization is allowed, the same regulation also prohibits communities from land clearing and clear cutting, burning, and building canals and drainage, which has been the practice of community agriculture so far in peat areas.

Such sectoral silos are also evident in the clash between national and regional regulations. In 2018, Riau Province issued a regional bylaw requiring “discussion with the DPRD” as a step that must be pursued before the Governor issues a recommendation for Social Forestry and Agrarian Reform area, whereas national level regulations do not require it. This certainly added to the procedural burden for social forestry applicants in Riau.

2. Implementation Barriers

In the field, there are some customary community leaders who help the release of customary lands for development projects. In Papua, indigenous peoples’ institutions can have a dual role as development brokers on customary lands. In West Sumatra,

Table 4. Tenure Option Barriers

Option	Regulatory Barrier	Option Regulatory Barrier Implementation Barrier
Ownership Right	None. Regulations are complete.	<ul style="list-style-type: none"> - Applies to all: - Rights where customary communities as legal subjects, are vulnerable to being co-opted by customary elites for development purposes. - Overlapping tenure rights/permits - Lack of facilitation/ assistance after the granting of rights/permits
Customary Right	Requires regional head decree that recognizes its existence. Land regulations still apply provisions on land registration for the administration of customary land.	
Social Forestry	None. Regulations are complete down to technical matters. Not in line with regulations in peat areas that prohibit land clearing/cutting activities.	
People’s Forest / Customary Forest	Although regulations regarding customary forests have been developing, the obligation to acknowledge existence through regional regulations remains a hindrance.	
Village-owned Forest	Regulations are neither clear nor operational because they do not yet regulate the definition and designation process.	
PWLHA	Regulations on territorial recognition are not yet linked with rules for tenure administration.	
Agreements	The enforceability of state law is weak because the legal relationship is private.	

customary land disputes that are litigated in courts mostly pertain to customary lands of customary communities which are already certified by the government but then sold by their customary leaders.

In addition, recognition is also hindered by overlapping claims to the same area. In Kampar, Riau Province, the Bupati's recognition of four *Kenegerian* (villages) of *Kekhalifahan* Batu Sanggan did not automatically allow the customary communities to use their fields. The Kampar Regent's decree that recognized them contradicted the MoEF designation of the area as Wildlife Reserve.

e. Enforceability

Customary rights over land and forest can be considered effective if, first, customary communities who hold the rights can exercise legal actions over their land, and other parties accept it or do not dispute it. Second, if there are parties outside the rightsholders who dispute or even violate it, they can be prosecuted in civil or criminal courts. The definition of enforceability deems customary rights as something that impose obligations on others to not dispute the existence of such rights.

In some customary rights options, rights are only obtained after recognition of existence from the state (Simarmata & Steni, 2017). However, that alone does not provide enforceability, especially if the recognition of the existence of a customary community does not include their customary territories. In such cases, customary rights over land or forest only become effective when there is already an administrative decision concerning customary territories.

For example, the Decree of the Regent of Kampar Regency in Riau, which states that the Regent recognizes the existence *kenegerian* and their traditional rights over customary forest or customary land, does not prevent the state from claiming community areas as state forest, specifically the Rimbang Baling Wildlife Reserve. The *kenegerian* also cannot report the government or the BKSDA on accusations of committing acts against the law that disrupt traditional rights.

Table 5. Enforceability of Tenure Options

Option	Enforceability	
	Strength	Weakness
Ownership Right	The rights basis is recognized for the purposes of converting rights, land registration, land acquisition, transfer of rights, and the court accepts them as proof of ownership	The rights basis only serves as preliminary evidence and is not absolute. Several state/ government and private institutions do not recognize this as proof of ownership
Customary Right	Listing in the Land Register can become a reason for the government not to issue permits/rights thereon without the consent of the rightsholder. Customary communities can also use this recognition to sue other parties who exercise control and use of customary land without rights	Listing in the Land register is deemed to only clarify the object of the right and not yet the subject of the right. As a result, listing is considered not yet a determination of the existence of a rights relationship between the subject and the object
Social Forestry	The Social Forestry right/permit guarantees the use and collection of forest products by the community so that it is not considered an unlawful act. Communities that hold permits/rights can defend their rights from the possibility of being claimed by other parties, including by bringing them to court. Plants in the permit/right area can be used as collateral.	
People's Forest/ Customary Forest	The government cannot issue permits/rights in customary forest areas without the owner's consent. Other parties who exploit and use the area without a license from the state can be reported by the community as having committed unlawful acts.	
Village-owned Forest	After the village-owned forest is recorded in the Village Inventory List and a certificate is issued, the village head on behalf of the village can arrange management, utilization and collaborate with outside parties to use village-owned forests	
PWLHA	The use of customary areas for community livelihoods is usually guaranteed	Does not give rise to a right over land and forest so that the legal actions of the community that are recognized on the land are still considered unlawful
Agreements		

Why is there no enforceability of the Kampar Regent Decree above? There are two reasons. First, the Bupati does not have the authority to designate private land or customary forests. Second, the enforceability of customary rights will only emerge at a later stage, namely at the establishment or administration of rights.

E. Policy Implications

In contrast to the recognition of individual customary lands, the recognition of communally controlled lands and forests is very complex, varied and fragmented. These options emerged from land sector, forestry and local government regulatory regimes. Local governments and ministries implemented these options with weak coordination, even entirely in isolation from each other.

One similarity between the options offered by the various sectors is the assumption that customary communities are subordinate to the state, even though both have public authority. Another assumption is that customary communities will gradually modernize and abandon their attachment to customs, including with regard to land and forests. Because of this assumption, the state requires customary communities to prove their existence before obtaining recognition of tenure rights.

This recognition of existence is not easy to obtain, so it does not address the need of communities to be able to immediately access or utilize lands and forests.

For this reason, many customary communities do not choose the highest level recognition of tenure security. Their choice of other tenure options is considered an intermediate step while waiting for the right momentum to replace it with an option that provides greater rights and tenure security.

Although the seven options include recognition and protection of customary right over land and forests, not all are immediately effective. All options do give rise to rights, but not all rights present an obligation for other parties to respect these rights. The options that do not directly provide enforceability, for example, are recognition of customary territories, customary law and customary institutions (PWLHA), where the regulation has yet to reach the administration of permits/rights.

In terms of utility, all policy options can provide benefits for rightsholders in the form of: (1) environmental protection and protection of cultural values; (2) guarantee of protection and legal certainty; (3) improved welfare and income. On the third point, welfare and income improvement requires optimal use. For this reason, communities need government support in the production, marketing and infrastructure processes. Policies that provide relief and incentives for communities, as well as development programs aimed at developing their economies, are urgently needed, as well as fair cooperation with companies.

Dari sisi kemanfaatan, semua opsi kebijakan dapat memberi manfaat bagi pemegang hak berupa: (1) perlindungan lingkungan dan nilai-nilai kultural; (2) jaminan perlindungan dan kepastian hukum; (3) peningkatan kesejahteraan (*well-being*) dan pendapatan (*income*). Pada poin yang ketiga, besarnya peningkatan kesejahteraan dan pendapatan mensyaratkan pemanfaatan yang optimal. Untuk itu, masyarakat membutuhkan dukungan pemerintah dalam proses produksi, pemasaran, dan infrastruktur. Kebijakan yang memberikan keringanan dan insentif bagi masyarakat, serta program pembangunan yang diarahkan untuk menumbuhkan perekonomian mereka sangat dibutuhkan, di samping juga kerja sama yang adil dengan perusahaan.

F. Conclusion

For customary communities to choose which option to pursue, they first need to consider the location of the customary territory object, whether it is inside or outside the forest zone. Next, they must ascertain the party that will be the tenure rightsholder subject. The answers to both these points will guide which recognition option is followed.

Table 6. Tenure Options Based on Rights Subject and Object Policies

	Object Location	Rights Subject				
		Individuals	Customary Community	Legal Entity	Group	Village
Right Object Location	Inside Forest Zone	<ul style="list-style-type: none"> • People's Forest • Social Forestry (HTR and Partnership) 	<ul style="list-style-type: none"> • Customary Forest • PWLHA 	<ul style="list-style-type: none"> • People's Forest 	<ul style="list-style-type: none"> • Agreement, Social Forestry (HD, HKM, HTR, IPHPS) 	<ul style="list-style-type: none"> • Social Forestry (Village Forest)
	Outside Forest Zone	<ul style="list-style-type: none"> • Ownership Right 	<ul style="list-style-type: none"> • Customary Right • PWLHA 		<ul style="list-style-type: none"> • Agreement, Social Forestry 	<ul style="list-style-type: none"> • Village-owned Forest

There is no one-size-fits-all option that applies to all situations, places and times. The options that exist for customary communities do not have to simply use customary identities such as customary rights, customary forests, village-owned forests, or PWLHA. There are other options that can be proposed as individuals or groups whose terms or procedures are relatively simpler but are effective



Photo Credit : Angus MacInnes/FPP

and sufficient to provide tenure protection for a certain period of time. Examples include social forestry and agreements between communities and the government/private sector. Specifically, for customary communities whose land/forest is located outside the forest zone, there is nothing wrong with considering the option of ownership rights which confer private rights for an unlimited period of time to the rightsholder.

What should be emphasized is that the recognition of customary tenure needs to be encouraged to produce customary rights that have enforceability. As well as being important for communities, enforceability should also be emphasized by supporting organizations and the central and local governments. This effort is indeed difficult considering the legal framework for recognition that separates subject recognition (under regional governments) and object recognition (under the central government).

Thus, for advocating organizations, the recognition of the subject in the form of PWLHA needs to include certain provisions or strategies that make customary rights enforceable. Meanwhile, for the central and regional governments, provisions governing the protection of customary community rights over their lands must be completed until effective rights can be issued. This requires the creation of new provisions that complement the existing but incomplete regulations. In addition, joint provisions that are binding across regulatory regimes (forestry, land and local governments) that enable coordination need to be enforced effectively. For example, an application for designation of customary forest through a Decree of the Minister of the Environment and Forestry should be carried out in clear communication with the Ministry of ATR/BPN. Given these cross-cutting challenges, we can also divide regulatory responsibilities to the legislative level which seeks to issue legislation covering all of the agencies or ministries concerned.

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