

POLICY PAPER

LEGALITY AND JUSTICE IN THE ESTABLISHMENT OF FOREST ZONES IN INDONESIA



Myrna A. SAFITRI
Nia RAMDHANIATY
Yance ARIZONA
Gemma Ade ABIMANYU
Mumu MUHAJIR
Idham ARSYAD



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Writers:

Myrna A. Safitri

Nia Ramdhaniaty

Yance Arizona

Gemma Ade Abimanyu

Mumu Muhajir

Idham Arsyad

Layout:

Andi Sandhi

Photo:

Mumu Muhajir and Luluk Uliyah

Publisher:

Epistema Institute

Jalan Jati Padang Raya No. 25

Jakarta 12540

Phone: 021-78832167

E-mail: epistema@epistema.or.id

Website: www.epistema.or.id

EXECUTIVE SUMMARY

The Government's target to allocate 12.7 million hectares or about 10.5% of the forest zones for the people will be difficult to achieve if there is not any improvement in the implementation of forest gazettement.

The Indonesian Government has targeted 12.7 million hectares of forest zone (*kawasan hutan*) to be allocated to the people. This target will be difficult to achieve if the gazettement of such forest zones is not implemented properly. This means that resolving communities' land claims is central to forest zone gazettement. Gazettement that consists of forest designation, delineation of boundaries and enactment is an important part of forestry planning. It requires serious attention because it is at

this phase that legal and legitimate forest zones will be achieved.

The Ministry of Environment and Forestry's attempts to ensure that 64% of the forest zones are finally gazetted needs to be recognized. Nevertheless, we also need to consider that in reality, as shown by our case studies in the districts of Lebak and South Barito, forest delineations have not been conducted or if they have, they have not been conducted properly. Communities have only received minimal information

about this program. Thus, the government has to provide sufficient budgets. Data and information on land use contains many errors and is not precise. The Ministry of Environment and Forestry needs to resolve these problems in their revision of Government Regulation No. 44 of 2004 on Forestry Planning. In addition to this, the Ministry also needs to consider settling land claims properly as a prerequisite for implementing the justice project of giving 10% of forest zones to the people.





INTRODUCTION

One of the important goals in President Joko Widodo's development policies is the increased allocation of forests to the people. The National Mid-Term Development Plan (*Rencana Pembangunan Jangka Menengah Nasional*, RPJMN) has targeted 12.7 million hectares of forest for this policy. This policy includes customary forests (*hutan adat*), state forest utilization permits for local communities, and partnerships in forest use between corporations and the people. With a forest land area of 120.7 million hectares, this forest for the people plan consists of 10.5% of the total of forest zones. This plan is much less than the initial RPJMN allocation of 40 million hectares. Nevertheless, this policy indicates significant change, given that in the previous period (2009-2014), the Ministry of Forestry (MoF), which is now the Ministry of Environment and Forestry (MoEF), only dared to target 2.5 million hectares. This target alone was not even achieved by the end of President Susilo Bambang Yudhoyono's administration.

We should appreciate the 'forest for the people' plan as the Government, undoubtedly, attempts to deliver justice in its forestry development. However, if we see the process of upholding justice as a continuum, then this policy only falls in the middle somewhere. Initially, the issue is how to ensure that the present forest zones where the forests for the people plan will be implemented are established in a process that respects and protects peoples' land rights. Then, later, there needs to be strong efforts to empower and protect these rights from any other threats, including those that could arise due to government changes to land use policy.

Indonesian forest zones are established through a series of activities in forestry planning known as forest gazettement (*pengukuhan kawasan hutan*). Gazettement generally starts with the designation of forest zones (*penunjukan kawasan hutan*) on paper. This, then needs to be verified through a forest

delineation (*penataan batas*) process to achieve empirical forest boundaries. In the delineation process, governments negotiate with land claimants, whether they agree or not to include their land in the forest zone. Then, the process continues by mapping the agreed boundaries. Finally, the administrative decision from the Forestry Minister is issued to declare the final status of the forest zone (enactment of the forest zones - *penetapan kawasan hutan*).

From the abovementioned process, we can see that forest gazettement is essential in assuring the legitimacy of forest zones. It is in this process that communities' land rights are protected. This study focuses on forest gazettement because an array of land tenure conflicts that have spread into Indonesian forest zones generally arise due to unsatisfactory settlement of people's land claims. In addition to this, there is the issue of governance in the gazettement process as transparency and public participation are still lacking. Up until 2009, for example, forest gazettement at the Ministry of Forestry was extremely low. Only 11.29% of all of the designated forest zones were successfully gazetted. We need to recognize that major changes occurred in 2014 when the Ministry successfully finalized the gazettement of 64% of forest zones. However, the extent to which the Ministry is able to resolve communities' land claims is still doubtful.

Regulations related to forest gazettement have not been able to provide legal certainty and fairness in upholding and protecting communities' land rights (Safitri and Nagara, 2015). The implementation of forest gazettement in Lebak, Banten and South Barito in Central Kalimantan confirmed this finding. Although the designation of forest zones and the delineation of forest boundaries have been conducted, people do not fully agree because their claims to land that is now in forest zones have not been resolved properly. There are still legal issues that are unclear in this regard. There are also coordination

issues between different levels of government. Similarly, there is political intervention that is unavoidable. Ultimately, the lack of a socially appropriate approach has become the greatest problem in implementing good governance in forest gazettement.

In response to the aforesaid problems, we have composed this policy paper into four sections. After this introduction, we briefly outline regulations on forest gazettement. In the third section, we describe some of the main findings of our research in Lebak and South Barito districts associated with establishing forest boundaries. In the final section, a number of policy recommendations are presented.

THE ESTABLISHMENT OF FOREST IN LEGAL AND ADMINISTRATIVE TERMS

The gazettement of forest zones is the Government's attempt to 'form' forests. We underline the word 'form' here because forest zones do not merely refer to an ecological landscape of 'forest', but rather the areas that have been planned by the Government to become 'forests'. Thus, the Government of Indonesia now states that forest zones include 'terrestrial forests' and marine conservation areas. Law 41/1999 on Forestry states that forest zones are areas that are enacted by the Government as permanent forests. The whole process to establish these zones is called forest gazettement.

The gazettement of Indonesia's forest zones goes back to the policies of the Dutch colonial government. At the end of the 19th century and the early 20th century, the Dutch had started gazettement in the Netherlands East Indiës, particularly in Java, Madura and several places in Sumatra Island. Forest management at the time adopted the paradigm of science, policies and modern industrial practices known as 'scientific forestry'. This scientific school of thought reduced the concept of forest to that of natural resources, or more precisely timber stocks that should be utilized maximally. Creating forest boundaries, separating forests from the life of local communities and the rural economy have become the easiest way for the state to control forests (Lang and Pye, 2001). As such, territoriality policy is significant in this regard by allowing political state power to be

applied in establishing forests (Peluso and Vandergeest, 2001). Moreover, regulations are the instrument for legalizing this policy and the administrative decisions of forestry officials mean that this policy has concrete and individual impacts on the people. Thus, forest zones then become areas that are politically and administratively constructed (Safitri, 2010).

As stated in the introduction, forest gazettement is conducted through the designation, delineation and enactment phases. The following subjects will discuss each stage by referring to the Government Regulation on Forestry Planning (Regulation Number 44 of 2004 which is currently under revision), Ministerial Regulation No. P. 44/Menhut-II/2012 as amended by Regulation No. P.62/Menhut-II/2013 on Forest Zone Gazettement and the Minister of Forestry Regulation No. P. 25/Menhut-II/2014 on the Forest Delineation Committee.

The designation of forest is the first step for the Ministry of Forestry in planning forest zones. Forest zones can be designated partially in certain areas or in an entire area of a province. The designated forest zones should be consistent with the Provincial Spatial Plan (RTRWP). Changes to forest zones are made through revisions to the RTRWP.

The legal status of designated forest zones is basically as indicative forests. Nevertheless, for the sake of administrative validity, these indicative forest areas are legalized by a Minister of Forestry's decree, and the boundaries are declared in a large-scale map of at least 1: 250 000.

In the introduction, we mentioned that up until 2009, the majority of Indonesia's forest consisted of indicative forest zones that were secured through the designation process. The Ministry of Forestry acknowledged that during that year, gazettement of forests only reached 11.29%. This means that 88.71% of forest zone boundaries had not been verified in the field. Certainly, this is very ironic considering that gazettement has been going on for some time and in some places it was even initiated in the colonial period.

One of the causes of this poor result is that forest delineation were not resolved properly. Designation of forest zones should be followed up with delineation of boundaries where people's land claims are resolved. The fact is this has not taken place and many forest zone boundary delineations have not been resolved or have been done so forcefully despite many objections from communities. Two cases that will be presented in this paper clearly show how the boundary delineation process was conducted and how communities responded to it.

Forest delineation is performed in two ways. The first method is to demarcate the borders of forest and non-forest land, known as outer forest boundaries (*batas luar*). The second way is to delineate the boundaries between different forest functions, also known as the borders of forest functions (*batas fungsi*). Examples of borders of forest functions include the boundaries between production forests and protected forests or boundaries between protected forests and conservation forests.

Boundary delineation also encompasses two phases. The first phase starts with mapping temporary boundaries. This is followed up by placing temporary boundary markers in the field and notifying the communities nearby. Following, communities land claims are inventoried, identified and settled. The outcomes of verbal claim negotiations and approval of the temporary forest boundaries are written up and signed. The second phase then continues by delineating permanent boundaries that are agreed by all land claimants. Subsequently, the Government places permanent boundary markers and then maps the boundaries. Claimants' verbal agreement to permanent boundaries and the boundary maps is then written up and signed. Only after that is the whole process of delineation reported to the Minister of Forestry to be legalized in a ministerial decree on forest zone delineation.

To implement the delineation of boundaries, the Forestry Minister has appointed a team known as the PTB committee. According to Ministerial Regulation P. 25/Menhut-II/2014, the task of this committee is to assess and establish forest boundary plans, identify and inventory the land rights of communities nearby the boundaries, and endorse the maps of planned and permanent boundaries. Presently, the PTB is chaired by the Head of Forest Zone Stabilization Unit (*Balai Pemantapan Kawasan Hutan*, BPKH). The BPKH is a Ministry of Forestry working unit at the province level. Previously, the heads of districts (*Bupati*) chaired the PTB.

The most important step in gazettement is forest delineation. This is where the handling of land tenure claims takes place. Ministerial Regulation P. 44/Menhut-II/2012 amended by Regulation P. 62/Menhut-II/2013 considers that land claims are settled by releasing the land that is being claimed from the forest zone. This simply reflects the view of the Ministry of Forestry that forest zones are identical to state forests. Thus, this does not allow for the existence of customary rights or any other land rights in forests. This

should not be the case because Law 41 of 1999 as corrected by the Constitutional Court Ruling No. 35/2012 does not state that forest zones are state forests. Forest zones consist of state forest land and titled forests. We can find customary forests (*hutan adat*) and other private individual/legal entity titled land in titled forests. Thus, settlement of land tenure claims in forest delineation essentially aim to clarify the borders of state and titled forests, in addition to determining the boundaries of forest and non forest zones.

Unfortunately, such an understanding is not yet widely accepted by forestry officials, especially those in charge of forest delineation. If only these officials did not insist that forest zones must be state forests, then forest boundary disputes would be easier to resolve. Communities would also have fewer objections to forest zones as they would be assured that their land rights would not be disregarded.

Once forest delineation is completed, the next stage is the enactment of forest zones. This marks the end of the entire forest gazettement process. Since February 21, 2012, Indonesia's forestry law has ensured that forest zones in legal terms are the zones that have been enacted. This relates to Constitutional Court Ruling 45/2011, which corrects one of the provisions in Article 1 number 3 in Law No. 41 Year 1999 concerning the definition of forest zones. Previously, this Article stipulated that forest zones were certain areas that are designated and/or enacted by the Government to be maintained as permanent forests. For many stakeholders, this definition created legal uncertainty because making forest zones in the designation phase is also legally binding. In fact, existing regulations state that forest zone designation can only create indicative forests, not final forest zones. Therefore, Constitutional Court Ruling 45 proclaimed that the definition of forest zones that covers designated zones was unconstitutional because it violated the rights of citizens to utilize their land in forest zones.

The Constitutional Court Ruling 45 echoed the public pressure for the Ministry of Forestry to immediately resolve the enactment of forest zones. In mid-August 2014, for the first time, the Ministry announced its remarkable achievement in forest enactment, as 69.7 million hectares of forest zone had been enacted. This consisted of around 57% of all forest zones. This number then grew impressively, when in October 2014, for instance, it reached 64%. The Government then made a target to complete all gazettements in 2015.

Now, the establishment of forests has been legally and administratively secured. Countless ministerial decrees have been granted to legalize the status of enacted forest zones, but the extent to which these decrees ensure legitimate forests is quite another matter. We argue that legitimacy will be achieved through fair and open processes, that respect all land rights where data and information is provided in a transparent manner. In the following section we can see how this process has occurred.

FOREST DELINEATION IN LEBAK AND SOUTH BARITO

As it has been stated repeatedly in previous sections, establishing forest boundaries properly will support the respect of all land rights holders to forest zones. This section will outline two examples of how the designation of forest zones and forest delineation were actually conducted in Lebak district in Banten province and South Barito in Central Kalimantan.

REDELINEATING FOREST ZONES IN THE NATIONAL PARK OF MOUNT HALIMUN-SALAK IN LEBAK

Banten province covers an area of 201,787 hectares of forest zone. In 2014, the Ministry of Forestry announced that only half of this vast area had been gazetted. Gazettement was only finalized in the districts of Serang and Pandeglang, meanwhile in Lebak, where we conducted our studies forest delineation had not been conducted.

Approximately 31.93% of Lebak district is forest zone. The forest is part of the Halimun Mountain ecosystem, which is spread over three districts namely Bogor, Sukabumi in West Java and Lebak district in Banten province. In the 1920s, the Dutch colonial government designated Halimun Mountain as protected forest. The Government of Indonesia then changed its function to become partly conservation forest (nature reserves and national parks) and the remaining areas became protection and production forests (see chart 1).

In 2003, the Ministry of Forestry expanded the area of the Halimun Mountain National Park by incorporating several regions in the area of Mount Salak. The name also changed to the Halimun-Salak Mountain National Park (TNGHS). As a result of this expansion, the existing forest zone in Lebak district increased, from 16,380 hectares to 42,925.15 hectares. In addition, as many as 44 villages spread over 10 sub-districts were also included within the TNGHS area. This area included an indigenous community known as Kasepuhan Banten Kidul. This community has inhabited the area around Halimun Mountain since the 17th century.

The Ministry of Forestry demarcated the forest for the first time when it was still Mount Halimun National Park. However, since the expansion of the national park, there has been no further re-delineation.

In 2006/2007, the District Government of Lebak established a Delineation Committee (PTB), chaired by the *Bupati*. The committee verified the existing forest boundaries in the designation maps and settled land claims for land that had become part of the TNGHS. Unfortunately, the work of this Committee was not so effective due to limited funding from Central Government and district governments.

Due to the strong pressure from the Kasepuhan Banten Kidul community, in 2011 the Government of Lebak proposed the Minister to revise the TNGHS boundaries. The Minister responded positively by establishing a team to review and verify areas and types of land use and tenure in TNGHS. The team, known as the Integrated Team (*Tim Terpadu*) delivered the following recommendations:



- a. The Government needs to change the composition of forest functions as follows: the National Park is around 68,590 hectares, Protection Forest is approximately 20,180 hectares, Limited Production Forest is 12,128 hectares, and Permanent Production Forest is 4,405 hectares;
- b. To release residential areas and agricultural land that had existed in the forest zone prior to 2003 or the time of the expansion of TNGHS;
- c. The Government needs to re-delineate the boundaries of TNGHS based on the assessment of the Integrated Team.

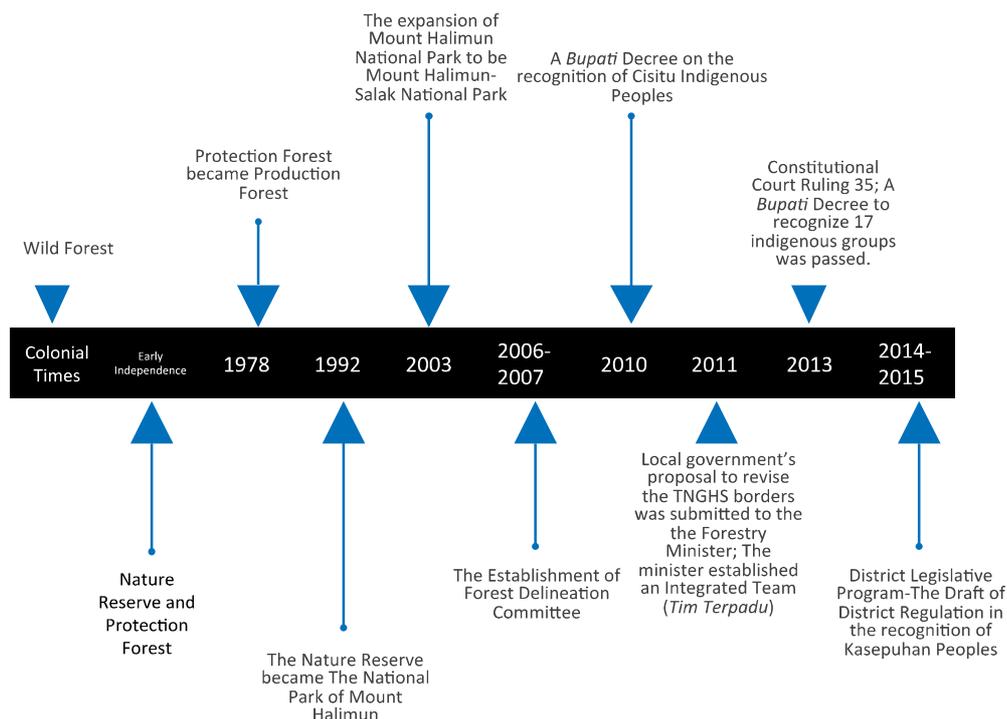
These recommendations could resolve the conflict between the Kasepuhan community and the Ministry of Forestry. Unfortunately, the Ministry of Forestry has not followed up on these recommendations. Strong insistence of conservationist groups that joined a consortium of NGOs and academics called Gedepahala for the re-delineation of TNGHS was one of the Minister's considerations for disregarding the Team's recommendations. This consortium argued that TNGHS was vital for conservation purposes on Java. With the support from a high level official in Susilo Bambang Yudhoyono's cabinet, Gedepahala advised the Minister of Forestry to maintain the TNGHS borders that were established in 2003.

Politics and conservation interests are a major constraint in the re-delineation of TNGHS. In fact, without this delineation, the traditional rights of the Kasepuhan community have been neglected. The Kasepuhan community have lost their rights for approximately 90 years due to the establishment of forest zones by various government regimes. This defeat became more severe when the National Park authorities restricted their access to forest use.

The Constitutional Court Ruling 35 that recognises customary forest as non state forest has brought new hope to the Kasepuhan community. One group from this community was an applicant in this Constitutional Court case. To further strengthen their claim to their customary areas within the National Park, the Banten Kidul community sought recognition of their customary areas from the district government (see chart 1). As stated by the Forestry Law, the recognition of customary forest can be approved provided the indigenous community has been recognized by a district regulation. Therefore, the current strategy of the Kasepuhan community is to obtain such recognition.

Previously, the *Bupati* of Lebak had issued a decree to recognise the Kasepuhan community. Nevertheless, the Ministry of Forestry rejected this decree because it was not in the form of a local regulation as required under Law 41/1999. In addition

Chart 1
Changes of of Forest Functions in TNGHS
and district government policies to recognize the indigenous peoples



to this, the decree did not include an ancestral territory map. Since 2014, the Kasepuhan of Banten Kidul with the support of a number of NGOs¹ has intensively encouraged the District Parliament to issue a district regulation for recognizing the Kasepuhan community and their ancestral territory.

Efforts that are underway at the district level, on the one hand, can encourage conflict resolution in TNGHS, however, on the other hand, the Government of Lebak remains doubtful that local regulations will be applicable to the National Park. At this point, the MoEF needs to support the legislative process at the district level. The important thing is to re-delineate the TNGHS boundaries in collaboration with the Kasepuhan and other communities. If this can be done in parallel with the legislative process, efforts to have legitimate forest areas will easily be accomplished.

INCOMPLETE FOREST DELINEATION IN SOUTH BARITO

Forest zones in South Barito in Central Kalimantan cover an area of 541,431 hectares. Most of these zones are still designated forests. In 2012, South Barito district became a government pilot project for accelerating forest gazettement. One of these pilot locations was the Barito and Kapuas Rivers' Protection Forest. This region covers three districts and several villages. In 2013, the Ministry of Forestry delineated area boundaries along 73,837 kilometers of this region (see chart 2).

When the temporary forest boundary markers were placed in the ground, most of the community refused to accept them. This was because the boundary markers were placed on the land of their houses, rice fields and gardens. Initially, only three villages refused that their land would be included in the forest zone, but when it came to signing the agreement on the boundary delineation, the number jumped up to eleven villages.

Our study found that the process to demarcate the boundaries was not preceded with adequate socialization. Aside from that, the approach of the field officers establishing the boundaries was contrary to the objective of the forest delineation. Instead of

settling land claims, these officers tried to persuade the people to accept the social forestry policy. This meant that the people would agree to their land becoming state forest where they could only access and use the forest land with various licenses. This shows just how distorted the information was. Social forestry is supposedly an empowerment program for communities to access state forest. Meanwhile, the real issue that needs be resolved is the verification and settlement of land rights claims. Only when there is no proof of a community claim, then the community is offered the option of utilizing the forest through community forestry permits.

For some forestry officials, the communities' refusal to sign the agreement on forest delineation indicated the failure of the forest gazettement project. However, for others, what happened in South Barito opened up a Pandora's box, as the community had the courage to express themselves. Rather than just meeting targets, the communities asked the Government to uphold their land rights in forest delineation.

The rejection of the community as shown in this case study could have been avoided if adequate information had been provided to the communities to inform them of the various consequences pertaining to the enactment of forest zones. Unfortunately, this was not part of the forest delineation process in South Barito. Furthermore, the process was conducted with insufficient and inaccurate data. It was further compounded by the limited budget available for claim verifications in the field and lack of dialogue with the communities.

The South Barito case provided a lesson that forest delineation is not just about the technical issue of mapping but is also a social and legal process. It requires a lot of dialogue that is based on accurate data and information, where agreements are not forced on the people. In other words, implementing the principle of free, prior and informed consent is important.

Finally, establishment of the forest boundaries in South Barito was discontinued. Interestingly, in October 2013, the agreement to the outer forest boundaries in Barito River Forest was signed and included the objections of the communities.

¹ The group that supports the Kasepuhan is Rimbawan Muda Indonesia (RMI) that has been working together with other NGOs such as Jaringan Kerja Pemetaan Partisipatif (JKPP) and AMAN to help in community mapping and with Epistema Institute and HuMa for legal advice in drafting district regulation.

Chart 2

Forest Delineation Process in Sungai Barito and Sungai Kapuas Protection Forests



CONCLUSION AND RECOMMENDATIONS

Forest gazettement, which has been conducted since the colonial period showed significant progress in 2014. It must be acknowledged that the MoEF has been working hard to strengthen the legality of forest zones by finalizing forest gazettement. However, once legality is attained, it does not mean that legitimacy and justice will follow. The extent to which forest delineation, an important part of gazettement, can settle all land claims properly is subject to further investigation. The two cases that we used in this paper have clarified that the establishment of forest boundaries is not yet perfect. In fact, identification, verification and resolution of land claims should be happening in this phase.

The greatest challenge of the MoEF now is to convince people of the legitimacy of the forest zones. The justice project of giving 10% of forests to the people will be difficult to achieve given that people do not believe that their rights will be recognized and protected. Improving regulations and forest

governance including forestry planning reform is an important priority. Nevertheless, we also recommend the MoEF to consider the following matters:

- a. Review forest delineation processes and the results. This review will strengthen the legitimacy of forest zones.
- b. The review referred to in point a) will be easily carried out through the implementation of a land claims settlement program in forest zones as stipulated in the Joint Regulation of Minister of Home Affairs, Minister of Forestry, Minister of Public Works and the Head of National Land Agency that was issued on October 17, 2014. Operational and technical direction on this Regulation needs to incorporate an implementation plan for handling land claims at the provincial level for the next five years. Priorities need to be implemented in the forest zones where there are many conflicts. Data on community complaints regarding forestry conflicts at the MoEF should be a starting point for identifying these prioritized locations. To begin with, inventorying should be conducted to identify the form and number of community claims to forest zones. The MoEF and the Ministry of Agrarian and Spatial Planning Affairs/National Land Agency in consultation with indigenous peoples' organizations and NGOs, must jointly produce a technical manual for this inventory.

- c. Annul the provision in Ministry of Forestry Regulation 62/2013 that excludes customary land claims in forest zones. Whether those customary or individual land rights are released or not from forest zones must be based on an assessment of present land use. If the land has already been used for non-forestry purposes such as housing, then that land can be released from the forest zone. However, if the land is being utilized for forestry purposes such as agroforestry, the land can remain as a forest zone with the status of customary or titled forest. Only with this provision can the Regulation on Forest Zone Gazettement be in line with the Constitutional Court Ruling 35.
- d. Revision of GR 44 of 2004 on Forestry Planning needs to govern a mechanism for disseminating information on forest zone gazettelement and procedures for obtaining consent from communities. In addition to this, it is mandatory that forest delineation is conducted on the basis of comprehensive data on land tenure and land use.
- e. Social forestry programs for non-indigenous communities should only be carried out on state



forest land where all land tenure claims have been resolved. Customary forests are to be implemented in indigenous territories, which have been mapped by the indigenous people and endorsed by the district government.

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Epistema Institute

Jalan Jati Padang Raya No. 25

Jakarta 12540, Indonesia

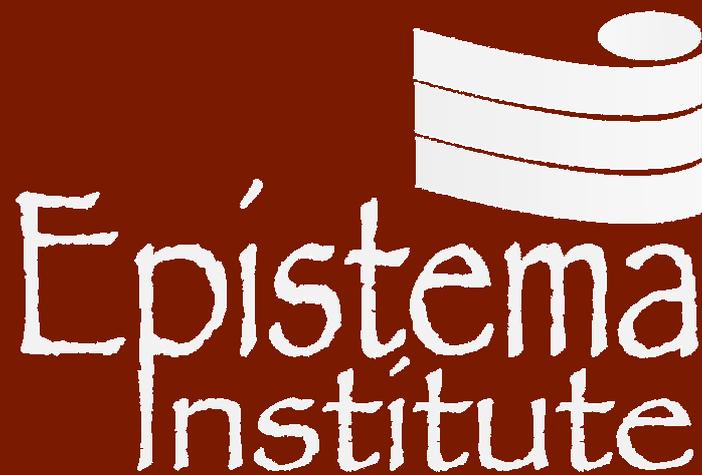
Phone: +622177832167;

Fax: +622178830500

Email: epistema@epistema.or.id

Website: www.epistema.or.id





Contact:

Jalan Jati Padang Raya No. 25
Jakarta 12540

Phone : +62 21 7883 2167

Fax : +62 21 7883 0500

Email : epistema@epistema.or.id

Website : www.epistema.or.id

Facebook : Epistema Inst

Twitter : @yayasanepistema