



## Indigenous Peoples' Rights in Development of the National Capital City: Between Fulfillment and Violation

Article	Abstract
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### INTRODUCTION

The government of President Jokowi for the 2019-2024 period in the Advanced Indonesia cabinet formed a work program by increasing Indonesia's infrastructure projects. The development of this infrastructure has infrastructure interconnections so that the area connects economic activities, industrial areas, tourism, plantations, and fisheries to rice field activities to increase economic

growth in the medium and long term.<sup>1</sup> In terms of improving the infrastructure project through the National Strategic Project (NSP), the government has issued various regulations regarding NSP.<sup>2</sup> One of the planned infrastructure developments that has been developed is the relocation of the National Capital and the implementation of the special regional government of the Indonesian Capital City (IKN), which is also a priority project in the 2024 government Work Plan.<sup>3</sup>

The motivation behind the government in moving the IKN is to expect a solution for equitable development by encouraging new economic centers in the IKN and the Eastern Region, so that the economy can proliferate inclusively, in addition to the motivation expected to support the creation of economic transformation to achieve the vision of Indonesia 2045 in terms of advanced Indonesia and the Indonesian economy entering the top five in Indonesia.<sup>4</sup> Therefore, the effort to move the national capital has been issued a basis through Law No. 3 of 2022 concerning the National Capital and its amendments through Law No. 21 of 2023 concerning Amendments to Law No. 3 of 2022 concerning the National Capital (IKN Law).

In its development, the construction of the IKN in the province of East Kalimantan contains various problems that need to be analyzed, both in terms of policy regulations, social, economic, and environmental impacts, and issues between the government and indigenous communities.<sup>5</sup> From a policy perspective, the ratification of the IKN Law is considered to have procedural flaws, where ideally, the policy of moving the IKN is carried out by drafting and enacting a Law before carrying out the Transfer, but the President of Indonesia requested permission to move the IKN and carried out the designation of the IKN location before the IKN Law existed. The emergence of the IKN Law seemed "rushed" so that the IKN Law gave rise to pros and cons and was challenged for judicial review at the Constitutional Court, such as in decision Number 39/PUU-XX/2022 and in case Number 66/PUU-XX/2022.

The relocation of the IKN also has the potential for cultural and cultural impacts. If we look back at the time when Jakarta was the capital city, business and government activities were centered in Jakarta so that people outside the Jakarta area flocked to reap business, this of course hampered the development and economic recovery in regions throughout Indonesia.<sup>6</sup> In addition, the development of the IKN has an impact on environmental restrictions, such as the industrial area that will be built in the IKN, which will have an impact on both the pollution produced and damage to the local ecosystem.<sup>7</sup>

In addition to considering the impact of policies and environmental impacts, the relocation of the IKN also needs to consider the protection and respect of human rights, especially for indigenous communities living in the IKN development area, which has negative impacts faced by

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<sup>1</sup> Sekar Banjaran Aji & Achmad Firas Khudi, "Indonesia's National Strategic Project, Displacement, and the New Poverty" (2021) 5:2 J Southeast Asian Hum Rights 136-153.

<sup>2</sup> Presidential Regulation No. 3 of 2016 which was amended by Presidential Regulation No. 58 of 2017, Presidential Regulation No. 56 of 2018 and Presidential Regulation No. 109 of 2020 concerning the Third Amendment to Presidential Regulation No. 3 of 2016 concerning the Implementation of National Strategic Projects

<sup>3</sup> Maret Priyanta & Cut Sabina Anasya Zulkarnai, "Sustainable Infrastructure Legal Policy in Indonesia: A National Strategic Project Approach for National Development" (2023) 7:1 Sriwij Law Rev 1-18.

<sup>4</sup> Indra Perwira, Susi Dwi Harijanti, Mei Susanto, Muhammad Yoppy Adhihernawan, "Capital City Relocation in Indonesia: Compromise Failure and Potential Dysfunction" (2024) 10:1 Law, Criminol Crim Justice 2345930.

<sup>5</sup> Muhammad Kamal, "Prospects for the New Capital City Policy in Law and Economic Perspectives" (2022) 5:1 Subst Justice Int J Law 86-108.

<sup>6</sup> Vera Susanti & Hardimansyah, *Building Shadow City: The Social and Cultural Effects of National Capital Relocation on National Unity* (2023).

<sup>7</sup> Hoong Chen Teo, Alex Mark Lechner, Saut Sagala, Ahimsa Campos-Arceiz, "Environmental Impacts of Planned Capitals and Lessons for Indonesia's New Capital" (2020) 9:11 Land 438.

indigenous communities.<sup>8</sup> According to the Indigenous Peoples Alliance of the Archipelago (AMAN), there are at least 22 indigenous communities currently living in the IKN development area, reaching 20,000 people from large indigenous groups, namely North Penajam Paser and Kutai Kartanegara, which have been protected by 23 regulations, including the 1945 Constitution in Article 18B number 2, then in the People's Consultative Assembly Decree Number VII/MPR/1998 concerning Human Rights, then in the Constitutional Court Decision No. 35/PUU-X/2012.<sup>9</sup>

However, even though the regulation has become a norm that Indigenous peoples must be protected, respected, and recognized, Indigenous peoples still face challenges in proving the basis for ownership rights to traditional land when facing other parties who have interests in customary land, so that the position of Indigenous peoples is considered vulnerable to conflict because the regulations are not enough to support the efforts of Indigenous peoples when making claims on customary land.<sup>10</sup> Moreover, the IKN Authority gave a surprise to the indigenous people by asking them to leave the IKN area for seven days. So if the IKN Authority moves the indigenous people under the pretext of building the capital city of the archipelago, it becomes an abusive act from the government and a regulation that contradicts previous regulations as a form of government power that takes over customary land for the sake of development.

This study identifies the fulfillment and violation of Indigenous peoples' rights in the development of the IKN. The first thing to do is to collect indigenous peoples' rights regulated by international and national legal instruments. Then after that, it is to conduct an assessment of the progress of the IKN development that has been carried out so far, especially whether it has guaranteed the protection of indigenous peoples' rights or vice versa (violated). This study is expected to provide information to the government as a consideration so that in the future it will implement national development that is friendly to human rights. In addition, it is also hoped that this study can enrich the treasury of knowledge, especially in the fields of law and social.

## RESEARCH METHODS

The research method used in this paper is normative legal research. Normative legal research is used because it focuses on the legal rules in positive law concerning the guarantee of Indigenous peoples' rights and the development of the IKN. The rules are assessed whether they are ideally by and in line with existing provisions or whether they are in conflict or even overlapping, and are not implemented by what they should be. The approach used is the legislative and conceptual approach

## ANALYSIS AND DISCUSSION

### *Guarantees of Indigenous Peoples' Rights in International Legal Instruments*

Indigenous peoples have territorial relations that can provide social, cultural, economic, and religious identity so the state is obliged to provide protection and recognition of the rights of indigenous peoples both in policy and in regulations. The regulation of indigenous peoples' rights

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<sup>8</sup> Krisna Angela & Anik Setyawati, "Analisis Pelaksanaan Pengadaan Tanah di Atas Tanah Ulayat Masyarakat Hukum Adat dalam Rangka Proyek Strategi Nasional (PSN) Demi Kepentingan Umum" (2022) 3:3 J Huk Lex Gen 199-216.

<sup>9</sup> Vitorio Mantalean & Bagus Santosa, "20.000 Masyarakat Adat Diperkirakan Tergusur Proyek Ibu Kota", (2022), online: *Kompas.com* <<https://nasional.kompas.com/read/2022/01/20/19254121/20000-masyarakat-adat-diperkirakan-tergusur-proyek-ibu-kota-baru?page=all>>.

<sup>10</sup> Bhakti Eko Nugroho, "Perlindungan Hak Masyarakat Adat dalam Pemindahan Ibukota Negara" (2022) 6:1 J Imu Sos dan Ilmu Polit Univ Jambi 64-78.

is regulated both in national law and international law, both for indigenous peoples individually and as a group.<sup>11</sup>

Talking about the regulation of Indigenous peoples' rights in national instruments, historically this instrument began when the United Nations Organization was formed in 1945 after the end of World War II which established the fulfillment of basic human rights and freedoms that must be recognized by nations, then based on the Universal Declaration of Human Rights (UDHR Declaration) made in 1947 and ratified through the UN General Assembly on December 10, 1948, it contains the main points of human rights by recognizing the dignity and rights of the same human being, providing freedoms without exception, distinguishing race, color, gender, language, religion, politics, or other views, national origin or community, property rights, birth or another status.<sup>12</sup> Not only in terms of giving recognition and freedom, the declaration states that everyone also has the right to equal legal protection and effective remedy from national courts for actions that violate the basic rights granted to him. As stated in articles 7 and 8 of the UDHR. Then the interpretation that is the guarantee of indigenous peoples in the declaration as in article 22 of the UDHR. In terms of these articles, it can be seen that everyone including indigenous peoples has social security so the state must provide social security programs, and economic, social, and cultural rights that are interrelated for dignity as supporting a decent life and free growth so that the state needs to form policies and regulations that support the fulfillment of these rights.<sup>13</sup>

The second instrument drafted by the UN Human Rights Commission is the International Covenant on Economic, Social and Cultural Rights 1966 which was ratified by Indonesia with the establishment of Law Number 11 of 2005 concerning the Ratification of the International Covenant on Economic, Social and Cultural Rights as the goal of the Indonesian nation as part of the international community, respecting, appreciating, and upholding the principles and objectives of the United Nations Charter and the Universal Declaration of Human Rights so that the instrument does not conflict with Pancasila and the 1945 Constitution of the Republic of Indonesia which contains civil and political rights, and concerning economic, socio-cultural rights which must be respected, protected and fulfilled by Indonesia and other countries that ratify it.<sup>14</sup>

Then the International Covenant on Civil and Political Rights 1966. This instrument has been ratified by Indonesia in Law Number 12 of 2005 concerning the Ratification of the International Covenant on Civil and Political Rights which aims to strengthen the basic principles of human rights in the civil and political fields as in the instrument whose provisions are legally binding. Other instruments include the International Convention on the Elimination of All Forms of Racial Discrimination 1965. Convention on Biological Diversity 1992.<sup>15</sup>

More specifically related directly to indigenous peoples, in international law several instruments regulate the rights of indigenous peoples and their protection. Some important instruments that are relevant today are: *First*, ILO Convention No. 169 concerning Indigenous and Tribal Workers in Independent Countries. This convention was adopted by the International Labour Organization (ILO) in 1989. This is the main international instrument that recognizes the rights of indigenous and tribal peoples, including the right to land, culture, and participation in decisions that affect them. This convention sets international standards for protecting the rights of

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<sup>11</sup> I Gede Yusa, "Identification And Analysis Of The Rights Of Indigenous Peoples In The Study Of Constitutional Law" (2016) 2:1 Const Rev 1-28.

<sup>12</sup> Ahmad Syofyan, "Perlindungan Hak-Hak Masyarakat Adat Menurut Hukum Internasional" (2012) 6:2 Fiat Justitia J Ilmu Huk 1-19.

<sup>13</sup> *Ibid.*

<sup>14</sup> Ikbal, "Implementasi Hak Ekonomi Sosial dan Budaya Masyarakat Adat Dalam Hukum HAM Internasional di Indonesia" (2011) 5:3 Fiat Justitia J Ilmu Huk 1-11.

<sup>15</sup> Sefa Martinesya, "Tanggung Jawab Pemerintah Terhadap Pemenuhan Hak Masyarakat Adat" (2020) 3:1 Nurani Huk J Ilmu Huk 69-76.

indigenous and tribal workers. The aim is to ensure that their rights are recognized and respected and that they are involved in decision-making that affects their lives and environment.<sup>16</sup>

Several articles specifically relate to development, among others, Article 7 states that indigenous peoples must be involved in decision-making processes that affect them, including in the context of development. This article emphasizes the importance of the active participation of indigenous peoples in the planning and implementation of development projects that affect them. Then, Article 15 regulates the rights of indigenous peoples to the lands and natural resources that they traditionally own. Development or exploitation of natural resources must be carried out with due regard to these rights and with the legitimate consent or consultation of indigenous peoples. Article 16 talks about the need for consultation and consent of indigenous peoples before development projects that may affect them are implemented. This article ensures that indigenous peoples have a voice in decisions that affect their lands and environment. Article 20 regulates the need for states to provide guarantees that indigenous peoples are not disadvantaged by development policies or actions. States are expected to consider the social and cultural impacts of development on indigenous peoples and to provide fair compensation if they are negatively impacted. Article 23 states that states must develop policies that support the development of indigenous peoples and protect them from detrimental exploitation practices. This includes policies that ensure that indigenous peoples can manage and develop their resources sustainably. These articles affirm the rights of indigenous peoples to participate in development protect their rights to land and natural resources, and ensure that development policies take into account their impacts on them.

*Second*, the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP). Adopted by the UN General Assembly in 2007, the Declaration affirms the rights of indigenous peoples around the world. Some of the key rights set out in UNDRIP include the right to recognition of their identity and culture, the right to their traditionally owned lands and natural resources, and the right to participate in decision-making that affects them. UNDRIP aims to ensure that indigenous peoples can maintain and develop their cultural identity and have control over their lives and resources.<sup>17</sup>

Several articles relating to the development and management of resources affecting indigenous peoples include Article 19 which states that the state must obtain the free, prior, and informed consent of indigenous peoples before implementing projects or policies that may affect their rights. This means that indigenous peoples must be involved in decision-making processes related to development that affect them. Article 20 regulates the right of Indigenous peoples to enjoy a standard of living adequate for their physical, mental, spiritual, moral, and social development. The state must ensure that development policies do not prejudice the ability of indigenous peoples to achieve this standard of living. Article 23 states that indigenous peoples have the right to determine development priorities and strategies that relate to their needs and aspirations. They also have the right to participate in the development process fully and equally. Article 32 states the right of indigenous peoples to determine and manage the development and exploitation of natural resources on their lands. This includes the right to benefit from natural resources located in their territories and the right to be involved in decisions relating to natural resource management. Article 28 provides for the right of indigenous peoples to obtain just and effective compensation or remedy if they are adversely affected by development, including environmental degradation or damage to

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<sup>16</sup> Ilham Dwi Rafiqi, "Legal Ideals Pancasila in the Development of a National Environmental Legal System" (2023) 4:3 Audit Comp Law J 134-146.

<sup>17</sup> Arasy Pradama Azis, "Afiriasi MK terhadap Jukstaposisi Masyarakat Adat Sebagai Subjek Hak Berserikat di Indonesia (Analisis terhadap Keterlibatan Aliansi Masyarakat Adat Nusantara dalam Putusan Mahkamah Konstitusi No. 35/PUU-X/2012)" (2019) 8:1 J Rechtsvinding 33.

their customary lands. These articles emphasize the importance of indigenous peoples' participation in the development process, the protection of their rights in relation to natural resources, and the need to obtain just compensation if their rights are affected by development projects.

*Third*, the Convention on the Rights of the Child (CRC): Although not specific to indigenous peoples, the CRC, adopted in 1989, covers the rights of children in general, including indigenous children. Its principles support the protection of the cultural rights and identity of Indigenous children. Several articles can be linked to the rights of Indigenous children, especially in the context of protection, participation, and development, including Article 30 which guarantees the right of children from minority groups or indigenous peoples to enjoy their own culture, religion, or language. This article supports the right of Indigenous children to preserve and develop their cultural identity, which is important in the context of development that may affect their lives. Article 3 stipulates that in all actions concerning children, the best interests of the child shall be a primary consideration. This includes development policies that must take into account the impact on children, including those from indigenous peoples. Article 27 mentions the right of children to enjoy a standard of living adequate for their physical, mental, spiritual, moral, and social development. This relates to development in terms of ensuring that Indigenous children have adequate access to the resources and services necessary for their development. Article 19 provides for the right of the child to be protected from all forms of violence, torture, or ill-treatment. In the context of development, this means that projects or policies that impact Indigenous peoples must ensure the protection of children from all forms of exploitation or harm. Although the CRC Convention does not specifically target Indigenous peoples in the context of development, these articles provide a basis for ensuring that Indigenous children enjoy equal protection and rights in the context of development policies and projects.

*Fourth*, the Convention on the Elimination of All Forms of Racial Discrimination (CERD): Adopted by the UN in 1965, this convention regulates the rights of individuals and groups of various races and ethnicities, including indigenous peoples, to be protected from racial discrimination and to enjoy equal rights in various aspects of life. Article 5 sets out the rights that must be protected for all individuals without discrimination, including the right to participate in political, economic, social and cultural life. This is relevant to ensuring that Indigenous peoples have equal access to economic and social opportunities in the context of development. *Fifth*, the Convention on the Protection and Promotion of Cultural Diversity (2005): Although not specifically about indigenous peoples, this convention recognizes the importance of protecting and promoting cultural diversity, which includes the cultures of indigenous peoples.

International legal instruments play a crucial role in protecting indigenous peoples from the negative impacts of development that may threaten their rights and the sustainability of their cultures. These instruments provide frameworks and guidelines for protecting indigenous peoples' rights in the context of development. They ensure that indigenous peoples are not only protected from the negative impacts of development but also have a recognized and respected role in the planning and implementation of policies that affect their lives, although implementation may vary depending on the country and local context.

### ***Guarantee of Indigenous Peoples' Rights in National Legal Instruments***

*Ubi societas ibi ius* "where there is society there is law" is an adage that has a deep meaning where the law is created based on the law that lives in society as a living law, in this case, the law grows in Indigenous communities carrying the historical values of Indigenous communities in Indonesia so that it has a development of legal standing in Indonesia so that it has a positive impact which is seen in the Congress of the Indigenous Peoples Association which does not agree to equate Indigenous communities with isolated communities or illegal loggers, because they think that

indigenous communities are groups of people who have a place to live in a certain area that has their own philosophical, cultural, social and regional value systems.<sup>18</sup>

Constitutionally, indigenous peoples have confirmed their existence and position in Article 18B paragraph 2 of the 1945 Constitution which reads "The state recognizes and respects the unity of indigenous legal communities and traditional rights as long as they are still alive and in accordance with the development of society and the principles of the Unitary State of the Republic of Indonesia, which are regulated by law": the state recognizes and respects the rights and existence of indigenous peoples, but it should be noted that these indigenous peoples, as long as they are still alive, in accordance with the development of society, must adapt to changes and recognition and respect in accordance with the principles of the Unitary State of the Republic of Indonesia.<sup>19</sup>

Indigenous communities have a wide range of rights that must be recognized and respected, in terms of the right to recognition and protection of customary areas which are the duties and authorities of the government and regional governments in protecting and managing the environment, namely providing policy determination regarding the procedures for recognizing Indigenous communities with local wisdom and the rights of Indigenous communities as in Law Number 32 of 2009 concerning Protection and Management of the Environment (currently several provisions have been amended in Law Number 6 of 2023 concerning the Stipulation of Government Regulation instead of Law Number 2 of 2022 concerning Job Creation into Law (Job Creation Law) as stated in Article 63 which reads:<sup>20</sup>

"In protecting and managing the environment, the Government has the duty and authority to determine policies regarding the procedures for recognizing the existence of indigenous legal communities, local wisdom, and the rights of indigenous legal communities related to environmental protection and management".

Indigenous communities have the right to control the earth, water, and space including the natural resources contained therein in the autonomous regions and customary law communities as necessary and not in conflict with national interests as stated in Article 2 paragraph (4) of Law Number 5 of 1960 concerning Basic Agrarian Principles which states (UUPA) "The right to control from the State mentioned above can be delegated to autonomous regions and customary law communities, as necessary and not in conflict with national interests, according to the provisions of Government Regulations." Customary law communities also have land ownership rights called customary rights as stated in Article 3 of the UUPA which reads:

"Considering the provisions in Articles 1 and 2, the implementation of customary rights and similar rights from customary law communities, as long as in reality they still exist, must be such that they are by national and state interests, which are based on national unity and must not conflict with other higher laws and regulations."

In terms of upholding human rights, Indigenous communities must be observed and protected by law, society, and government, including the protection of the cultural identity of Indigenous legal communities, rights to customary land are protected and in line with the times, this is as stated in article 6 paragraph (1) and (2) of Law Number 39 of 1999 concerning Human Rights which reads: "(1) In the context of upholding human rights, differences and needs in indigenous legal communities must be observed and protected by law, society and the government. (2) The cultural identity of Indigenous legal communities, including rights to customary land are protected, in line

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<sup>18</sup> Sartika Intaning Pradhani, "Traditional Rights of Indigenous People in Indonesia: Legal Recognition and Court Interpretation" (2018) 1:2 *Jambe Law J* 177-205.

<sup>19</sup> Indah Dwi Qurbani & Ilham Dwi Rafiqi, "Prospective Green Constitution in New and Renewable Energy Regulation" (2022) 30:1 *Leg J Ilm Huk* 68-87, online: <<http://www.ejournal.umm.ac.id/index.php/legality>>.

<sup>20</sup> Nabila Aulia Rahman, Zainal Arifin Mochtar, Ilham Dwi Rafiqi, Mohamed Yayah Jalloh, "Legal Politics of Environmental Licensing Governance After Job Creation Law" (2022) 6:2 *Hang Tuah Law J* 123-134.

with the times" in the explanation of the law, customary rights that are still in effect and upheld in the Indigenous community environment that must be respected and protected as protection and enforcement of human rights including protection of the national cultural identity of indigenous legal communities, customary rights that are still firmly held by indigenous legal communities.

Then in Article 5 of Law Number 41 of 1999 concerning Forestry (several provisions were amended in the Job Creation Law) which contains a division of forests based on their status, namely state forests and rights forests, as referred to by state forests can be customary forests, then Article 4 paragraph 3 where the state must pay attention to the rights of customary law communities to control forests as stated "(3) Forest control by the State continues to pay attention to the rights of customary law communities, as long as in reality they still exist and their existence is recognized, and do not conflict with national interests" The rights of customary law communities to the management, utilization, and empowerment of forests have been explained in Chapter IX Article 67 which states.

"(1) Customary law communities as long as in reality they still exist and their existence is recognized have the right to: a. collect forest products to meet the daily needs of the indigenous community concerned; b. carry out forest management activities based on applicable customary law and do not conflict with the law, and c. receive empowerment to improve their welfare. (2) Confirmation of the existence and elimination of customary law communities as referred to in paragraph (1) are stipulated by Regional Regulations. (3) Further provisions as referred to in paragraph (1) and paragraph (3) are regulated by government regulations."

Then in the Regulation of the Minister of Environment and Forestry Number P.17/MENLHK/SETJEN/KUM.1/8/2020 concerning Customary Forests and Rights Forests which regulates that customary law communities have the right to do the following: a. utilization of areas; b. utilization of environmental services; c. utilization or collection of timber forest products; d. utilization or collection of non-timber forest products; e. Forest management activities based on applicable customary law and not in conflict with the provisions of laws and regulations; and/or f. receive empowerment to improve their welfare.<sup>21</sup>

In Law Number 26 of 2007 concerning Spatial Planning (several provisions were amended in the Job Creation Law), as stated in the explanation, to achieve the objectives of organizing spatial planning, the laws and regulations contain the main provisions, one of which is in letter f, namely "the rights, obligations, and roles of the community in organizing spatial planning to ensure community involvement, including indigenous peoples in every process of organizing spatial planning".<sup>22</sup>

Indigenous communities grow and develop in the areas or places they inhabit, known as traditional villages. According to Article 6 paragraph (1) of Law Number 6 of 2014 concerning Villages (currently amended in Law Number 3 of 2024 concerning the Second Amendment to Law Number 6 of 2014 concerning Villages), villages are divided into villages and traditional villages where the formation of villages is determined through district or city regional regulations which must consider the initiative of the village community, origins, customs, socio-cultural conditions of the village community, as well as including the capabilities and potential of the village. The village regulations referred to in the draft are discussed and agreed upon by the Village Consultative Body together with the Village Head, with in mind that members of the village deliberation in their activities and in drafting village regulations must respect the socio-cultural values and customs of the village community, this is as stated in Article 63e. Villages also have the right to regulate and

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<sup>21</sup> Ilham Dwi Rafiqi, "Pembaruan Politik Hukum Pembentukan Perundang-Undangan di Bidang Pengelolaan Sumber Daya Alam Perspektif Hukum Progresif" (2021) 5:2 Bina Huk Lingkung 320-321.

<sup>22</sup> Tomy M Saragih, "Konsep Partisipasi Masyarakat dalam Pembentukan Peraturan Daerah Rencana Detail Tata Ruang dan Kawasan" (2021) 17:3 J Sisa 14.



manage community interests based on the rights of origin, customs and socio-cultural values of the village community and traditional villages have authority over the rights of origin as stated in Article 103:

“The authority of the Customary Village based on the original rights as referred to in Article 19 letter a includes:

- a. regulation and implementation of government based on the original structure;
- b. regulation and management of customary or customary areas;
- c. preservation of the socio-cultural values of the Customary Village;
- d. settlement of customary disputes based on customary law applicable in the Customary Village in an area that is in line with the principles of human rights by prioritizing resolution through deliberation;
- e. holding of a settlement hearing of the Customary Village court in accordance with the provisions of laws and regulations;
- f. maintenance of peace and order in the Customary Village community based on customary law applicable in the Customary Village; and
- g. development of customary legal life in accordance with the socio-cultural conditions of the Customary Village community.”

The affirmation of Indigenous peoples in their status as having rights to land through the overall procedure is carried out by the Regulation of the Minister of Home Affairs Number 52 of 2014 concerning Guidelines for the Recognition and Protection of Indigenous Legal Communities, the stages that must be carried out in terms of the recognition and protection of Indigenous peoples as in article 4 through 3 methods, namely identification of Indigenous Legal Communities, verification and validation of Indigenous Legal Communities and determination of Indigenous Legal Communities.

Identification activities are carried out by the Regent/Mayor through the sub-district head by involving the customary law community or community groups by examining the history of the customary law community, customary territory, customary law, assets and/or objects and customary government institutions/systems which will be verified and validated by the district/city customary law community committee and the results will be announced to the customary community within one month and its implementation will be determined based on a Joint Decree of the Regional Head, if the customary community objects to the results of the decision, the customary community can submit an objection to the committee and re-verification and validation will be carried out or can submit it to the State Administrative Court.<sup>23</sup>

Indigenous communities can explore their economic development through business opportunities for business activities that have specific processes, are labor intensive, and have a special and hereditary cultural heritage as in article 13 paragraph 1 letter c which reads "reserving appropriate fields and types of business activities has a specific process, is labor intensive, and has a cultural heritage that is special and has been passed down from generation to generation."

The rights of indigenous peoples in Indonesia are regulated in various laws and regulations that aim to protect their existence, traditions, and welfare.<sup>24</sup> As previously reviewed, there are various guarantees of indigenous peoples' rights spread across various laws and regulations, for example, the right to autonomy for their indigenous communities, the right to manage their

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<sup>23</sup> Lars Tummers, "Public Policy and Behavior Change" (2019) 79:6 Public Adm Rev 925-930.

<sup>24</sup> Fathul Hamdani et al, "Constitutional Analysis of the Need for the Tribal Peoples Bill: Initiatives to Establish a Fair Customary Court" in *Pros Pengakuan dan Perlindungan Masy Huk Adat di Tingkat Nas dan Int (Recognition, Respect, Prot Const Rights Indig Peoples a Natl Int Perspect* (Jakarta: Asosiasi Pengajar Hukum Adat (APHA), 2023) 191.

customary land, the right to natural resources, the right to development, the right to spirituality and culture, the right to the environment, and various other human rights.

### *Weighing between Fulfillment and Violation of Indigenous Peoples' Rights in Capital City Development*

The IKN project, which should have a vision as a world city built and managed to become a sustainable world city and a driver of the Indonesian economy in the future, instead raises questions when viewed from the perspective of indigenous peoples, whether the development of the capital city provides fulfillment of indigenous peoples' rights or creates violations of indigenous peoples' rights that inevitably must be faced by indigenous peoples with various impacts. As has been regulated in several legal instruments, both national and international laws that regulate several indigenous peoples' rights which of course must be obeyed and implemented by the state, government and society.<sup>25</sup> However, the bitter reality experienced by indigenous peoples regarding various IKN development conflicts that have an impact can be felt by indigenous peoples directly or indirectly regarding several IKN policies and regulations that conflict with the rights of indigenous peoples that have previously been determined.

The IKN Law also aims to attract investors for the relocation of the capital city and organize a special regional government for the IKN by providing business use rights or what is called HGU for up to 190 years and building use rights or HGB for up to 160 years as in article 16A, this policy has given rise to criticism where the first criticism is the 2-cycle policy of HGU and HGU which violates the procedures and period for granting land rights in the form of HGU and HGB as in Law Number 5 of 1960 concerning the Principles of Agrarian Law in article 29 with a maximum HGU period of 25 years and in article 35 paragraph (1) the maximum HGB period is 30 years.<sup>26</sup>

Criticism of the location of the IKN for HGU and HGB partly comes from the land of the customary law community that will be given to investors. In other words, investors will become landowners on customary land and there will be overlapping ownership of IKN land so that there is no protection for customary law community land and there is no legal certainty.

Then, the controversy carried out by the IKN Authority which has made an appeal for the relocation of indigenous peoples to leave their homes within seven days under the pretext of building the capital city of the archipelago is an abusive act by the government and regulations that contradict previous regulations as a form of government power that takes over customary land for development. Although following Government Regulation number 39 of 2023, the mechanism is through compensation with money, replacement of land or resettlement, however, the concept of customary law regarding customary land rights has values that are communalistic religious magical in nature which means that land is believed to be an inheritance from ancestors or ancestors from generation to generation so that it has the right to its origin magical powers. So that the rights of the community must be protected and respected, of course this is contrary to the constitutional basis of Article 18B of the 1945 Constitution which states that the state recognizes the existence of indigenous communities and respects the unity and rights of indigenous communities who own the land based on custom and also the provisions in Article 6 paragraph (1) and (2) of Law Number 39 of 1999 concerning Human Rights in other words, customary rights that are still in effect and upheld in the customary law community environment must be respected and protected in terms of protecting and enforcing human rights in customary law communities including enforcing the

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<sup>25</sup> Hoong Chen Teo, et.al., *Op.Cit.*, 438.

<sup>26</sup> Andre Bagus Saputra Aditya Khrisna Murti, Nawang Wulan, "Problematika Konflik Norma Penerapan Jangka Waktu Hak Atas Tanah berdasarkan Peraturan Pemerintah Nomor 12 Tahun 2023 tentang Pemberian Perizinan Berusaha, Kemudahan Berusaha, dan Fasilitas Penanaman Modal Bagi Pelaku Usaha di Ibu Kota Nusantara" (2023) 3:1 Pros Semin Huk Aktual Fak Huk Univ Islam Indones 33-46.

rights of the national cultural identity of customary law communities and rights that are still firmly held by customary law communities which continue to be respected and protected as long as they do not conflict with the principles of a state based on law based on justice and the welfare of the people.

Some indigenous people who do not know about the IKN plan, do not understand the impacts that arise in the procurement of the IKN both in terms of social, cultural, legal certainty, and the environment and others and the government only conducts socialization to local governments and community groups that do not always represent indigenous people. Although President Joko Widodo invited discussions with figures from the Paser Sultanate and the Kartanegara Sultanate in Balikpapan regarding culture and the plan to move the National Capital City which is to improve the human resources of the East Kalimantan community, however, the impact that occurred in the plan was that the community became dissatisfied with the lack of involvement regarding the transfer of the National Capital City and the sultanate was considered unable to represent the actual indigenous people because the former kingdom, heir, sultanate and former *Swapraja* became identities that had diametric differences in the concept of indigenous people.<sup>27</sup>

This is not by the guarantee of Indigenous peoples' rights in national instruments and international instruments where there is no comprehensive involvement of Indigenous peoples in holding consultations so there is a lack of respect for indigenous peoples' participation in the formulation, implementation, and evaluation of planning in national development programs that have a direct impact on indigenous peoples, such as in Law Number 26 of 2007 concerning Spatial Planning where in the provisions of the regulation it is stated that the State carries out spatial planning for the prosperity of the people themselves where spatial planning aims to ensure the involvement of the community including indigenous peoples who have the rights, obligations, and roles as a community in every process of organizing spatial planning where in this case indigenous peoples have the right to be involved in decision making. This means that the implementation of spatial planning must respect the rights held by indigenous peoples by statutory regulations.

In addition, various regional regulations eventually become ineffective, for example, Regional Regulation of East Kalimantan Province Number 1 of 2015 concerning Guidelines for Recognition and Protection of Customary Law Communities in East Kalimantan Province where this Regulation has the objective as stated in Article 3 letter b which reads "recognizing and protecting the rights of customary law communities in East Kalimantan Province as a basis for organizing government and developing development programs" and this Regulation has the objective of facilitating customary law communities to participate in development as stated in Article 3 letter c which reads "facilitating customary law communities in East Kalimantan Province to be able to participate in development by their authority" and the rights of customary communities in Article 5 have not been implemented properly so that conflicts still arise that befall customary communities. In addition, Regional Regulation of Penajam Paser Utara Regency Number 2 of 2017 concerning the Preservation of Paser Customary Protection only contains the preservation and protection of Paser customs in terms of socio-cultural values and has shortcomings in other customary rights including the protection and recognition of customary rights, especially in terms of land rights and how the Paser customary community can resolve conflicts faced by the Paser customary community. Regional policies by regional governments must be implemented and include all the needs of their communities as a reflection of good governance in empowering and protecting indigenous communities.

Furthermore, the existence of Indigenous communities has an important role in maintaining forests that are proven to be sustainable, but with the development of the IKN which is in a forest area that is often used by Indigenous communities to meet their needs, Indigenous communities

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<sup>27</sup> Bhakti Eko Nugroho, *Loc.Cit.*, p. 83-97.

have the right to manage, utilize and empower forests as a development of economic values and to meet their needs, so far Indigenous communities have relied on their economy in forests, rice fields, gardens, rivers, and seas as their traditional jobs, but are used for investors which have caused the displacement of indigenous communities and environmental damage. Indigenous communities are no longer able to utilize natural resources to meet their needs in the forest and manage the forest, so this is contrary to the Regulation of the Minister of Environment and Forestry Number P.17/MENLHK/SETJEN/KUM.1/8/2020 concerning Customary Forests and Forest Rights which regulates that indigenous legal communities have the right to utilize and collect forest products so that they get empowerment to improve their welfare.

It is important to know that indigenous peoples have many rights in the country which have been regulated in regulations, however many rights are violated by the transfer and development of IKN, as follows:

**Table 1:** *Potential violations of indigenous peoples' rights in the development of the National Capital Region*

No	Problem Typology	Potential Human Rights Violations
1	Land conflicts	<ol style="list-style-type: none"> <li>1. Land rights</li> <li>2. Rights to control customary land</li> <li>3. Right to reside</li> </ol>
2	Existence of Indigenous Peoples	<ol style="list-style-type: none"> <li>1. Right of origin</li> <li>2. Right to recognition and protection of indigenous peoples</li> <li>3. Right to develop and preserve their customs</li> </ol>
3	Problematic Regulations	Right to participate in decision making
4	Environmental Destruction and Pollution	Right to a good and healthy environment
5	Loss of utilization of natural resources	Rights of indigenous peoples to the management, utilization and empowerment of natural resources and forests

**Source:** *Author.*

In overcoming various problems and challenges faced by Indigenous communities, the government can open a forum that presents all Indigenous communities as a forum for an in-depth consultation with Indigenous communities so that they can exchange views between procurement interests and Indigenous community rights and Indigenous communities can find out what impacts will be obtained after the national procurement program is running or fair and equal compensation if the procurement is approved, not only that, the government needs to issue regulatory policies that can prioritize the rights of Indigenous communities and recognition of the existence of subjects and objects in Indigenous communities that can truly be implemented and designed together with representatives of indigenous communities regarding their rights, stages of problem-solving, prevention of rights violations so that indigenous communities get legal certainty. In addition, in the IKN development area, special development can be included for indigenous community residential areas that can strengthen their cultural and religious values so that this can become a cultural tourism destination and create development in the economic and tourism sectors.

## CONCLUSION

Regarding the consideration of whether there is fulfillment and violation of Indigenous peoples' rights in the development of the IKN. After collecting the rights of Indigenous peoples regulated in international and national legal instruments and then reviewing the progress of IKN development that has been carried out so far, it turns out that the development of the IKN, both in the policies and regulations of the IKN Law, has not guaranteed the protection of Indigenous peoples' rights and there are violations of Indigenous peoples' rights in legal instruments, both national and international law, such as land rights, rights to control customary land, rights to reside, rights of origin, rights to recognition and protection of indigenous peoples, rights to develop and preserve their customs, rights to participate in decision-making, rights to a good and healthy environment, rights of indigenous peoples to the management, utilization, and empowerment of natural resources and forests. In addition to these rights, of course, other rights have the potential to be violated, especially general human rights.

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