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## Unravel Persistent Land Tenure Insecurity Behind Indonesia's Palm Oil Industry: Study case Kinipan Indigenous Community in Central Kalimantan.

Widya Naseva Tuslian

Leiden University, [widya.naseva.tuslian@umail.leidenuniveristy.nl](mailto:widya.naseva.tuslian@umail.leidenuniveristy.nl)

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# UNRAVEL PERSISTENT LAND TENURE INSECURITY BEHIND INDONESIA'S PALM OIL INDUSTRY: STUDY CASE OF KINIPAN INDIGENOUS COMMUNITY IN CENTRAL KALIMANTAN.

Widya Tuslian\*

\* Leiden University, the Netherlands

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Corresponding author's e mail : widya.naseva.tuslian@umail.leidenuniveristy.nl

## Abstract

*This paper argues that legal pluralism within the context of state law contributes to tenure insecurity experienced by indigenous communities behind the palm oil industry in Indonesia. It put forward that the law-making process that primarily holds up economic rationality and favors large palm oil corporations result in various contradicted legal products that are harmful to the acknowledgment of the indigenous community's existence and their land rights. Taking the Kinipan Indigenous group in Central Kalimantan as a case study, this paper primarily discusses the general pattern of tenure insecurity experienced by the Indigenous community in Indonesia in facing the large-scale palm oil corporations.*

**Keywords:** indigenous community, legal pluralism, tenure insecurity

## Abstrak

*Tulisan ini mengajukan pendapat bahwa pluralisme hukum dalam konteks hukum negara berkontribusi terhadap kerawanan tenurial yang dialami masyarakat adat dibalik industri kelapa sawit di Indonesia. Tulisan ini mengemukakan bahwa proses pembuatan hukum yang hanya mengutamakan rasionalitas ekonomi dan memiliki kecenderungan mengutamakan kepentingan korporasi kelapa sawit besar menghasilkan berbagai produk hukum yang saling bertentangan dan berbahaya terhadap pengakuan keberadaan dan hak-hak masyarakat adat di Indonesia. Dengan mengambil masyarakat adat Kinipan di Kalimantan Tengah sebagai studi kasus, tulisan ini fokus mendiskusikan tentang pola umum kerawanan tenurial yang dialami masyarakat adat di Indonesia dalam menghadapi korporasi kelapa sawit berskala besar.*

**Kata kunci:** masyarakat adat, pluralisme hukum, kerawanan tenurial

## I. INTRODUCTION

The palm oil sector plays a significant role in Indonesia's economy. For Indonesia, the Palm oil industry is one of the most lucrative sectors, as palm oil is its most agricultural export commodity.<sup>1</sup> Apart from that, Indonesia is the largest palm oil supplier in the world. <sup>2</sup>Indonesia supplies more than half of the total world demand for palm oil<sup>3</sup>. In Indonesia, industrial palm oil plantations cover about 10 million hectares of land, 5% of Indonesia's total land. There are around 700 palm oil plantations across Indonesia, with the majority located in Sumatra and Kalimantan.<sup>4</sup> This makes Indonesia the country with the largest number of palm oil plantations globally. However, on the flip side of this glory, the palm oil industry brings perennial issues in Indonesia, particularly regarding land disputes involving the Indigenous community. According to the National Land Agency, there are about 8,000 documented land disputes in Indonesia, half of which are disputes involving palm oil companies. Violation of small peasants' rights, contravention of Indigenous community's land rights, criminalization of small peasants,<sup>5</sup> or indigenous group members and arbitrary eviction are frequently heard cases that become an open secret in Indonesian palm oil industries. It can be said that in Indonesia, the palm oil industry manifests a trade-off between economic rationalities and the right of vulnerable groups in society.

A case involving a traditional ethnic community in Central Kalimantan *Laman Kinipan* Indigenous Community (*Kinipan* Community) vs. one of the largest palm oil corporations in Kalimantan (The company)<sup>6</sup> is a case in point and reflects the general pattern of a land dispute relating to the oil palm industry in Indonesia. In this case, the company did a land clearing on 1242 hectares of land located in an ancestral land forest of *the Kinipan* community<sup>7</sup>, where 198 households of *Kinipans* live around that area<sup>8</sup>. This situation was exacerbated by the criminalization of the community chiefs who wanted to protect their ancestral land. <sup>9</sup>The company succeeded in attaining permits from the Indonesian Ministry of Forestry (MOEF) and from the regional head of *Lamindau* Regency of Central Kalimantan, where the land is situated, for conducting such harmful operations. These permits become a strong legal backup for their actions, as they can claim that they do the land clearing rightfully and with due process of law.<sup>10</sup>

From the Indonesian land law perspective, the position of the Indigenous community is indeed very tenuous. Two major Indonesian land laws: the Basic

<sup>1</sup> UNDP, Indonesia Palm Oil Country Fact Sheet, (UNDP 2015), p.1

<sup>2</sup> Budidarsono, Suseno, Arie Susanti, and Anelies Zomer. *Oil Palm Plantation in Indonesia: The Implications for Migrations, Settlement/Resettlement, and Local Economic Development* (Utrecht University Repository, 2013).

<sup>3</sup> <https://thepalmscribe.id/facts-about-indonesian-palm-oil/>, accessed on 8 March 2021

<sup>4</sup> UNDP, (N.2), P.1

<sup>5</sup> Lund, *Nine-Tenths of The Law: Enduring Dispossession in Indonesia* (Yale University Press: London, 2021), p. 26.

<sup>6</sup> PT. Sawit Mandiri Lestari (SML)

<sup>7</sup> Apriska Widiangela, "A Legal Analysis on The Problematics of The Laman Kinipan's Indigenous Community Recognition" *Jurnal Hukum Lex Generalis* 2, no. 3 (2021), p. 2.

<sup>8</sup> <http://walhikalteng.org/2020/11/08/kinipan-perjuangkan-hutan-adat-tak-kunjung-dapatkan-pengakuan-negara/>, accessed on 3 March 2021.

<sup>9</sup> <https://elsam.or.id/land-clearing-di-desa-kinipan-ancam-kehidupan-masyarakat-adat/> accessed on 5 March 2021

<sup>10</sup> Press Release Regional Government of Central Kalimantan, <https://mmc.kalteng.go.id/berita/read/30581/press-release-pemprov-kalteng-mengenai-pt-sawit-mandiri-lestari>, accessed on 6 March 2021.

Agrarian Law of 1960, which regulates forest land, and the Basic Forestry Law of 1999, which regulates non-forest land, do not accommodate communal rights in general and indigenous rights in particular. This condition incites endless protests from activists and NGOs concerned about human rights and the indigenous community's rights. For years, legal mobilization has been carried out, one most militant by: the "Indigenous People's Alliance of The Archipelago" (AMAN) demanding constitutional court for an improvement in land regulations concerning the right of indigenous communities. This brought about a positive result: in 2013, the Indonesian Constitutional Court issued a decision 35/PUU-X/2012 revising several articles in the forestry law no 41 of 1999, which reinforced customary forestry's acknowledgment under the forestry law. This legal development, in theory, can widely open a legal avenue for the recognition of Indigenous people's land rights.

Moreover, positive light on recognizing indigenous land rights is backed up by Indonesia's involvement in almost all core human rights treaties<sup>11</sup> and many human-rights-related declarations, including those related to land tenure security and the rights of indigenous people. One instance is the International Covenant on Economic Social and Political Rights (ICESCR), on which Indonesia is the party. The Committee on Economic, Social, and Cultural Rights (CESCR), a treaty-based monitoring body of ICESCR, put forward that article 11 (1) of ICESCR on the right to adequate housing is essential in advocating land tenure security. According to CESCR, tenure security is one of the seven criteria determining an adequate residency.<sup>12</sup> In this sense, CESCR mandates the state parties to guarantee the land tenure security in fulfilling the right of adequate living for its citizens without discrimination. Apart from that, Indonesia is also among 144 countries that vote in favor of the Declaration on the Rights of Indigenous People (UNDRIP), which supports the rights of self-determination of indigenous people to protect their dignity.<sup>13</sup> By participating in those international instruments that advance tenure security and indigenous people's right, fulfilling indigenous people's rights and tenure security are supposed to be Indonesia's main agenda to show its commitment to those international accords.

However, despite the abovementioned legal improvement and Indonesia's adherence to international instruments that mandate the protection of indigenous people's rights, unfortunately, the reality speaks the contrary. In the case of the *Kinipan* community, for instance, those legal progress does not enhance much the rights of the *Kinipan* people to their ancestral forest. Because in fact, the recognition of indigenous land rights relies on the recognition of their existence as a customary legal community. Furthermore, according to the Ministry of Home Affairs regulation, no 52 of 2014 on the Recognition and Protection of Customary Legal Community, the recognition of customary legal community depends on the approval of the head of the region. Therefore, based on that ministerial regulation and the power vested under the regional autonomy law, regional governments have a say in determining the fate of *Kinipan's* rights. Unfortunately, the regent of *Lamindau* regency, where *the Kinipan* community is situated, denies the *Kinipan* community's existence as a customary legal community.<sup>14</sup> For that reason, land clearing and the company's operations on

<sup>11</sup> <https://www.ohchr.org/> accessed 9 March 2021.

<sup>12</sup> Gustaaf Reerink, *Tenure Security of Indonesia's Urban Poor: A Socio-Legal Studies on Land, Decentralization, and the Rule of Law in Bandung* (Leiden University Press: 2011).

<sup>13</sup> Adriaan Bedner, and Stijn van Huis, "The return of the native in Indonesian law: Indigenous communities in Indonesian legislation" *Bijdragen tot de Taal-, Land- en Volkenkunde/Journal of the Humanities and Social Sciences of Southeast Asia and Oceania* 164, no. (2008).

<sup>14</sup> Widiangela, "Laman Kinipan's Indigenous Community Recognition," p 2.

*Kinipan's* ancestral forest continue and are legitimated by two project permits no EK.525.26 SK-IL/VI/2012 and 188.45/479/XI/HUK/2014 by the *Lamindau* regency.

From the above description, a simplistic view might see this situation as a legal inconsistency.<sup>15</sup> In which state's regulations and policies under one jurisdiction can contradict each other.<sup>16</sup> However, this article postulates that this situation is a form of legal pluralism. But instead of adhering to a traditional definition of legal pluralism which is interpreted as a confluence between the state and non-state law.<sup>17</sup> Here, legal pluralism happens within the context of state law. In this context, the regulations concerning the land rights of indigenous communities conflict, and the vested interest can use one or part of the law as their legal justifications for their actions. In this case, on the one hand, there is a legal development (constitutional court rulings) that revised the existing law so that it opens for the recognition of customary community's rights. On the other hand, the MOEF and the local government issued some decrees that legitimize the company to operationalize their business on the land that is claimed owned by the indigenous group. This is an instance that the state laws at different levels in Indonesia contradict each other and result in a different mode of thinking and legal reasoning and has created legal pluralism within state law.

Based on the above discussion, it is interesting to see that legal pluralism within state law can contribute significantly to the deterioration of the indigenous community's tenure security. Therefore, this article will focus on the following research question: how the legal pluralism within the context of state law constitutes persistent tenure insecurity of the indigenous people in the palm oil industry in Indonesia?

This paper will structure as follows: The second part will highlight the Indonesian land rights system to see how is the laws regulate the position of the indigenous community; *subsequently*, it will delve down into the insecurity of tenure held by *the Kinipan* indigenous community; *next*, the fourth part will analyze the reasoning behind the persistent tenure insecurity of indigenous community by putting forward that contradictory legal products create harmful practices and policies that infringe the rights of the indigenous community. *Lastly*, this paper will conclude the discussion and highlight important findings in the previous parts.

## II. INDONESIAN LAND RIGHTS SYSTEM

To begin with, in Indonesia's land system, the land is classified into two categories: non-forest zone and forest zone.<sup>18</sup> Non-Forest zone comprises one-third of the total land in Indonesia and is regulated by the Basic Agrarian Law / the law no 1 of 1960 (BAL), while the forest zone comprises two-thirds of the total land in Indonesia and is regulated by the Basic Forestry Law (BFL) no 41 of 1999.

Non-forest land is regulated by the BAL, and it stipulates four categories of land rights: the full right of ownership, right to cultivate, right to build, and right to use. Those rights are individual rights that can be held only by a person or a legal entity. The non-forest land is under the administration of the National Land Agency (NLA). The BAL was an attempt of the Indonesian government to unify the dualism

<sup>15</sup> Donelson, "Legal Inconsistencies" *Tulsa Law Review* 55 (2019), p. 4.

<sup>16</sup> *Ibid.*

<sup>17</sup> Sally Engle Merry, "Legal Pluralism" *Law and Society Review* 22, no. 5 (1988), p. 870.

<sup>18</sup> Laurens Bakker & Sandra Moniaga, "The Space Between: Land Claims and the Law in Indonesia," *Asian Journal of Social Science* (2010), p. 188

of the land rights in the colonial era, which separated land rights for the Europeans and Foreign Orientals (the Dutch Civil Codes regulated this category) and the land rights for the natives (their own customary/ *adat* rights regulated this category). Fifteen years after the Indonesian independence in 1945, the government succeeded in drafting the first Indonesian Land law. However, instead of documenting the land rights of natives Indonesian, the BAL translated the types of land ownership created by the Dutch colonial government and applied them to all Indonesians. This idea was to terminate segregation between classes and reinforce unity for all Indonesian regardless of ethnicity. The BAL does mention that it recognizes the customary rights so long as it does not contradict the national interest (BAL, 1960, art. 4); however, this national interest can be interpreted broadly. Thus, this stipulation offers no concrete rights for the customary communities.<sup>19</sup> By this fact, we can see that BAL neglects the reality that customary land rights still exist. The consequence is that the customary land rights system that is mostly communal is at odds with this law. This situation causes perennial land conflicts in Indonesia, particularly involving the customary communities who live in the non-forest land.

Meanwhile, Forest Land is regulated by the BFL, and it divides between State Forest (*Hutan Negara*) and Private Forest (*Hutan Hak*). The forest zone is under the administration of the Ministry of Environment and Forestry (MOEF). The BFL stipulated that all the forest land not subject to private entitlement belongs to the states. MOEF can issue concession permits for the state-owned and private corporations that have been zoned for production.<sup>20</sup>

Nevertheless, the area inside and around these forested land often has been home to many indigenous and locals for generations; thus, it sparks many conflicts between indigenous communities and corporations that manage these state forests.<sup>21</sup> The position of customary forests is stipulated under the forestry law and is strengthened by the constitutional court decision 35/PUU-X/2012 in 2013. Before 2013, the forestry law stipulated in Article 1(6) that: a “*customary forest is a state forest located in customary community territory.*” The term ‘state forest’ indicates that the state owns the land occupied by the customary community; therefore, by its very nature, this law does not acknowledge the ownership of indigenous communities to the forest they reside. The constitutional court decision revised this stipulation into: “*customary forest is a forest located in the territory of the customary community,*” thus excluding the customary forest from the state forest. This decision was a breakthrough and a major victory for AMAN, an NGO that focuses on the rights of indigenous people, which is the key actor who filed a judicial review to the constitutional court. This court decision is also revolutionary because, for almost a decade, the forestry law has been used to legitimate dispossession of the *customary forest* as the position of the customary community was weak in the previous provisions. By this court ruling, the legal pathway for the acknowledgment of the indigenous community is wide-open as the government disclaims the forest where the customary community lives. This signifies that the government recognizes the customary forest as belonging to the customary community and makes any dispossession of the customary forest by the government, let alone the private actors, illegitimate.

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<sup>19</sup> Tania Li, “Articulating Indigenous Identity in Indonesia: Resource, Politic, and Tribal Slot,” *Comparative Studies in Society and History* 42 (2000), p. 149.

<sup>20</sup> Mia Siscawati. *Overview of Forest Tenure Reforms in Indonesia* (Center for International Forestry Research (CIFOR), 2017)

<sup>21</sup> *Ibid.*

From the above discussion of Indonesian land law, we can see that the law is problematic for the indigenous community, both for their existence and rights. The Indonesian land law does not favor the Indigenous community and seems to deny their presence by trying to disguise their identity as “Indonesian”. Although to some extent, it looks like the Indonesian government tries to create unity for all Indonesian and promote inclusivity, in reality, this situation constructs the indigenous community as ‘other’.<sup>22</sup> Thus excluding their existence and further discriminating against their rights. As a result, Indonesian land laws (both BAL and BFL) disregard the presence of the indigenous community. Indeed, there is a progressive development shown by the constitutional court ruling in recognizing customary forest. However, whether it improves the position of the customary community, in reality, particularly the *Kinipan* community in our case study, we will discuss in the next part.

### III. TENURE INSECURITY EXPERIENCED BY KINIPAN INDIGENOUS COMMUNITY.

The last part shows that Indonesian land law does not adequately accommodate indigenous rights to non-forest or forest land. However, as also described in the previous part, there was at least a development that, in theory, opened a way for indigenous land rights’ recognition. Through a case study of *Kinipan* Indigenous Community vs. The company, this part will analyze whether the recent legal improvement affects the betterment of the customary community’s land rights significantly. But beforehand, it is important to shed light on the definition of ‘tenure security and ‘tenure insecurity’ to put these terms into context.

#### A. Tenure Security and Tenure Insecurity

The term ‘tenure’ is derived from the Latin word that means ‘holding’; in the context of land law, tenure security can be defined as holding the land with certain rights and obligations.<sup>23</sup> From the government’s perspective, a rightful land tenure shall be manifested through the state’s law which prescribes certain rights and obligations for holding a plot of land.<sup>24</sup> However, in many situations, a legitimate tenure from the government’s point of view can be different from a legitimate tenure from the society’s point of view. As society may interpret, a legitimate tenure should conform to the custom of society.

Generally, tenure security can be described as a condition in which someone can use the land with certainty for a certain period and under certain circumstances without unreasonable intrusion.<sup>25</sup> Needless to say, a secure tenure should be free from potential conflict moreover conflict. It is common in the literature that security of tenure is divided into three categories: legal, de facto, and perceived tenure security.<sup>26</sup> Legal tenure security defines legal protection that the state gives to the

<sup>22</sup> Christopher Baker-Beal, “The Evolution of The European Union’s ‘Fights Against Terrorism’ Discourse: Constructing The Terrorist As Other,” *Cooperation and Conflict* 49, no. 2, (2014), p. 214.

<sup>23</sup> Henri Dekker, *The Invisible Land: Land Reform, Land Tenure Security, and Land Registration*, (Routledge: 2003), P.43.

<sup>24</sup> UN-HABITAT, *Land Tenure Security in Selected Countries: Securing Rights and Property for All: Synthesis Report* (UN-HABITAT: 2014)

<sup>25</sup> Kent ELBOW, USAID, *Land Tenure Issues and Best Practice Workshop*, (USAID:2014)

<sup>26</sup> Gustaaf Reerink, *Tenure Security for Indonesia’s Urban Poor: A Socio-Legal Study on Land, Decentralization, and The Decentralization in Bandung* (Leiden University Press: 2011); Bernardo Almeida, *Building*



landholders; de Facto tenure security is a factually secure condition from involuntary removal regardless of tenure arrangement. The perceived tenure security is a secure feeling perceived by the landholder that their tenure arrangement is secure.<sup>27</sup>

Meanwhile, tenure insecurity can be realized in many ways, but forced eviction is the most severe realization of tenure insecurity.<sup>28</sup> And, to a certain extent, any tenure system comes up with insecurity. However, several aspects such as legal pluralism, poor land documentation, and overlapping rights or claims can worsen tenure insecurity even more.<sup>29</sup>

## B. Case study: Kinipan Insecurity of Tenure

To understand the context of tenure insecurity experienced by the *Kinipan* community, we need to observe the following case study: Since 2012, *the Kinipan* community has constantly rejected the opening of a Palm oil project situated in their ancestral land in Central Kalimantan by the company. *Kinipan* community lives around that forest area and has relied upon their living resources from their ancestral forest for many generations by farming rice, tubers, durian, rubber, stinky beans, medicinal herbs, and rattan.<sup>30</sup> The Agency for the Registration of Indigenous Territories (BRWA)<sup>31</sup> Affirms through indigenous territory certificate that the land on the company's project is the territory of *the Kinipan* community. However, the company argues that their project is legitimate because they have attained permits from the Ministry of Environment Forestry (MOEF) and the local government to release 19.091 hectares of state forest in central Kalimantan. These permits are formulated through the decree of MOEF in 2015 no 1/I/PKH/PNBN/2015 for 'land release permit' and the decrees of *Lamindau Regent* in 2012 no EK.525.26 SK-IL/VI/2012 and in 2014 no 188.45/479/XI/HUK/2014 for 'environmental feasibility permit'. As a result, the company conducted the project expansion in 1.242 hectares of *Kinipan* Community's ancestral forest.<sup>32</sup> Moreover, in 2017, The National Land Agency (NLA) issued a decree 82/HGU/KEM-ATR/BPN/2017 to give a 'right to cultivate.'<sup>33</sup> for the company. It culminated in 2018 when the company was bulldozing a large scale of their forest. The *Kinipan* community did not dare to confront this activity because the company mobilized the police and armed forces to protect this activity. The only attempt that the *Kinipan* community could make is guarding the leftover forest. In 2020, six *Kinipan* people, including its chief, Effendi Buying, were guarding their leftover forest. They heard sounds of machines and chainsaws, and they were worried that the company would continue to cut down their forest; therefore, they confiscated the

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*Land Tenure System: The Political, Legal, and Institutional Struggles of Timor Leste* (Leiden University Press: 2020), p. 22.

<sup>27</sup> *Ibid.*

<sup>28</sup> UN-HABITAT

<sup>29</sup> *Ibid.*

<sup>30</sup> Widiangela, "Laman Kinipan's Indigenous Community Recognition," p. 18.

<sup>31</sup> *Badan Registrasi Wilayah Adat (BRWA)* is a non-governmental agency legalized through the decree of the ministry of human rights no. AHU-0007773.AH.01.04. This foundation was founded in 2010 and aimed to map out and provide registration to the indigenous territory. It is important to note that the Indonesian government does not have documented data on indigenous community and their territories. <https://www.brwa.orid/pages/about>. Accessed on 7 March 2021.

<sup>32</sup> Achmadi, *Budaya Hukum Penyelesaian Konflik Hak Atas Tanah Adat: Studi Dalam Masyarakat Dayak Tomun Berbasis Kearifan Lokal*, Universitas Muhammadiyah Surakarta Postgraduate Dissertation (Surakarta: Universitas Muhammadiyah Surakarta, 2020), p. 51.

<sup>33</sup> *Hak Guna Usaha*



chainsaw. Unfortunately, this attempt ended up with all six *Kinipan* people arrested by the police on 6 August 2020<sup>34</sup>; although all the six people were released a day after their arrest, as they could be cooperative, it was still persecution and intimidation toward indigenous people. Apart from affecting their residency, their source of living, and causing a criminalization, the company's project on *Kinipan's* ancestral forest also affects their overall wellbeing. The project has caused massive flooding due to deforestation since 2018; according to the chief of *Kinipan*, this flooding had never happened before the project was initiated.<sup>35</sup>

From the case study above, we can see that *Kinipan's* community experiences grave tenure insecurity. And from the three sub-concepts of tenure security discussed previously: legal, de facto, and perceived tenure security, it is clear that the situation underwent by the *Kinipan* community does not fulfill any definition of those sub-concepts. In terms of legal tenure security, the *Kinipan* does not have a legal legitimation from the state for the land they claim as their ancestral land, that is why from a statutory law perspective, their occupancy can be seen as an illegal occupancy, and any attempt by *Kinipan* community to protect 'their land' can be equated as a criminal act for trespassing the land they do not legally own. In terms of de facto tenure security, the *Kinipans* noticeably do not have this kind of tenure security because, factually, they cannot preserve 'their ancestral land' from involuntary dispossession. While in terms of perceived tenure security the *Kinipans* do not perceive this type of security from the present situation, it can be expected that they do not feel secure about the tenure arrangement and the factual situation concerning their 'ancestral land'.

Therefore, it is clear that the court ruling which is supposed to improve the right to land of indigenous communities as discussed in the previous part does not help the condition of the *Kinipan* community anyway. We can see despite the court ruling no 35/PUU-X/2012 in 2013 should be a legal path to ameliorate the right of the indigenous community to their land, however in reality, the implementing policies issued by the authorities, such as MOEF's decree in 2014 for releasing the land; *Lamindau Regent's* decree in 2014 for environmental feasibility; and NLA's decrees in 2017 in granting 'right to cultivate' for The company, which clearly in conflict with the court ruling, were still issued and brings detrimental effect to the indigenous community's tenure security. This case study shows that legal disharmony incurs tenure security, particularly for the vulnerable group in a society like the indigenous group. But, does this phenomenon only reflect legal disharmony? And how do the inconsistencies constitute tenure insecurity to the indigenous people? We will delve down these questions in the next part.

#### **IV. UNRAVEL PERSISTENT LAND TENURE INSECURITY BEHIND THE PALM OIL INDUSTRY.**

From the previous part, we have seen that one significant cause of tenure insecurity of the indigenous community in Indonesia is disharmonious law and policies. On the one hand, the law was revised, so on the paper, the Indigenous community can have a legal right over the forest area in which they reside, on the other hand, the policies enacted after that constitutional court ruling seem to contradict and prevent the realization of indigenous people rights over their land. As discussed in the introduction,

<sup>34</sup> Widiangela, "Laman *Kinipan's* Indigenous Community Recognition,"

<sup>35</sup> *Ibid.*, 4.

instead of viewing this as merely a legal inconsistency, this paper wants to see this situation as legal pluralism. And this paper argues that in this situation, legal pluralism plays an important role in creating tenure insecurity for the indigenous community, particularly in facing palm oil corporations. However, it is important to note that this paper does not want to predetermine the legal pluralism as an innate culprit; instead, this paper only wants to see legal pluralism as a neutral omnipresent phenomenon in any society that can be a contributing factor to the betterment or deterioration of any situation. In discussing that premise, this part will discuss why the situation in the case study can be defined as legal pluralism and how legal pluralism in the context of state law causes tenure insecurity for indigenous communities in facing the palm oil industry.

### A. How is this 'legal pluralism'?

To understand how this case is legal pluralism, we need to know the definition of legal pluralism. In general, legal pluralism happens when there is more than one legal order in the same social field.<sup>36</sup> Commonly, the term legal pluralism is used to define the presence of the state and non-state law in one jurisdiction.<sup>37</sup> However, this proposition can imply that the state law should be united and harmonious (to be seen as one legal order) and juxtaposed with another legal order. But, if the state law in itself comprises a different set of rules and policies that overlapped and contradict each other, creating different legal justifications for conflicted actions, it seems that there is more than one legal order even within the context of state law. Therefore, it is interesting to see that this phenomenon shows legal pluralism in the context of state law.

One renowned feature of legal pluralism is the 'Semi-Autonomous Social Field' (SASF).<sup>38</sup> Falk-Moore defines SASF as:

*"..the small field in terms of its semi-autonomy---the fact that it can generate rules and customs and symbol internally, but that it is also vulnerable to the rules and decisions and other forces emanating from the larger world by which it is surrounded."*<sup>39</sup>

We can see in our case study that the operation of the palm oil company on the ancestral land of *Kinipan's* community seems to form SASF. The company's operationalization is claimed to be lawfully conducted by the permits issued by the MOEF and *Lamindau* regent. These permits create internal (and external) symbolism as if the company is running a legitimate operation. But this SASF is also 'vulnerable' to the 'larger world by which it is surrounded' because there is a revised law that affirms the customary community can claim their right in their customary land, and the land in their project is claimed by the *Kinipan* community as their ancestral forest, as the *Kinipans* have lived in and around that area for generations.

By seeing the definition of legal pluralism and the semi-autonomous social field above, their characteristics are clearly-demonstrated in our case study; that is how the phenomenon in this study can be categorized as legal pluralism within the context

<sup>36</sup> John Griffith, "What is Legal Pluralism," *Journal of Legal Pluralism and Unofficial Law* (1986), p. 1.

<sup>37</sup> Gordon Woodman, *Ideological Combat and Social Observation: Recent Debate about Legal Pluralism*, (Woodman, 1998), p. 34.

<sup>38</sup> Sally Falk Moore, *Law and Social Change: The Semi-Autonomous Social Field as An Appropriate Subject of Study* (Law and Society Review, Summer: 1973), p. 720.

<sup>39</sup> *Ibid.*

of state law. But how it constitutes tenure insecurity for the indigenous community, we will explore in the following sub-part.

## B. Unravel the Cause of Tenure Insecurity

The previous sub-part has shown how the phenomenon in this paper's case study can somehow show legal pluralism within the context of state law. It is important to note here that in Indonesia, the recognition of the indigenous community's land rights involves various regulations, policies, government authorities, and stakeholders, particularly when it involves a palm oil project. Although ideally, according to Indonesia's law-making law no 12 of 2011, the laws and policies at different levels should be aligned to create unity and harmonious legal order,<sup>40</sup> Unfortunately, that does not always happen in Indonesia, and in fact, it is evident in this paper's case study. Therefore, the law and policies at different levels seem to give legal justification for the contradicted actions. As proposed in the previous sub-part, this paper suggests seeing this phenomenon as a legal pluralism within the context of state law. But how does it affect tenure insecurity for the indigenous community? We will discuss it below.

First, we need to look at the perspective of recognition of customary forests. As proposed previously, there was a constitutional court ruling that amended article 1(6) of Basic Forestry Law so that the government relinquished the state's claim over the customary forest and acknowledged that the customary forest is a forest located in the territory of the customary community. This was an actual legal breakthrough as; theoretically, the indigenous community can have legal recognition over the customary forest. However, it is not very simple to get legal recognition over the customary forest; some procedures are regulated in sectoral regulations. One of the most significant is the Ministry of Home Affairs regulation no 52 of 2014 on the Recognition and Protection of Customary Legal Community. According to article 3 (2), the recognition of the existence of customary community depends on each regional head (Regent, Governor, Mayors). Without this formal recognition of their existence as an Indigenous community, the *Kinipans* cannot get the acknowledgment of their ancestral forest. And this was the major obstacle for them as the local government of *Lamindau*, where *Kinipan* village is situated, is unwilling to recognize their existence formally.<sup>41</sup> It can therefore be said that the symbolic triumph of the basic forestry law's amendment is not followed by a factual improvement of *Kinipan's* community right to the customary forest.

Now, we need to look from the perspective of a palm oil company's business. There are at least two key authorities in this area, particularly in this case study: the ministry of forestry (MOEF) and the head of the region of *Lamindau* regency, where the project is located. As described previously, according to forestry law, the MOEF has the authority over the Indonesian forest land. The MOEF issued the 'land release permit' in 2015, which gave the company legitimacy in operationalizing its business on the land claimed to be *Kinipan's* forest. Meanwhile, based on the power vested by

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<sup>40</sup> According to the Law-Making Law no 12 of 2011, Hierarchically, the Indonesian Laws comprise 1. 1945 Constitution; 2. Resolutions of People Representative's Council; 3. Acts/Laws, and Government Regulations in Lieu of Acts 4. Government Regulation; 5. Presidential Regulation; 6. Regional Regulation. Apart from those laws, some other regulations, such as Ministerial Regulations and State Institutions Regulations, etc., are valid, as long as ordered by the higher regulations or based on authority.

<sup>41</sup> Widiangela, "Laman Kinipan's Indigenous Community Recognition," p. 7.

regional autonomy law and according to the plantation law,<sup>42</sup> the head of the region has the authority to give a permit to the plantation business operation in their region. The regional head of *Kinipan* granted the company the permit in conducting and continue its business operations. That being said, arguably, the company has a 'legal' justification for their business operation in the *Kinipan's* ancestral forest, although it is clearly at the expense of *the Kinipan* community's wellbeing. Had these key authorities referred to the amendment of article 1(6) of basic forestry law as earlier mentioned, and advanced the protection of human rights, particularly the indigenous people's right, these business permits might not be issued as it is clearly in contrast with the purpose of amended forestry law. But, as these authorities seem to champion economic rationality,<sup>43</sup> These policy-making processes have created plurality within the context of state law, which favors the company's interest.

In sum, from the illustration above, we can see that the authority's inclination toward economic rationality in the law-making process has created pluralism in the context of state law. On the one hand, the *Kinipans* can have legal protection to their ancestral forest because there is an amendment in the forestry law. However, unfortunately, it is prevented, as, on the other hand, the company also has a legal backing of the permits granted by the MOEF and regional head. This legal plurality within the context of state law renders tenure insecurity to the indigenous community. And with the present situation, Indonesian laws only give a hollow hope of realizing proper tenure security for the indigenous people.

## V. CONCLUSION.

In conclusion, this paper shows that the authorities' policies that favor the large palm oil corporation and champion the economic rationalities have created pluralism in the context of state law that is harmful to the tenure security of *the Kinipan* community in this study. Therefore, even though there is a landmark decision of the constitutional court no 35/PUU-X/2012 that technically can guarantee the *Kinipan* community over their ancestral forest where they have lived for generations, in reality, the MOEF and the regional government of *Lamindau* regent still can issue the policies that can legally back up the company's projects on *Kinipan's* ancestral forest. As mentioned before, this situation creates pluralism within the context of state law which, on the one hand, can protect the rights of indigenous people on the paper but, on the other hand, can justify the action of a large corporation in continuing their operations that are unfavorable for the indigenous community. This situation certainly causes severe tenure insecurity for the *Kinipan* community and negatively affects their overall well-being.

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<sup>42</sup> Article 14 (5) Plantation Law no 18 of 2004.

<sup>43</sup> According to the Indonesian economic coordinator ministry, the palm oil industry has created 16 million jobs for Indonesians and improved 3,6% of the national economy, even during the time of the pandemic. <https://www.cnnindonesia.com/ekonomi/20210506174918-92-639608/industri-sawit-diklaim-buka-16-juta-lapangan-kerja> accessed on 8 May 2021.

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