

# Out of the Lion's Den, Into the Crocodile's Jaws?:

## Lessons from policy developments on customary forest in Bulukumba



### Main messages

Constitutional Court (Mahkamah Konstitusi or MK) decision no. 35/2012 has opened space for customary communities to demand recognition of their rights. In the absence of clarity in the national legal framework regarding the extent of rights, authority within customary forests, and procedures to gain recognition, regional governments can take strategic steps towards recognition of customary groups and their rights within their territory. Collaborative multistakeholder policymaking initiatives can help create an integrated, comprehensive yet flexible policy and thereby consolidate a system of adaptive management across different authorities and interests.

### Implications

Ideally, local people should initiate the process. Where capacity is lacking, interventions by a third party might be needed. Yet to a significant degree, recognition of customary rights is determined by the willingness, openness and capability of local government and parliament to continue with the legal process for drafting a regulation.

Such processes must:

1. Reflect operational realities or stakeholder needs on the ground;
2. Have clear and unified goals, with clear objectives;
3. Have capable civil society and government facilitators;
4. Have the support of key members of local government;
5. Have the involvement of community stakeholders.

However, recognition of the rights of customary communities will not only depend on a 'good' regulation produced collaboratively involving all stakeholders, but also on the commitment of all stakeholders to implement the regulation. Recognition by the state also implies dealing with the national government in a formal system, which has not always proven to be an advantage for customary communities.

## Introduction

Recent changes to Forestry Law No. 41/1999 give greater rights to Indonesian customary groups over their traditional forests. The Constitutional Court declared customary forest a form of privately owned or “rights-based forest”<sup>[1]</sup> (*hutan hak*) (Decree MK 35/PUU-X/2012), granting customary groups ownership rights over their traditional forest areas. Although the legal guidance for recognizing customary forest is still in the making, it is understood that a preliminary step to recognize customary forest and release it from state forest is through a local government regulation (*PERDA*) that recognizes customary groups and delineates their traditional forests (Safitri and Uliyah, 2014). Unlike decrees, such a regulation requires legitimation by the local parliament (DPRD).

Few local governments have done so. One of the most advanced is Bulukumba, South Sulawesi, where The Agroforestry and Forestry in Sulawesi: Linking Knowledge with Action Project (AgFor) was involved in promoting a multi-stakeholder collaborative process at district level to recognize the rights of the Kajang people to manage their customary forest. This process was particularly helpful as it allowed the convening of relevant stakeholders who play an important role in sustaining an effective process of policy formulation. We begin by describing the legal background enabling customary forest recognition and finally detail the Kajang case. This brief serves as a lesson-drawing tool for policymakers and civil society actors seeking to undertake MK35 or other forest-related *PERDA* throughout Indonesia.

## Legal Background

The Forestry Law of 1999 maintained the two basic forest categories of “state forest” (*hutan negara*) and “rights-based forest” (*hutan hak*) of the earlier law (Law 5/1967). State forest is state-owned forest within the forest zone, in which the Ministry of Environment and Forestry (MoEF) dictates legal relationships, forest status, function, and uses. *Hutan Hak* is owned, usually by individuals<sup>[2]</sup> or a legal entity coming under the divided jurisdiction of MoEF, the Ministry of Agrarian Affairs and Spatial Planning, the regional governments, and numerous secondary bureaucracies. MoEF administers

and governs the legality of forest products in ‘*hutan hak*’ (such as granting licenses to log), the Land Agency grants property rights to title forest in the form of leaseholds and registration, and the regions have a number of subsidiary administrative responsibilities related to both MoEF and BPN activities (Sahide and Giessen, 2015).

The original formulation of the 1999 Forestry Law contains a form of state forest known as “customary forest” (*hutan adat*). It states: “...customary forests are state forest located in indigenous peoples’ territories.” The Indigenous Peoples’ Alliance of the Archipelago (AMAN) and two co-petitioners argued before the Constitutional Court in 2012 that this formulation was unconstitutional, because it allowed the Government to grant commercial licenses within customary forest areas without the consent of customary communities, excluding them from the resources that they had accessed and enjoyed for generations (AMAN, 2013; Butt, 2014). The Court held in favor of the petitioners, in part, ruling to strike the term “state” from “state forest,” thus moving customary forest into title forest. The Court furthermore held that customary groups are legal subjects and can own *hutan hak* as “third parties.” This ruling, MK 35/PUU-X/2012 (MK35), therefore creates three forms of title forest: individual, legal entity, and customary forest.

Indigenous rights and environmental advocates celebrated this decision because of the additional environmental benefits should customary property rights be acknowledged and enforced (IRIN, 2014). It is unknown how many customary groups exist in Indonesia, but AMAN claims customary groups control between 40 million hectares (c. 30-50%) to 60 million hectares (75%) of the Forest Zone (Jakarta Globe, 2013) with less than 1% of the forest area currently registered to customary groups (DTE, 2013). Efforts to map ancestral domains, beginning with the Ancestral Domain Registration Agency (Badan Registrasi Wilayah Adat or BRWA) in 2010, have now yielded 6.8 million hectares and 618 maps of customary land. According to advocates, however, this represents only a small fraction of customary land areas (IRIN, 2014). MK35 may thus provoke a groundswell of grassroots efforts to legally recognize customary forests and may have a large impact on the forest zone.

[1] The term *hutan hak* indicates forest owned by a party other than the state and has also been translated as title forest.

[2] In recent draft regulations, it can also refer to communal property.





Multistakeholder meeting as part of the *PERDA* process. © Balang

Implementation uncertainties nonetheless surround MK35. Various regulations clearly state that recognizing customary communities and their territories is the mandate of local governments. However, where local governments have such a ruling it is more on regulating rather than recognition of rights (Safitri and Uliyah, 2014).

### What Can Be Done?

Local governments must first issue a district regulation (*PERDA*) or a Bupati decree (*Peraturan Bupati*) before MoEF or the relevant agencies can legally recognize customary forests. The local government must, in the regulatory process, recognize the existence of the customary group and delineate the traditional forest area. MoEF lays out the criteria for customary group recognition based on the Forestry Law: (1) the adat group is organized as a distinguishable community; (2) the adat group has existing structures and institutional arrangements; (3) the adat group has clear territories and boundaries based on customary law; (4) customary law and customary judiciaries still exist; (5) the group still gathers forest products to cater to their daily needs.

The *PERDA* on recognition is the primary responsibility of the regions regarding customary forests (Sahide and Giessen, 2015; Safitri and Uliyah, 2014), but the *PERDA* drafting process in itself has much leeway. Given this regulatory uncertainty, we promoted a multi-stakeholder collaborative process as the best method to draft a *PERDA*.

Forest related decision-making, especially, seeks to find governance solutions for complex social and ecological circumstances that implicate many stakeholders and sectors (Armitage, 2005); a comprehensive, collaborative and participatory approach is essential. Civil society and government actors should therefore resist the common method of drafting *PERDA*, which typically utilizes technical experts and follow-up outreach to stakeholders (“sosialisasi”) in lieu of stakeholder participation and public consultation (Butt, 2010). Multi-stakeholder initiatives can lead to varied outcomes, however, so those who participate or promote such initiatives should pay special attention to process to produce the results that genuinely reflect local people’s wishes and needs.

### Collaborative Initiatives for *PERDA* Drafting

Numerous scholars have discussed the theoretical and practical concerns underpinning collaborative and adaptive management of natural resources (cf. Lee 1993; Berkes 2009; Olsson et al 2004). Collaboration can cover a variety of issues at multiple scales of governance, and can take on a number of different forms (Hemmati et al 2002). These initiatives seek to create spaces for stakeholder dialogue to create governance solutions to social and environmental problems (Moog et al 2013).

Specific to Indonesia, a Department for International Development (DFID) study from 2003 details several attempts at collaborative *PERDA* drafting that sought to create community forest management and regional forestry schemes. The authors found that the more successful initiatives were those that had concrete effects on the social contract and local institutional arrangements, including the local government. These cases were democratic, widely representative, and inclusive of stakeholders in the drafting process, with clear goals and objectives (boundaries of dialogue) and the requisite budgetary outlays for drafting, dissemination, and implementation, as well as commitments from key members of the local executive and legislative branches. Less successful cases did not have these elements. Commitment from national agencies was generally lacking, in all cases. The authors found that this lack of higher-level commitment did not hamper positive, *de facto* changes on the ground, provided the local institutional arrangements, including local government were in place and operational.

The DFID (2003) study presents a number of important lessons for successful collaborative *PERDA* drafting. These processes must:

1. Reflect operational realities or stakeholder desires on the ground.
2. Have clear and unified goals, with clear objectives.
3. Have capable civil society and government facilitators.
4. Have the support of key members of local government.

There are three broad stakeholder groups involved in successful *PERDA* processes:

1. Government actors and administrators with political expertise and influence.
2. Community stakeholders and NGO representatives, who communicate operational realities and desired change.
3. NGO and government facilitators with facilitative and technical expertise.

We use the Kajang case study as a way to contextualize and clarify these general points. We find that the Kajang collaborative *PERDA* initiative, which successfully passed a *PERDA* through the local legislature under MK35, had many of these elements of success.



Adat forest designated as limited production forest. © Balang

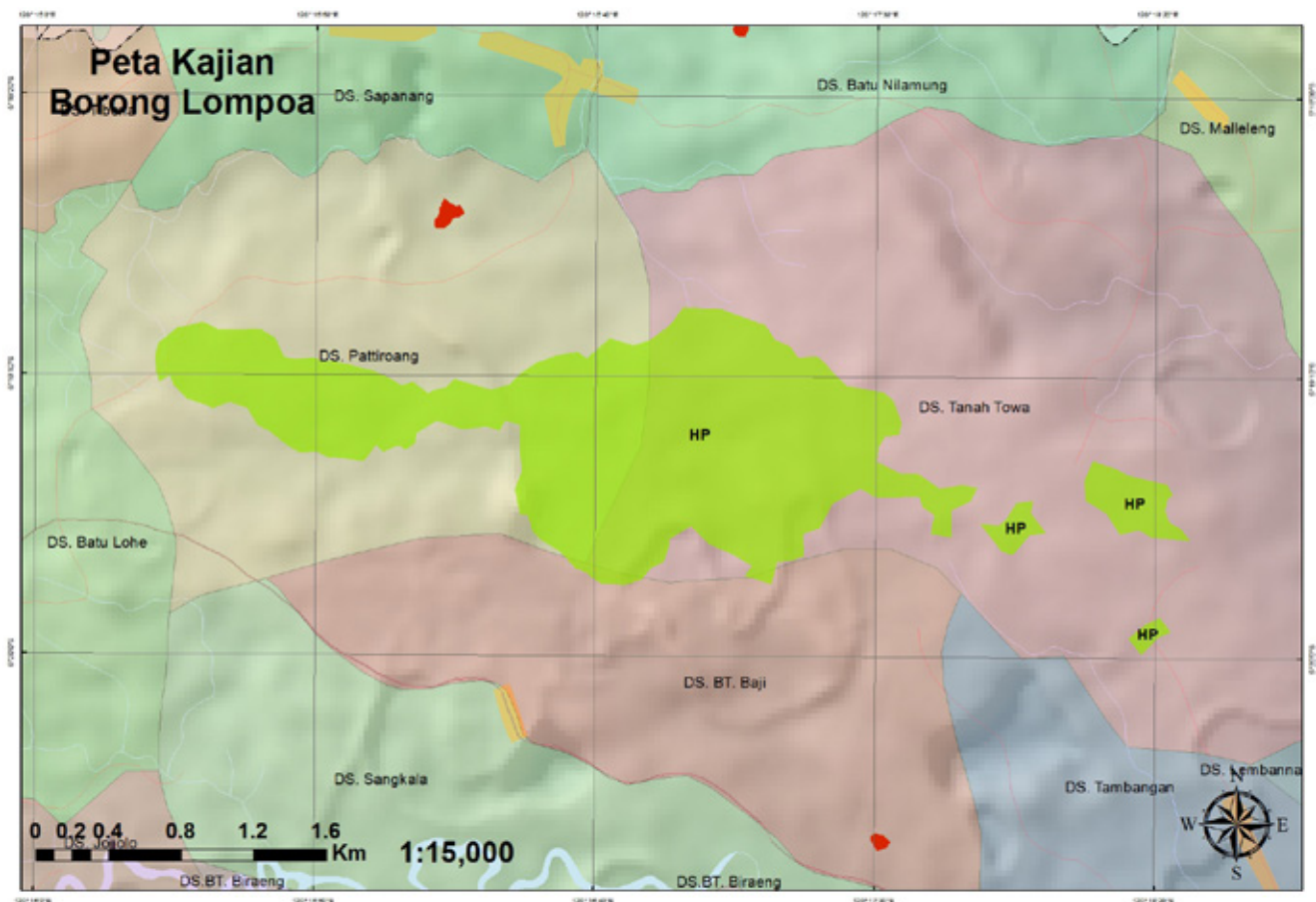
### *The Kajang Case*

The Kajang customary group, which resides in Bulukumba, South Sulawesi, has experienced territorial decline within its ancestral domain for the past thirty years. The leasehold (HGU) for the rubber plantation PT Lonsum covers over 5,000 hectares throughout Kajang areas of Bulukumba. The Kajang presently retain control of less than 500 hectares of forest within the traditional area.

Tensions between the customary group and the company over land rights have resulted in repeated bouts of protests and incidences of violence. Numerous community, civil society, and government actors fear a return to hostility in the near future. Many stakeholders have proposed legal recognition and conflict mediation efforts to ensure a cessation to hostility.

The Kajang manage several forests and natural areas—Borrang Lompoa, Saukang, and lesser forests—in accordance with customary law, and possess all of the criteria for customary forest recognition as outlined above. They have created a semi-formal management structure within their forests that consists of complementary customary law and formal surveillance/enforcement structures. Ethnic Kajang and Kajang sympathizers within the formal government apparatuses appear to make this arrangement possible. While the central and regional governments do not formally recognize Kajang authority within these forest areas, Kajang authority there remains in force, particularly in private law matters. As a practical matter, the Kajang form an essential part of forest management in these areas.





Land use map of the Kajang customary forest. Source: Bulukumba Perda Taskforce, 2014.

The customary system of forest management in Kajang forests has furthermore proven robust. Forest cover loss in the main forest area, Borrong Lompoa, and lesser forest areas has been marginal in the last fifteen years and reportedly for generations (see map). The Kajang deeply value forest conservation, which is a pillar of their customary belief system. By contrast, the state designated protection forest (*hutan lindung*) in a neighbouring sub-district has been rapidly converted into settlements and non-protection uses.

Kajang's remaining forests contain old growth and lucrative species. The main forest, Borrong Lompoa, is classified as "limited production forest" (*hutan produksi terbatas*) and numerous private parties have expressed their interest in exploiting it. There is consequently a broad consensus among community members, civil society, and key policymakers that something must be done to protect Kajang property rights. Arguments for economic, social, and cultural rights, environmental sustainability, and conflict management frame this consensus, which has produced efforts to legalize Kajang control of their remaining forest areas under the Forestry Law.

In 2008, the Government of Bulukumba (at the behest of the Forestry agency who asked UNHAS for assistance) initiated a process to draft a *PERDA* recognizing the Kajang people and customary forests. The effort lacked public participation and did not reach completion. With MK35, the process was revived in conjunction with the AgFor project in Sulawesi. Under this project, the Bupati was advised to convene a multi-stakeholder 'Taskforce' for *PERDA* drafting. Owing to operational realities on the ground and the organization of the collaborative process [discussed hence] the process reached completion and the local parliament drafted the *PERDA*. The *PERDA* was signed on November 17<sup>th</sup> 2015.

### Operational Realities

The *PERDA* began with a good chance at local legitimacy and success. There was a clear demand among Kajang, civil society, and government stakeholders in Bulukumba for legalized Kajang control of the traditional forest areas, and a clear institutional precedent for that control. A semi-formal management structure with legitimate, de facto control



Lake Tukasi, part of the Kajang territory in Bulukumba sub-district. © Balang

over the relevant forest areas already exists. Customary and formal forestry management structures work in collaboration on a number of levels, for example, informal collaboration between formal and informal enforcement structures ensure that customary and formal violations in the forest zone are properly penalized. Ethnic Kajang and Kajang sympathizers also hold key positions in the local, formal management apparatuses, particularly within the local forestry agency. Kajang custom proves complementary, in many ways, to state policy and seems relatively resistant to the illegal forest conversion processes occurring in other parts of Indonesia. It is also robust in the face of challenges from outsiders who wish to legally acquire remaining areas of the Kajang forest estate. The extent of third party control in customary forest is still unclear, and so the effect of the *PERDA* on this semi-formal management structure is uncertain. The *PERDA*, does not provide for new or unfamiliar institutional arrangements. It tries, in large part, to preserve the existing forest management structures by securing Kajang forest tenure.

### *The PERDA Drafting Process*

The *PERDA* process incorporated key members of Kajang leadership, both traditional and modern. These Taskforce members were key to the public consultation aspects of *PERDA* drafting. NGO groups such as AMAN and Balang Institute, who represented the interests of the Kajang nationally and locally, formed an essential

core of practitioners who committed themselves to understanding the “lay of the land” in Kajang areas. They engaged primarily in research efforts, such as GIS mapping, key informant interviews, and household surveys in order to contribute to a draft *PERDA* that would reflect Kajang territorial and customary realities, such as the nature and existence of customary law and the extent of Kajang territorial control.

Also involved in *PERDA* drafting and consultation were the local government including key members and head of forestry service, tourism and cultural service, and bureau of law. These members ensured that the group had the necessary political capital and regulatory expertise to create a comprehensive draft. They secured government funding for drafting, providing transportation, facilities, and person power for consultation and research efforts.

Balang and CIFOR representatives were accepted as being neutral and thus were able to bring these stakeholder groups together through productive, goal-oriented dialogue and agenda setting, as well as the provision of technical expertise and capacity building for research efforts. Due to the combined efforts of all stakeholder groups, the *PERDA* was adequately evidenced, disseminated among stakeholder groups, and secure in its commitments from key members of the local government. The facilitators elicited the necessary communication, accord, and focus within the group to keep the *PERDA* on track for completion.



## Further Considerations

Similar to the cases outlined in the DFID (2003) study, the Bulukumba *PERDA* lacked central and higher-level provincial decision makers altogether, who may have had some say over the *PERDA* during bureaucratic review and MoEF approval. To gain full claim of the *PERDA* for title over customary process, this process will need to take place with MoEF officials. The *PERDA* also had uncertain alignment with existing laws and regulations, which continue to be reviewed with the local legislature. Notably, the *PERDA* regulation map contained small sacred areas known as *saukang* that might consist of a small stand of trees, a single tree or even some bushes rather than forests as defined in the Forestry Law. Their inclusion at the behest of the Taskforce into the *PERDA* also expanded the scope of the regulation beyond MoEF authority.

## Conclusion

The establishment of a law that supports the indigenous people's rights and territory is a significant achievement, not only for the district but also for other areas throughout Indonesia and for the MoEF. The participatory processes have become examples for developing policies in the future as expressed by a staff of Bulukumba Bureau of Law, Ikhsan Amier<sup>[3]</sup>: "The making of district regulations in the future should adopt this process, which is fully participatory. Although it is a long process, the product and the results are accountable and legitimate".

This brief suggests that regional governments can take positive steps toward customary group and forest recognition. Collaboration can help to create or consolidate a system of adaptive management across different authorities and interests (such as customary forests) reflective of the local stakeholders. The ensuing policy outcomes may prove protective of local community interests as well as of the integrity of the forests. We nonetheless maintain that several elements must be in place to produce a lasting social contract through local regulations.

A collaborative effort must translate stakeholder demands into a workable regulation that is representative and politically and operationally viable. The collaborative effort must itself have the requisite political and financial capital supporting it

to produce a high-quality *PERDA*. It is necessary to secure the commitment of key government actors and to incorporate them into the collaboration. The social and environmental complexity of the forest zone additionally often leads to the exclusive use of technical experts in *PERDA* drafting. These technical experts can help instead to build knowledge and technical capacity among stakeholder groups for devising their own *PERDAs* and help to incorporate extant expertise among local people in terms of indigenous knowledge. Highly skilled largely neutral<sup>[4]</sup> facilitators are likewise indispensable for facilitating communication, cooperation, and timeliness in the *PERDA* process.

While national-level commitment on the final draft *PERDA* in Bulukumba remains to be seen, the central government does not typically invalidate *PERDAs* unless they contain provisions on taxation or user charges (Butt, 2010). Customary forest recognition is nonetheless politically-charged, with the divided support of national agencies. How the national agencies ultimately receive the *PERDA*, and how it affects operational realities on the ground, may both ultimately determine its ability to create the positive, lasting change that proponents of customary forests wish to see. Those undertaking similar processes elsewhere in Indonesia can continue to draw lessons from the unfolding Kajang example and similar *PERDA* initiatives, with an eye to what may be required in their own unique, local context to help create lasting and beneficial change under MK35.

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[3] Source: <http://balanginstitut.org/2015/11/penetapan-perda-p3mha-ammatoa-kajang/>

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