

Affirmative Action Model For The Rights Fulfillment Of Indigenous Peoples In The Nusantara Capital (IKN) Area

Model Aksi Afirmatif Pemenuhan Hak Masyarakat Adat di Kawasan Ibu Kota Nusantara (IKN)

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ABSTRACT: The decision to build a new capital on the Kalimantan Island called Nusantara caused various conflicts, such as the neglect and marginalization of indigenous peoples and the ignoring of their certainty of access and meaningful participation. This paper explains how the substance of the Nusantara Capital development regulation is to provide full protection to Indigenous peoples or vice versa, how it impacts the protection of Indigenous people's rights, as well as how the affirmative action model fulfills the rights of Indigenous peoples in the Nusantara Capital area. Through a socio-legal approach as the method, the results of the study found that the constitution has regulated the recognition of indigenous peoples, but in the substance of regulations related to the Nusantara capital, the phrases that regulate are very weak. The phrases used do not explicitly ensure the protection of the rights of indigenous peoples, which has an impact on various neglect of the existence of indigenous peoples. As a result, a model of affirmative action is needed for indigenous peoples in the regulation of the Nusantara capital. This includes ensuring access for indigenous peoples to be involved in policymaking. Furthermore, transparency of information in the development of the Nusantara capital is important to formulate policies that accommodate the protection and fulfillment of the rights of indigenous peoples. It is important to ensure the recognition of indigenous peoples and their living space through an affirmative action model regulated by the head of the Nusantara capital authority.

ABSTRAK: Keputusan untuk membangun ibu kota baru di Pulau Kalimantan yang disebut Nusantara menimbulkan berbagai konflik, seperti penelantaran dan marginalisasi masyarakat adat serta pengabaian kepastian akses dan partisipasi yang bermakna bagi mereka. Tulisan ini menjelaskan bagaimana substansi pengaturan pembangunan Ibu Kota Nusantara memberikan perlindungan penuh kepada masyarakat adat atau sebaliknya, bagaimana dampaknya terhadap perlindungan hak-hak masyarakat adat, serta bagaimana model tindakan afirmatif pemenuhan hak-hak masyarakat adat di kawasan Ibu Kota Nusantara. Melalui pendekatan sosio-legal sebagai metodenya, hasil penelitian menemukan bahwa konstitusi telah mengatur pengakuan masyarakat adat, namun dalam substansi pengaturan terkait Ibu Kota Nusantara, frasa yang mengatur sangat lemah. Frasa-frasa yang digunakan tidak secara eksplisit menjamin perlindungan hak-hak masyarakat adat, yang mengakibatkan pengabaian dan marginalisasi masyarakat adat. Oleh karena itu, diperlukan model tindakan afirmatif bagi masyarakat adat dalam pengaturan Ibu Kota Nusantara. Hal ini mencakup jaminan akses bagi masyarakat adat untuk terlibat dalam pengambilan kebijakan. Selain itu, transparansi informasi dalam pembangunan Ibu Kota Nusantara penting untuk merumuskan kebijakan yang secara efektif mengakomodasi perlindungan dan pemenuhan hak-hak masyarakat adat. Penting juga untuk menjamin pengakuan terhadap masyarakat adat dan ruang hidupnya melalui model tindakan afirmatif yang diatur oleh kepala otoritas ibu kota nusantara.

Keywords:

affirmative action;
indigenous peoples;
Nusantara capital area

Kata Kunci:

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1. Introduction

The establishment of the State Capital through Law Number 3 of 2022 has drawn various reactions from various layers of society. These reactions arose because the discussion time for this regulation was very short, only 43 days, with minimal public consultation.¹ The impact of the short discussion time of the law, which contains 11 chapters and 44 articles, is that it does not include the aspirations or perspectives of locals.² From this briefly formulated provision, the name of the new Capital is determined as the *Ibu Kota Nusantara* (Nusantara Capital). The Nusantara Capital is a special regional government unit at the provincial level whose territory is the seat of the Capital of the Republic of Indonesia.³ The Nusantara Capital has a vision as a world city for all that is built and managed to (a) become a sustainable city in the world; (b) as a driver of the Indonesian economy in the future; and (c) become a symbol of national identity that represents the diversity of the Indonesian nation based on Pancasila and the 1945 Constitution of the Republic of Indonesia.⁴ The Nusantara Capital covers a land area of approximately 256,660 ha (two hundred fifty-six thousand six hundred sixty hectares) and a seawater area of approximately 69,769 ha (sixty-nine thousand seven hundred sixty-nine hectares).⁵ The local situation of the communities in the two designated locations has automatically changed since the establishment of the new Capital.

The local situation that emerged after this determination is a concern for indigenous peoples in the area that will become the Nusantara Capital. Indigenous peoples are part of the people of a nation, so their rights are part of human rights. This is affirmed in ILO Convention 169 and the United Nations Declaration on The Rights of Indigenous Peoples (UNDRIP), which guarantees the rights of indigenous peoples. The rights of indigenous peoples are also guaranteed by the constitution in Article 18B paragraph (2) of the 1945 Constitution of the Republic of Indonesia. However, relocating the new Capital in East Kalimantan presents many challenges. One of the main problems that arise is the issue of recognition of Indigenous peoples as the basis for guaranteeing the rights of Indigenous peoples in the Nusantara Capital⁶ and guaranteeing the protection of Indigenous people's rights.⁷ The lack of protection of these rights has resulted in the lack of transparency and participation of Indigenous peoples in the planning and development of Nusantara Capital, injustice in the amount of compensation for Indigenous people's land,⁸ problems with land certificates, degradation of land ownership, land concessions, and overlapping policies.⁹

Several scholars have focused on the situation of Indigenous peoples in the process of relocating to the Nusantara Capital. According to Rakhmat Hidayat, the Nusantara Capital creates new problems for Indigenous peoples around that place, such as the emergence of agrarian conflicts in Indigenous peoples in Nusantara Capital, agrarian conflicts cause ecological degradation, the marginalization of Indigenous peoples from their ancestral lands, considering that the existence of Indigenous peoples around the Nusantara Capital area has been maintaining their existence since the early generations.¹⁰ Following Bhakti Eko's findings that the establishment of the Nusantara Capital has not sought maximum guarantees for the protection of Indigenous peoples who will live in areas that will be built by the Capital, the inclusion of Indigenous peoples in the Nusantara Capital Relocation Process Plan must address substantive needs that are not limited to symbolic and procedural ones.¹¹ An interesting

1 Chusna Fitria Farisa, "UU Ibu Kota Negara Rampung Dalam 43 Hari, KSP Bantah Pembahasannya Buru-Buru," *kompas.com*, 2022, <https://nasional.kompas.com/read/2022/01/19/12454001/uu-ibu-kota-negara-rampung-dalam-43-hari-ksp-bantah-pembahasannya-buru-buru>.

2 Wasisto Raharjo Jati, "A New Indonesian Capital City: Conflict Pending - New Mandala," *newmandala.org*, 2022, <https://www.newmandala.org/a-new-indonesian-capital-city-conflict-pending/>.

3 Article 1 (2) Law Number 3 of 2022 concerning the State Capital

4 Article 2 Law Number 3 of 2022 concerning the State Capital. See also Mahendra Putra Kurnia, Rika Erawaty, and Grizelda, "Implikasi Pemindahan Ibu Kota Negara Dari Perspektif Hukum Internasional," in 60 Kiat Unmul Mendukung Terwujudnya Kaltim Berdaulat Dan IKN Yang Kuat (Mulawarman University Press, 2022), <https://news.detik.com/x/detail/investigasi/20190610/Pemindahan-Ibu-Kota-dari-Sukarno->.

5 Article 6 (2) Law Number 3 of 2022 concerning the State Capital

6 Nadya Dwi Cahyani and Indri Fogar Susilowati, "Kajian Yuridis Pengakuan Masyarakat Hukum Adat Di Wilayah IKN Dalam Upaya Memberikan Perlindungan Hak Atas Tanah Masyarakat Hukum Adat," *Novum*, no. 4 (2023): 37–50.

7 Bhakti Eko Nugroho, "Perlindungan Hak Masyarakat Adat Dalam Pemindahan Ibukota Negara," *Jisip-Unja* 6, no. 1 (2022): 64–78.

8 Cahyani and Susilowati, "Kajian Yuridis Pengakuan Masyarakat Hukum Adat Di Wilayah IKN Dalam Upaya Memberikan Perlindungan Hak Atas Tanah Masyarakat Hukum Adat."

9 Nabil Abduh aqil et al., "Urgensi Perlindungan Hak Kepemilikan Atas Tanah Masyarakat Adat Di Wilayah Ibu Kota Negara Nusantara," *Recht Studiosum Law Review* 1, no. 2 (2022): 14–27, <https://doi.org/10.32734/rslr.v1i2.9670>.

10 Rakhmat Hidayat, "Konflik Agraria Masyarakat Adat Dalam Pemindahan Ibukota Negara," *Konferensi Nasional Sosiologi IX APSSI*, 2022, 140–51, <https://betahita.id/news/detail/7861/masyarakat-adat-dalam-ancaman-konflik-agraria-.html.html>.

11 Nugroho, "Perlindungan Hak Masyarakat Adat Dalam Pemindahan Ibukota Negara."

conclusion conveyed by Mirza Buana in his writing is that in the relocation of Nusantara Capital, the government only encourages prioritizing the right to development but fails to fulfill legal duties and responsibilities towards its citizens. The Nusantara Capital relocation process should be carried out openly and transparently. If there is relocation of Indigenous and local communities, it must be fair, including compensation, so that the condition of the community is not necessarily worse than before.¹²

This paper will focus not only on the impact of the relocation of Nusantara Capital but also on effective modeling to guarantee the rights of indigenous peoples affected by the relocation of Nusantara Capital. Thus, this paper aims to analyze (1) the substance of the Nusantara Capital development regulations on the protection of indigenous people's rights and (2) how the affirmative action model for fulfilling the rights of Indigenous peoples in the Nusantara Capital area can overcome this. The discussion is carried out by first identifying and inventorying the substance of Nusantara Capital development regulations related to the protection of indigenous people's rights. Based on the problems identified by previous studies regarding the protection of Indigenous people's rights in the Nusantara Capital area, socio-legal research is used on the community in Sepaku Village and Pemaluan Village, Penajam Paser Utara Regency to find the right affirmative action model for the fulfillment of Indigenous people's rights in the Nusantara Capital area.

2. Method

This article is the result of research into the use of empirical legal research as an alternative approach to the testing of doctrinal studies of the law.¹³ This research examines the application of the rights of indigenous peoples communally recognized in human rights. The data collection process begins with determining the population and sample, with the data collection method using purposive sampling by using certain criteria considerations such as indigenous community leaders in the Penajam Paser Utara Regency area in East Kalimantan Province, especially in Sepaku Village and Pemaluan Village. Data searches were conducted on studies or literature related to the conditions of indigenous peoples in that area. Furthermore, regulatory searches were also carried out and analyzed using the juridical-qualitative method to clarify the form of regulation related to the appropriate affirmative action model for indigenous peoples in the Nusantara Capital area.

3. Findings and Discussion

3.1 Human Rights and Protection of Indigenous Peoples' Rights

Human rights are basic rights inherent in every human being that are universal. Human rights are not a gift from the state or positive law but are solely based on their dignity as human beings, so the state has no authority to reduce or take away a person's human rights.¹⁴ The state is only in charge of the fulfillment of one's rights. Thus, although every person is born with a different race, ethnicity, gender, language, culture, religion, and nationality, he still has rights that must be upheld by anyone and in whatever country he is. This is the universal nature of human rights.¹⁵

The regulation of human rights in the global community was systematically organized once it was outlined in the Charter of the United Nations and the Universal Declaration of Human Rights, adopted by the UN General Assembly on 10 December 1948. As a follow-up step to the UDHR, it calls on the international community to pay attention to the rights of indigenous peoples, who are often the target of human rights violations. In particular, the term Indigenous peoples became widely known after the Inter Labor Organization (ILO) declared the Convention Concerning Indigenous and Tribal Peoples in Independent Countries (ILO Convention 107) in 1957. This Convention requires States Parties to recognize and protect indigenous and tribal peoples with all their traditional rights and territories, as well as prohibits the dispossession of indigenous peoples' rights and territories for any reason except with the consent of the indigenous peoples and with adequate and fair compensation. It was then revised by the Convention Concerning Indigenous and Tribal Peoples in Independent Countries (ILO

12 Mirza Satria Buana et al., "The Nusantara Capital City Project: Why Development and Human Rights Do Not Always Mix," *Law and Development Review* 16, no. 1 (2023): 185–223, <https://doi.org/10.1515/ldr-2022-0063>.

13 Muhamad Muhdar, *Penelitian Doctrinal Dan Non-Doctrinal: Pendekatan Aplikatif Dalam Penelitian Hukum* (Samarinda: Mulawarman University Press, 2019), <https://doi.org/10.13140/RG.2.2.12690.20169>.

14 Nurwahidah and Asni, "Perlindungan Hak Masyarakat Hukum Adat Melalui Peraturan Daerah Perspektif Siyash Syar'iyah" 3, no. 2 (2022): 261–71.

15 Zidane Tumbel, "Perlindungan Hukum Terhadap Hak-Hak Budaya Masyarakat Adat Dalam Perspektif Hukum Hak Asasi Manusia," *Lex Et Societatis* 8, no. 1 (2020): 5–14, <https://doi.org/10.35796/les.v8i1.28466>.

Convention 169) of 27 June 1989, which emphasizes Indigenous and tribal peoples.¹⁶

Until now, the term Indigenous People has been used in several international agreements, namely The Kari-oca Declaration on the Rights of Indigenous Peoples (1992), the Rio de Janeiro Earth Declaration (1992), the Chiang Mai Declaration on the Rights of Asian Indigenous Tribal People (1993), Vienna Declaration and Program of Action formulated by the United Nations World Conference on Human Rights (1993). Now, the term indigenous people is more officially used with the birth of the United Nations Declaration on the Rights of Indigenous People, also known as UNDRIP.¹⁷

Specifically, ILO Convention 169 is the first legally binding international legal instrument that regulates and recognizes the collective rights of indigenous peoples. It also recognizes important indigenous rights such as free and informed consent, consultation, and compensation. In making policies that will affect Indigenous peoples, governments must consult with them through applicable procedures, especially through their representative bodies, or when considering legislative or administrative measures that may directly affect them.¹⁸ Following the ILO 169 agreement, the Rights of Indigenous Peoples was declared in the United Nations Declaration on the Rights of Indigenous Peoples on 29 June 2006. This Declaration is progressive in recognizing the important foundation for the protection, recognition, and fulfillment of the rights of indigenous peoples. The Declaration also contains recognition of the individual and collective rights of indigenous peoples, the right to cultural identity, the right to education, health, language, and other basic rights. The Declaration also contains recognition of both the existence and the right of indigenous peoples to self-determination, as well as indigenous peoples' rights to land, territory, natural resources, and participation in development. Concerning human rights to customary rights, the general doctrine of the state's obligation to protect, respect, and fulfill customary rights applies. ILO Convention 169 is an international legal instrument ratified by 24 countries.¹⁹ This instrument can be used as a reference in formulating a policy strategy for protecting indigenous peoples in Indonesia, even though Indonesia has not ratified the ILO Convention 169.

In the Constitution of the Republic of Indonesia, indigenous peoples are recognized and protected through Article 18B paragraph (2) and Article 28I paragraph (3) of the 1945 Constitution. The consequence of this regulation is the responsibility of the state, both the central government and local governments, to respect the cultural identity and traditional rights of indigenous peoples by aligning themselves with the times while upholding human dignity. The form is issued by issuing policies or regulations related to the protection of indigenous peoples' rights and keeping indigenous peoples in existence. The state also guarantees protection to indigenous peoples if their traditional rights are violated.²⁰

Unfortunately, this arrangement is not followed up by regulations at the Law level that specifically regulate the derivatives of Article 18B (2) and Article 28I (3) of the 1945 Constitution regarding the recognition and protection of indigenous peoples in Indonesia. However, several separate regulations at the law level regulate the protection and recognition of indigenous peoples, including Article 2 paragraph (4) and Article 3 paragraphs (1) and (2) of Law No. 5/1960 on Basic Agrarian Principles which authorizes customary law communities to exercise state control rights and recognizes customary rights, Articles 4, 5 and 67 of Law No. 41/1999 on Forestry recognizes customary forests managed by customary law communities, Law No. 6/2014 on Villages recognizes customary villages, Law No. 23/2014 on Local Government authorizes local governments to grant recognition to customary law communities, and Article 9 paragraph (2) of Law No. 39/2014 on Plantations stipulates that entrepreneurs who apply for rights over a certain area must first conduct deliberations involving customary law communities.²¹

Specifically, in order to recognize and respect the unity of customary law communities and their 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, it is necessary to recognize and protect customary law communities,

16 Ministry of Foreign Affairs, 2022, Final Report, "Reviu Kebijakan Kemitraan: Kajian Masyarakat Hukum Adat Indonesia dan Strategi Untuk Penguatan dan Perlindungan Hukumnya", Foreign Policy Strategy Board/ Badan Strategi Kebijakan Luar Negeri (BSKLN), Ministry of Foreign Affairs, Jakarta.

17 Tumbel, "Perlindungan Hukum Terhadap Hak-Hak Budaya Masyarakat Adat Dalam Perspektif Hukum Hak Asasi Manusia."

18 See, Article 6(1)(a) ILO Convention 169 on Muazzin Muazzin, "Hak Masyarakat Adat (Indigenous Peoples) Atas Sumber Daya Alam: Perspektif Hukum Internasional," PADJADJARAN Jurnal Ilmu Hukum (Journal of Law) 1, no. 2 (2014): 322–45, <https://doi.org/10.22304/pjih.v1n2.a7>.

19 Stivani Marantika Poro, Ali Imron, and wika Yudha Shanty, "Perlindungan Hukum Hak Tradisional Masyarakat Hukum Adat Terhadap Tindakan Individualisasi Tanah Ulayat Untuk Tujuan Komersial," Bhirawa Law Journal 2, no. 1 (2021).

20 Poro, Imron, and Shanty.

21 Aryo Subroto, "Peran Negara Dalam Menjaga Eksistensi Masyarakat Hukum Adat," Yuriska : Jurnal Ilmiah Hukum 11, no. 1 (2019): 59–73, <https://doi.org/10.24903/yrs.v11i1.457>.

the central government through the Ministry of Internal Affairs stipulates Internal Affairs Ministerial Regulation Number 52 of 2014 concerning Guidelines for Recognition and Protection of Customary Law Communities. In the regulation, three stages must be carried out before a decree of recognition and protection is issued by the head of the region, namely the identification stage, the verification and validation stage, and finally, the stage of determination of indigenous peoples. Article 5, paragraph (2) states that there are five things identified as proof of the existence of customary law communities: (1). history of customary law communities; (2). customary territory; (3). customary law; (4). customary property and/or objects; and (5). customary institutions/government system.

In das sollen, the central government has guaranteed juridically in organizing a welfare government system²² by fighting to fulfill constitutional and traditional rights. Constitutional rights are the basic rights and basic freedoms of every citizen, related to education, employment, equality before the law, socio-economic rights, freedom of opinion, and the right to live and reside guaranteed by the Constitution. While traditional rights are special or special rights inherent and owned by a community of people for the existence of common origin (genealogical), the similarity of territory, and other customary objects, rights to customary land, rivers, and forests are practiced in the community.²³

However, in Das Sein, the ambiguous construction of constitutional articles related to recognition and respect does not escape the middle ground that only provides political satisfaction. The Constitutional Court (Mahkamah Konstitusi), as the guardian of the constitution, is also unable to make interpretations that benefit indigenous peoples. The facts show that Article 18B paragraph (2) cannot be implemented. This is evidenced by the fact that so far, the Constitutional Court (Mahkamah Konstitusi) has never been able to grant the proposal of indigenous peoples in the Constitutional Court because indigenous peoples are not considered to have valid legal standing. The four conditions for the recognition of Indigenous peoples, namely, as long as they are still alive, following the development of society and the principles of the Unitary State of the Republic of Indonesia, and regulated in the Law, are extremely high requirements for Indigenous peoples to obtain legal standing status, including obtaining their traditional rights. On the contrary, for the authorities or entrepreneurs as strong parties, the four conditions are used as arguments to close the door tightly so that Indigenous peoples cannot easily obtain their customary rights.²⁴

3.2 Nusantara Capital Policy and Indigenous Peoples's Rights

The protection and recognition of indigenous peoples in Indonesia is regulated in the Indonesian constitution, article 18B paragraph (2) of the 1945 Constitution, which states that the Indonesian state recognizes and respects the unity of customary law communities and their traditional rights as long as they are still alive and under the development of society and the principles of the unitary state of the Republic of Indonesia as regulated by law. This declarative arrangement does not necessarily give the community the right to the customary authority that should be attached to it, even though the conditions attached to the recognition backfire for indigenous peoples to maintain the existence of indigenous peoples and their inherent customary rights. The politics of Indonesian agrarian law places the regulation of indigenous peoples in a gray area by stipulating the conditions regulated by legislation.

The guidelines for recognizing and protecting indigenous peoples are regulated in the Minister of Internal Affairs Regulation No. 52/2014, which mandates regions to determine and protect indigenous peoples in their territory. This then provides a mandate for regional heads to arrange for the determination and protection of indigenous peoples in their territories, such as the enactment of Provincial Regulation Number 1 of 2015 concerning Guidelines for the Recognition and Protection of Indigenous Peoples in East Kalimantan Province. The establishment of the Nusantara Capital City in Penajam Paser Utara makes this area no longer within the scope of East Kalimantan Province, so Regional Regulation Number 1 of 2015 does not apply to the Nusantara Capital City area. Prior to the establishment of IKN, indigenous peoples were not recognized as stipulated in the Regional Regulation. So, when the determination of the Capital City will be built in the Penajam Paser Utara area, this causes vulnerability²⁵ to indigenous peoples who have not been recognized through regional regulations or even regional head decisions for both indigenous peoples and customary rights they control in the Penajam Paser

22 Rahmawati Al-Hidayah et al., "Strategi Hukum Pengembangan Tambak Smart Silvofishery Dalam Mangrove Di Ibu Kota Nusantara," *Prosiding Seminar Nasional Lahan Suboptimal Ke-11 Tahun 2023* 6051 (2023): 616–25.

23 Jawahir Thontowi, "Pengaturan Masyarakat Hukum Adat Dan Implementasi Perlindungan Hak-Hak Tradisionalnya," *Pandecta: Research Law Journal* 10, no. 1 (2015): 1–13, <https://doi.org/10.15294/pandecta.v10i1.4190>.

24 Thontowi.

25 Susmiyati, H.R., Harjanti, W., Al Hidayah, R. (2023). Development of the Nusantara Capital, Sustainable Extraction for East Kalimantan. In: Warsilah, H., Mulyani, L., Nasution, I.K. (eds) *Assembling Nusantara. Advances in 21st Century Human Settlements*. Springer, Singapore. https://doi.org/10.1007/978-981-99-3533-8_11

Utara area. These conditions pose a major threat to cultural identity and the living space and movement of the community, not only to indigenous peoples. The situation is then exacerbated through the provisions of Article 42 of Law Number 3 of 2022 concerning the State Capital, which states that with the enactment of this law, the laws and regulations governing regional government are invalid. This article has the consequence that East Kalimantan Regional Regulation No. 1/2015 on Guidelines for the Recognition and Protection of Indigenous Peoples in East Kalimantan does not apply. This is very concerning considering that the Aliansi Masyarakat Adat Nusantara (AMAN), through interviews with mass media, stated that there are at least thirteen indigenous communities in Penajam Paser Utara Regency that are included in the Nusantara Capital City area. AMAN's overlay of the IKN Strategic Area Delineation Map shows that there are 51 indigenous communities in Penajam Paser Utara Regency and Kutai Kartanegara Regency.²⁶ The provisions of Article 21 of Law Number 3 of 2022 concerning the State Capital mention that spatial planning, land, and transfer of land rights, the environment, disaster management, and defense and security are carried out by paying attention to and providing protection for individual rights or communal rights of indigenous peoples and cultural values that reflect local wisdom. Article 4 paragraph (3) of Presidential Regulation Number 65 of 2022 also states the same thing concerning Land Acquisition and Spatial Planning for the Capital City. Under these conditions, the rights of indigenous peoples are very vulnerable to being violated by the Nusantara development projects. It has also been emphasized by Mirza Buana that this development project IKN has the potential to ignore the rights of indigenous peoples who are often not involved in decision-making processes that affect their land and lives, causing threats to the land and autonomy of indigenous peoples.²⁷

These arrangements place land and other natural resources controlled by customary law communities in a vulnerable and open position because each parcel of land becomes the object of land acquisition by the Nusantara Capital Authority and/or ministries/agencies within the Nusantara Capital through the release of forest areas and through land acquisition mechanisms.²⁸ This means that although there is room for negotiation through consensus in the transfer of land rights, the status of the Nusantara Capital as a national strategic area makes this possibility even smaller. Therefore, with the spirit attached to the protection of indigenous peoples as mandated by the constitution, it is necessary to establish regulations regarding the determination and protection of indigenous peoples in the IKN area.

3.3 The Fact of Indigenous Peoples' Existence in the Nusantara Capital

The term Indigenous peoples (*masyarakat adat*) refers to Indigenous peoples in Indonesia, but there are also other terms used, such as customary law communities (*masyarakat hukum adat*) or tribal peoples (*penduduk pribumi*), where these terms contain the same meaning. The Aliansi Masyarakat Adat Nusantara (AMAN) 1999, at its first congress, determined the definition of Indigenous peoples as communities that live based on ancestral origins for generations on a territory that has customs, which has sovereignty over land and natural resources, socio-cultural life governed by customary law and customary institutions that manage the sustainability of community life.²⁹

Self-identification of the community is important in placing a social entity as indigenous. ILO Convention No. 169 of 1986 stated the basic definition of indigenous peoples, that what is meant by nation, tribe, and Indigenous peoples is a group of people who have a historical trace with the community before the invasion and colonization, who developed in their area, consider themselves different from other communities that are now in their area or are not part of the community. They are not a dominant part of society and are determined to maintain, develop, and pass on their ancestral territories and ethnic identity to the next generation as the basis for their continued existence as a tribe-nation, according to their cultural patterns, social institutions, and legal systems.³⁰

The administrative area of Penajam Paser Utara Regency is currently designated as the Nusantara Capital based on Law Number 3 of 2020 concerning the State Capital. In the past, this area was inhabited by tribal groups who lived scattered. Each group established a small kingdom commonly called the Adat Kingdom. Each kingdom carried out traditions passed down from generation to generation who made a living as fishermen and farmers. Adat kingdoms were built by the Paser tribe around the rivers and bays around Penajam. An Adat kingdom is

26 Muhammad Arman, "IKN, Sebuah Masalah Masyarakat Adat," *mediaindonesia.com*, 2022, <https://mediaindonesia.com/opini/529875/ikn-sebuah-masalah-masyarakat-adat>.

27 Buana et al., "The Nusantara Capital City Project: Why Development and Human Rights Do Not Always Mix."

28 Haris Retno Susmiyati et al., *Abuse of Power: Legalization of Illegal Mining in National Strategic Projects* (Atlantis Press SARL, 2024), https://doi.org/10.2991/978-2-38476-279-8_2.

29 Mia Siscawati, "Masyarakat Adat Dan Perebutan Penguasaan Hutan," *Jurnal Transformasi Sosial* 16, no. 33 (2014): 3–23.

30 International Labour Office., *Hak-Hak Masyarakat Adat Yang Berlaku : Panduan Untuk Konvensi ILO 169*, 2010.

usually led by a king or adat leader. For example, the customary government of the Adang Tribe lives in Teluk Adang (Paser Regency), the adat government of the Lolo Tribe lives in the Lolo River Estuary (Paser Regency), the adat government of the Kali Tribe lives in Long Kali (Paser Regency), the adat government of the Tunan Tribe lives in the Tunan River Estuary (Penajam Regency), and the Balik Tribe government lives around Balikpapan Bay.³¹

The Balik tribe is one of the tribes in East Kalimantan that, according to history, initially inhabited Balikpapan as a minority group. At one time, a disease outbreak occurred, which caused the Balik tribe to leave the Balikpapan area to save themselves to various places, including the Sepaku River area, which is currently administratively included in the Sepaku District.³² The Balik Tribe community is spread across several villages in the Sepaku Sub-district, including Pemaluan Village, Bumi Harapan Village, and Sepaku Village. Sepaku sub-district is one of the 4 (four) sub-districts in Penajam Paser Utara Regency. Sepaku Sub-district is an area that is included in the government's Core area (Kawasan Inti Pemerintahan) of the Nusantara Capital based on government stipulations as stated in the Nusantara Capital law.

Based on the results of field research, information was obtained regarding the historical existence of the Balik Tribe in the Nusantara Capital area today. According to Sibukdin, the adat leader of the Balik tribe in Sepaku village, their ancestors occupied the area long before the independence of the Republic of Indonesia, around 1911. Sibukdin is the third or fourth generation of the Balik tribe to occupy the area.³³ As an indigenous people, the Balik Tribe also has various identities and characteristics that are owned by other indigenous peoples. In addition to the adat territory currently occupied, the Balik tribe also has adat institutions. These adat institutions are part of the Paser adat institutions, which are hierarchical, starting from the adat institutions at the village level, sub-district level, and also at the district level.³⁴ In addition to adat institutions, the Balik tribe has another identity, namely language. The Balik Tribe's language tends to be different from other tribes in East Kalimantan and even different from the Paser language itself, which is called the Balik language. Balik language is the daily language of the Balik people interacting with each other, including those who live and settle outside the Sepaku sub-district area.

The Balik tribe also has other cultural treasures besides language. The Belian ritual (*Belian Bawo*) and dance art called ronggeng dance are some of them. The *Belian Bawo* ritual of the Balik tribe differs from the Belian ritual of other tribes in Kalimantan. The unique difference in the Balik tribe's Belian ritual is the ritual of cutting the tongue. Nevertheless, nowadays, the tongue-cutting ritual is almost extinct because it is considered contrary to Islamic teachings. In this procession, it is explained that the cut tongue is a sign that 'people from above' (spirits) have come. However, the person's tongue will return to normal after the ritual.

Meanwhile, the ronggeng dance, or *Ronggeng Balik*, is a traditional dance performed by the women of the Balik tribe. Nowadays, many *Ronggeng Balik* are performed with only dance and music. But actually, traditional *Ronggeng Balik* is also performed by dancers who sing in the local language of the Balik tribe. In the past, Ronggeng Balik was used by the Balik people as one of the healing rituals for people affected by illness. The elders of the Balik community will then lead prayers and give traditional medicinal herbs with seven female *Ronggeng Balik* dancers accompanied by drums and Gambus Music. In the past, the Balik tribe believed that the series of processions could help heal by involving ancestral spirits.³⁵

3.4 Problems in the Development of the Nusantara Capital and Indigenous Peoples

3.4.1 Negation of the recognition of the existence of indigenous peoples in the Nusantara capital development area

The issue currently faced by indigenous peoples in the IKN area is their recognition as a unity of customary law communities as mandated by Article 18b paragraph (2) of the Constitution. The indigenous peoples in the Penajam Paser Utara Regency and Kutai Kartanegara Regency, which are now partially designated as IKN areas, have been waiting for their legitimization as an entity for far too long. After the enactment of Minister of Internal Affairs Regulation 52/2014, the indigenous people of Paser have also tried to pressure the local government for

31 BPCP Kaltim, "Jejak Budaya Penajam Paser Utara | Balai Pelestarian Cagar Budaya Provinsi Kalimantan Timur," kebudayaan.kemendikbud.go.id, 2018, 13<https://kebudayaan.kemendikbud.go.id/bpcbkaltim/jejak-budaya-penajam-paser-utara/>.

32 Interview with Adat Leader of the Balik tribe on October 17, 2022

33 Interview with Adat Leader of the Balik tribe on October 17, 2022.

34 Interview Adat Leader of the Balik tribe in Pemaluan Village on October 18, 2022

35 Sucipto, "Yati Dahlia Tak Ingin Ronggeng Balik Tercekik - Kompas.Id," [kompas.id](https://www.kompas.id/baca/sosok/2022/03/29/yati-dahlia-tak-ingin-ronggeng-balik-tercekik), 2022, <https://www.kompas.id/baca/sosok/2022/03/29/yati-dahlia-tak-ingin-ronggeng-balik-tercekik>.

recognition. On 7 March 2016, the Paser indigenous people held an action demanding recognition and protection of the rights of the Paser indigenous people in the yard of the Penajam Paser Utara Regent's office. The Paser indigenous people have been given promises too often, but there has never been any realization. Therefore, they firmly demand that the Penajam Paser Utara Regency Government immediately implement the 6 (six) demands of the indigenous people, and they will continue to oversee every existing policy until the community can enjoy independence in accordance with the great ideals of the founders of this nation.³⁶ Two of the six points demanded by indigenous peoples are: First, to form a local regulation recognizing and protecting the rights of indigenous peoples, and second, the local government should immediately implement Minister of Internal Affairs Regulation 52/2014 on the Guidelines and Protection of Indigenous Peoples.

Referring to the identification results conducted by the Aliansi Masyarakat adat Nusantara (AMAN) in 2021, it was found that 21 Indigenous Peoples communities inhabit the IKN development area, namely 19 Indigenous Peoples Communities in Penajam Paser Utara Regency and 2 Indigenous Peoples Communities in Kutai Kartanegara Regency.³⁷ The two local governments, namely Penajam Paser Utara Regency and Kutai Kartanegara Regency, do not yet have regulations governing the recognition and protection of indigenous peoples as well as other regions, namely Paser Regency,³⁸ Kutai Barat Regency,³⁹ and Mahakam Ulu Regency⁴⁰ each of which has a regional regulation on the recognition of indigenous peoples. The existing condition of regulations governing indigenous peoples in Penajam Paser Utara Regency is Regional Regulation of Penajam Paser Utara Regency Number 2 of 2017 concerning the Preservation and Protection of Paser Customs. Unfortunately, this regulation only accommodates the position of customary institutions, not focusing on indigenous peoples, so the existence of this regulation does not provide concrete recognition and protection of indigenous peoples.

3.4.2 Lack of Recognition of Indigenous People's Territories in the Nusantara Capital Development Area

The lack of recognition on the existence of indigenous peoples has implications for the lack of recognition of their customary territories. Recognition of customary territories cannot be separated from the existence of indigenous peoples as humans who are essentially closely related to land. For indigenous peoples, land is not only an area for settlement but also a place to seek life and livelihood. The living space for indigenous peoples is not only houses and yards but also rivers, forests, fields, gardens, and traditional rites, ancestral graves that cannot be separated in the lives of indigenous peoples.⁴¹ Land conflicts in the IKN area have been happening for a long time. Before there was a discourse on moving the capital to East Kalimantan, conflicts occurred between indigenous peoples and corporations holding concessions in indigenous territories. In 2019 alone, AMAN noted that 30,000 hectares of indigenous territories overlapped with Industrial Forest and Plantation concession licenses.⁴²

36 Aliansi Masyarakat Adat Nusantara - AMAN, "Masyarakat Adat Penajam Paser Utara Tuntut Pengakuan Dan Perlindungan Hak Masyarakat Adat," accessed October 8, 2024, <https://aman.or.id/regional-news/masyarakat-adat-penajam-paser-utara-tuntut-pengakuan-dan-perlindungan-hak-masyarakat-adat>.

37 AMAN, "Tangguh Di Tengah Krisis," Catatan Akhir Tahun AMAN 2021 Aliansi Masyarakat Adat Nusantara, 2021, <https://aman.or.id/organization-document/catatan-akhir-tahun-aman-2021:-tangguh-di-tengah-krisis>.

38 Paser Regent Decree Number 413.3/KEP-924/2019 on the Recognition and Protection of the Paring Sumpit Customary Law Community of Muara Andeh Village in Paser Regency.

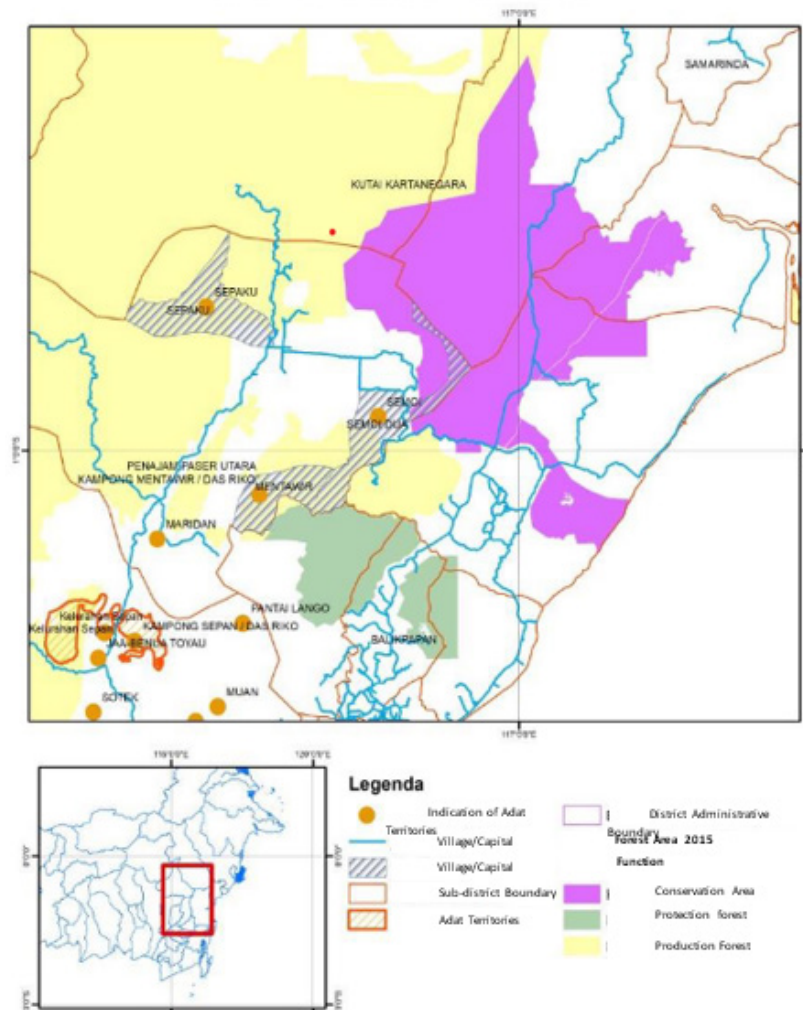
39 Regional Regulation of West Kutai Regency Number 14 of 2019 on the Status and Territory of Customary Land

40 Regional Regulation of Mahakam Ulu Regency Number 7 of 2018 concerning Recognition, Protection, Empowerment, Customary Law Communities and Customary Institutions.

41 Interview, Indigenous woman figure of Balik, August 2024

42 AMAN, "Tangguh Di Tengah Krisis."

Figures 1. Capital Territory Vs IP's Territory Analysis



Source: End-Year Notes AMAN, 2021

Prior to the IKN project, there were two waves of large-scale land demand by development projects that were responded to with land ownership claims. The first wave took place in the 70s to 90s. During this period, the central and local governments needed land for transmigration sites, building roads, and government offices, including the need for land to be used as oil palm plantation areas with Cultivation Rights Title.⁴³ The second wave took place during the first half of the 2000s. During this period, land was needed for mining, small-scale forestry, oil palm plantations, and infrastructure development. One of the characteristics of this period is the magnitude of land ownership claims due to the euphoria of reform and decentralization.⁴⁴ Furthermore, from the results of AMAN's identification, of the 21 Indigenous Peoples communities that inhabit the area used to develop IKN, 11 Indigenous Peoples Community areas are included in the core zone of IKN development. This shows that the IKN development location is not an empty and conflict-free land, as stated by state officials on various occasions.⁴⁵

The lack of recognition of Indigenous Peoples' territories is inversely proportional to the IKN area land-sharing policy that occurs in Indigenous Peoples' territories, in addition to the stretching of various projects, as

43 Rikardo Simarmata, "Tumpang Tindih Penguasaan Tanah Di Wilayah Ibu Kota Negara 'Nusantara,'" *Veritas et Justitia* 9, no. 1 (2023): 1–33, <https://doi.org/10.25123/vej.v9i1.6504>. See also H. R. Susmiyati and Siti Maimunah, "Tubuh Tanah Air - Inside Indonesia: The Peoples and Cultures of Indonesia," *Insideindonesia.org*, 2022, <https://www.insideindonesia.org/editions/edition-148-apr-jun-2022/tubuh-tanah-air>.

44 Christopher Barr et al., *Decentralization's Effects on Forest Concessions and Timber Production*, Center for International Forestry Research (CIFOR), 2006.

45 AMAN, "Masyarakat Adat Penajam Paser Utara Tuntut Pengakuan Dan Perlindungan Hak Masyarakat Adat."

well as the division of forest land for several well-known campuses,⁴⁶ in addition to granting business concessions for investors.⁴⁷ Indigenous peoples are increasingly squeezed into their living spaces. Even the land of houses and yards has no certainty that it will not be evicted, as conveyed by the customary head of Balik, “there is talk about not being evicted, but we do not hold paper evidence that we are not evicted, while the graves of ancestors have been removed, the river has been dug up, so we cannot use the river.”⁴⁸ Forests can no longer be accessed, gardens and fields cannot be cultivated, and rivers have become abnormal since the river normalization project to meet the needs of the government in IKN. The government divided the forest, but not for indigenous peoples.

3.4.3 Development of the Nusantara’s Capital without Meaningful Participation of Indigenous Peoples

In accordance with Law No. 12/2011 on the Formation of Laws and Regulations, there are many legal principles that stakeholders must then implement in making policies. One example of a principle that should continue to exist in every breath of policy is the “participatory principle.” In accommodating community participation or meaningful participation, at least three prerequisites must be met, among others:⁴⁹ First, the right to be heard, which is a prerequisite for giving the public the right to be heard. In principle, this right has been explicitly regulated in Law 13/2022, more precisely in Article 96 paragraph (2). Second, the right to be considered is a prerequisite for giving the right to be considered, considering that the community will feel the impact and consequences of the enactment of a legislative regulation.⁵⁰ One concrete example still fresh in our memories is the Constitutional Court’s decision regarding the Job Creation Law, which was declared formally flawed by the Constitutional Court.⁵¹ This decision is then considered a problem with the lawmaking process because, in its preparation, several principles are not implemented properly and correctly. Third, the right to an explanation is a prerequisite for giving the public the right to an explanation or answer to the opinion given.

The participatory principle gives legitimacy to the community to participate in making regulations or policies. The philosophy is that because the policy will directly impact the community, it is expected that the legal substance of the policy must depart purely from the hearts and minds of the people. Indigenous peoples, as entities that cannot be separated from the state, are always ignored by state authorities in policy-making. One concrete example is the government’s policy of moving the capital from Jakarta to Kalimantan, which has caused many polemics, such as agrarian conflicts, environmental issues, and the erosion of indigenous peoples in the Nusantara Capital.

The participatory principle as a forum for the community, especially indigenous peoples, to contribute to the creation of good and safe regulations has apparently experienced dysfunction in its implementation. Referring to the theories presented on participation, the participation approach is divided into four types, as follows:⁵² The first type, Top-down, one-way communication and/or consultation, is a form of communication carried out by the government, in this case, the regulation maker, to inform the community that a new regulation will be formed, but this delivery is not accompanied by a discussion space for the community. The second type, Top-down deliberation and/or co-production, is communication carried out by the government to the community by taking the initiative to open a space for discussion and deliberation so that the community can convey their aspirations and expectations of the policies that the government will make in the future. The third type, bottom-up one-way communication and/or consultation, is communication conducted by the community and initiated by the community based on

46 Devita Savitri, “IKN Bakal Punya Hutan Pendidikan Dan Riset, Almamater Jokowi Jadi Pengelola,” *detik.com*, 2024, <https://www.detik.com/edu/perguruan-tinggi/d-7541670/ikn-bakal-punya-hutan-pendidikan-dan-riset-almamater-jokowi-jadi-pengelola>. See also Luqman Hakim, “OIKN: Reforestasi Di IKN Bakal Libatkan Tujuh Perguruan Tinggi - ANTARA News,” *antaranews.com*, 2024, <https://www.antaranews.com/berita/4250095/oikn-reforestasi-di-ikn-bakal-libatkan-tujuh-perguruan-tinggi>.

47 Hendrik Khoirul Muhid and S.D Andryanto, “Konsesi HGU Nyaris 2 Abad Di IKN, Begini Tanggapan Berbagai Pihak, KPA: Lebih Buruk Dibanding Era Penjajahan Belanda - Bisnis Tempo.Co,” *bisnis.tempo.co*, 2023, <https://bisnis.tempo.co/read/1780644/konsesi-hgu-nyaris-2-abad-di-ikn-begini-tanggapan-berbagai-pihak-kpa-lebih-buruk-dibanding-era-penjajahan-belanda>. See also A Asnawi and ND Sitoningrum, “HGU 190 Tahun Buat Investor IKN, Bagaimana Nasib Masyarakat? - Mongabay.Co.Id,” *mongabay.co.id*, 2024, <https://www.mongabay.co.id/2024/07/18/hgu-190-tahun-buat-investor-ikn-bagaimana-nasib-masyarakat/>.

48 Interview of the Adat Leader, August 2024

49 Dian Ayu Widya Ningrum, Al Khanif Al Khanif, and Antikowati Antikowati, “Format Ideal Tindak Lanjut Putusan Mahkamah Konstitusi Untuk Mengefektifkan Asas Erga Omnes,” *Jurnal Konstitusi* 19, no. 2 (2022): 314, <https://doi.org/10.31078/jk1924>.

50 Rokilah Rokilah, “The Role of the Regulations in Indonesia State System,” *Ajudikasi : Jurnal Ilmu Hukum* 4, no. 1 (2020): 29–38, <https://doi.org/10.30656/ajudikasi.v4i1.2216>.

51 Caroline Gabriela Pakpahan, Muhammad Fawwaz Farhan Farabi, and Rianjani Rindu Rachmania, “Quo Vadis: Konsep Meaningful Participation Sebagai Implikasi Putusan MK No. 91/PUU-XVIII/202 Dalam Menunjang Hak Konstitusional,” *SALAM: Jurnal Sosial Dan Budaya Syar-I* 10, no. 4 (2023): 1285–1308, <https://doi.org/10.15408/sjsbs.v10i3.32560>.

52 Mark S. Reed et al., “A Theory of Participation: What Makes Stakeholder and Public Engagement in Environmental Management Work?,” *Restoration Ecology* 26 (2018): S7–17, <https://doi.org/10.1111/rec.12541>.

community initiatives, but there is no room for discussion and deliberation in this communication. The fourth type, bottom-up deliberation and/or co-production, is communication by the community to the government based on the community's initiative, and the government also accepts and is willing to dialogue and deliberate together for the enactment of participatory regulations.

The approach of participation, as intended, can occur anywhere and at any time. It all depends on the quality of regulations and policies implemented by the government and, as far as possible can be accepted by the community. However, what must be highlighted is the role of the government in initiating deliberations so that policy forming can accommodate the aspirations of the community as widely as possible. In conclusion, Reed MS, et al. argue that bottom-up participation, be it communication or deliberation, does not always produce good regulations.⁵³ Given that, in practice, many things must be considered to determine which approach is most appropriate to use in community involvement when producing a policy. Firstly, we should take the time to deeply understand the local context to determine the suitability of the type of engagement approach and tailor its design to that context. Second, all parties should be engaged in dialogue as soon as possible to share the results of development and rule-making based on the most relevant sources of knowledge. Third is managing power dynamics so that each party's contribution is valued and all have an equal opportunity to contribute. Fourth, the duration and frequency of deliberate engagement in the process should be equalized, recognizing that deeply held values may change. Fifth, the representativeness of stakeholder interests and decision-making power should be matched to the spatial scale of the issue under consideration. For this reason, the government must know more about the conditions of the community, especially those affected by the enactment of a policy.

Public participation in drafting regulations is very important, as in the Constitutional Court Decision No. 91/PUU-XVIII/2020, the stages of drafting laws must go through meaningful public participation. This meaningful participation is an important issue because, since the beginning of the formation of the IKN Law, it was drafted with neglect of meaningful participation. Public communication was carried out only through one-way communication and was not substantive. Even consultation forums with academics seemed to fulfill formalities⁵⁴ without ensuring meaningful participation as well as communication with Indigenous Peoples.⁵⁵ The IKN Law was passed hastily in only 43 days, and there was no time to conduct adequate public testing. The government gave no space to dialogue and deliberate on the future direction of IKN.

Community Participation in the IKN Law, based on Article 37 paragraph (1), the community can participate in the process of preparation, development, relocation, and management of the Nusantara Capital. Further, in Article 21, community participation, as intended, can be carried out in the form of public consultation, deliberation, partnership, delivery of aspirations, and/or other involvement in accordance with the provisions of laws and regulations. However, the indigenous people during the IKN were not involved in the stages of IKN development. According to the statement of the customary chief Balik,

“invitations to meetings with indigenous peoples mostly hear directions from the government, without any concrete substance to guarantee the interests of indigenous peoples. Even when the community objected to the intake development project that displaced ancestral graves, the project continued.”⁵⁶

Based on field facts, it shows that the government, in the development of IKN, applies the first type of communication, Top-down, one-way communication and/or consultation, which is a form of communication carried out by the government, in this case, the formulator of the regulation, to convey to the community that a new regulation will be formed. However, this delivery is not accompanied by a discussion space for the community. So, community participation, especially among indigenous peoples, is almost non-existent.

3.4.4 Lack of information disclosure and policy transparency in IKN Development

The Nusantara Capital (IKN) has a special autonomy status that is different from other provinces or districts/cities in Indonesia. This “special” narrative is then reinforced in the explanation section of The Capital Law,⁵⁷ stating that “the implementation of a special government in the Nusantara Capital is possible by referring to Article 18B paragraph (1) of the 1945 Constitution of the Republic of Indonesia”, this status is similar to special regions such as Jakarta and Yogyakarta, but with broader authority, especially in regard to development

⁵³ Reed et al.

⁵⁴ No Name, “Akademisi Hukum Unmul Tolak Pembahasan RUU IKN Yang Tidak Partisipatif,” klikamarinda.com, 2022, <https://klikamarinda.com/akademisi-hukum-unmul-tolak-pembahasan-ruu-ikn-yang-tidak-partisipatif/>.

⁵⁵ Interview of the Adat Leader, June and September 2024.

⁵⁶ Interview of the Adat Leader, August 2024,

⁵⁷ Law of the Republic of Indonesia Number 21 of 2023 Concerning the Amendment to Law Number 3 of 2022 Concerning the Nusantara Capital City

and management. Although located in East Kalimantan, IKN has administrative and economic autonomy under the IKN Authority.

The authoritative form of management provides special authority in IKN policy-making. In the principle of transparency of information and policies in development, in reality, information is often closed and policy transparency does not occur, such as first, project transparency and environmental risks are not transparently conveyed to citizens. Since the beginning, the IKN project was not open to the public. The drafting of the IKN Law was made by ignoring the principle of transparency in the drafting of laws, so a petition for review appeared before the Constitutional Court, but the Constitutional Court's decision stated that it rejected the petition. It stated that the IKN Law was constitutional. This differs from the Constitutional Court's decision on testing the Work Creation Law, which has the same substance as the IKN Law, deciding that the principle of transparency is not fulfilled and the process is hasty and exclusive. The Work Creation Law was declared not to fulfill the information disclosure requirements and was explicitly declared by the Constitutional Court as conditionally unconstitutional.⁵⁸

Secondly, information related to the spatial plan should have been communicated openly and transparently, not only in planning but also in implementation. However, the document was poorly shared, leading to 200 landowners being deemed to have violated the IKN spatial plan, a document that was not adequately communicated to indigenous peoples. Under the pretext of the IKN spatial plan, communities had to leave homes and territories that had clearly been occupied by indigenous peoples for generations in the region based on IKN's interests. Communities were evicted from their homes and given seven days to leave.⁵⁹ People are scared and stressed by this situation. Landowners were never invited to the spatial planning discussions and were suddenly asked to vacate their homes.⁶⁰ The finding of eviction orders poses a serious threat to the existence of indigenous peoples. However, after strong protests from residents, academic groups, and Indigenous Peoples, the letter was withdrawn.⁶¹

Third, the transparency of the IKN Development project, both planning and handling of its impacts, was not carried out transparently. The public even had to file an information lawsuit at the Public Information Commission, and the result was that the public won the information lawsuit and the authorities were required to disclose information to the public. However, instead of implementing the decision of the Public Information Commission (KIP), the authorities appealed the decision.⁶²

Fourth, the transparency of policy plans toward indigenous peoples is not openly informed. Regional symbols, symbols of indigenous peoples, are used in various occasions in the capital of the archipelago. However, transparency and clarity on the fate of indigenous peoples are not openly conveyed, while the living space of the community continues to change and be destroyed by various IKN infrastructure project activities.

3.4.5 The indecisiveness of Regulations in Protecting the Rights of Indigenous Peoples in the Provisions of IKN

The IKN Law, in several provisions, mentions indigenous peoples as a right that must be considered in the implementation of policies for the development of the Nusantara capital. However, the interpretation of the regulatory provisions contains several important criticisms because the content of the phrases is not firm and actually opens space for ignoring the rights of indigenous peoples. Criticisms of the regulation are: Firstly, the phrase 'in the implementation of the policy, it shall be implemented with due regard to indigenous peoples,' including in Article 21: Spatial planning, land and the transfer of land rights, the environment, disaster management, and defense and security as referred to in Articles 15 to 20 shall be implemented by paying attention to and providing protection for individual rights or communal rights of indigenous peoples and cultural values

58 Nor Fadillah, "Penerapan Asas Keterbukaan Dalam Pembentukan Undang-Undang Tentang Cipta Kerja Dan Undang-Undang Tentang Ibu Kota Negara," *Jurnal Lex Renaissance* 7, no. 2 (2022): 243–64, <https://doi.org/10.20885/jlr.vol7.iss2.art3>.

59 Surat Deputy Bidang Pengendalian Pembangunan Otorita IKN Nomor: 179/DPP/OIKN/III/2024 Tertanggal 4 Maret 2024, Perihal undangan arahan atas pelanggaran yang tidak berijin dan atau tidak sesuai dengan Tata Ruang IKN.

60 DP Sumedi and Imam Hamdi, "Koalisi Masyarakat Sipil Kaltim Tolak Perampasan Tanah Untuk IKN Nusantara - Nasional Tempo. Co.," *nasional.tempo.com*, 2024, <https://nasional.tempo.co/read/1844375/koalisi-masyarakat-sipil-kaltim-tolak-perampasan-tanah-untuk-ikn-nusantara>.

61 FN Ulya and Ihsanuddin, "Otorita IKN Tarik Surat Yang Minta Warga Sekitar IKN Robohkan Rumahnya Halaman All - Kompas. Com.," *nasional.kompas.com*, 2024, <https://nasional.kompas.com/read/2024/03/15/06472671/otorita-ikn-tarik-surat-yang-minta-warga-sekitar-ikn-robokan-rumahnya?page=all>.

62 Yasmin Medina Anggia Putri, "Transparansi Proyek IKN Dipertanyakan: JATAM Kaltim Dan FH Unmul Temukan Indikasi Kejahatan Informasi," *kaltimtoday.co*, 2023, <https://kaltimtoday.co/transparansi-proyek-ikn-dipertanyakan-jatam-kaltim-dan-fh-unmul-temukan-indikasi-kejahatan-informasi>.

that reflect local wisdom. Likewise, the provisions of Article 16 (1) Acquisition of Land by the Nusantara Capital Authority and/or ministries/institutions in the Nusantara Capital is conducted through a forest area release mechanism and a Land procurement mechanism in accordance with the provisions of laws and regulations. Explanation of Article 16 Paragraph (1) Land acquisition mechanisms is carried out with due regard to community land rights and customary community land rights. Whereas in the provisions of paragraph (3), it is stated that land for public interest development in the Nusantara Capital is categorized as land acquisition for development in the public interest, in the Elucidation of Article 16 Paragraph (3), it is stated that the granting of management rights to the Nusantara Capital Authority is carried out with due regard to community land rights and land rights of indigenous peoples. Law 21 of 2023 Concerning the Amendment to Law Number 3 of 2022 Concerning the Nusantara Capital,⁶³ Article 15A Paragraph (3) The granting of management rights to the Nusantara Authority shall be carried out with due regard to property rights and other forms of land rights held by the community, as well as land rights of indigenous peoples.

Second, unilateral claims related to land status are based on Article 30 (1), which states that land in the capital city of the archipelago is designated as (a). State Property; and/or (b). assets under the control of the Nusantara Capital Authority. Based on this provision, land in the IKN becomes state property or assets under the control of the IKN authority. This claim will have an impact on the existence of the territory and living space of indigenous peoples. The state's unilateral claim to all land in IKN. Although it is affirmed in the Explanation of Article 30 Paragraph (1) that the stipulation is carried out by taking into account the Land Rights of the community and the Land Rights of indigenous peoples. However, this provision could jeopardize the existence of indigenous peoples' lands, which until now have been reluctant for the state to provide legal recognition and protection. The regulation actually provides an opportunity for the loss of indigenous peoples' lands instead of prioritizing the recognition and protection of indigenous peoples.

Third, the IKN provisions do not regulate explicitly and concretely the recognition of indigenous peoples who actually exist in the IKN area, as well as the recognition of the territories and living space of indigenous peoples that have existed before the presence of IKN. In fact, there is no regulation that specifically makes a breakthrough on the issue of protecting the rights of indigenous peoples.

3.5 Affirmative Action Model: Fulfilling Indigenous Peoples' Rights in the Nusantara Capital Region

In terms of its history, the term affirmative action is defined as the application of a policy where the state and public institutions issue policies that provide opportunities or special treatment to certain groups, including quota policies in state and public institutions: parliament, government, educational institutions, and employment. The concept of affirmative action has a long history in the global world. The term affirmative action is not even universally accepted in terminology. Some understand it in terms of 'positive' and others in terms of 'affirmative.' In America, the term 'affirmative action' is used, while in Europe, such as the UK, France, and Germany, the term 'positive discrimination' is used.⁶⁴

Elizabeth S. Anderson, as cited in Hendri Sayuti, defines this term more broadly, including all policies that have the aim of (a) seeking the removal of barriers in systems and norms against groups as a result of a history of injustice and inequality, and/or; (b) seeking the promotion of an inclusive society as a prerequisite for democracy, integration and pluralism; (c) seeking equality based on identity classifications (race, gender, ethnicity, sexual orientation, etc).⁶⁵

Affirmative action is a temporary discriminatory policy that aims to make certain groups/groups that face unequal situations, get equal opportunities with other groups or groups in the same field. This affirmative policy seems to provide privileges that treat a group differently but to change the situation for the better. Thus, affirmative action is often referred to as positive discriminatory action. Affirmative action works as a mechanism of change and, from a new perspective, shows that temporary interventions can have lasting effects under certain conditions.⁶⁶

The Indonesian Constitution in regulating human rights in Article 28H paragraph (2) contains and regulates the principle of affirmative action. The article reads, "Everyone is entitled to special facilities and treatment to

63 Law Number 21 of 2023 Concerning Amendments to Law Number 3 of 2022 Concerning the Nusantara Capital.

64 George Gerapetritis, *Affirmative Action Policies and Judicial Review Worldwide*, Springer (Switzerland: Springer International Publishing, 2016).

65 Hendri Sayuti, "Hakikat Affirmative Action Dalam Hukum Indonesia (Ikhtiar Pemberdayaan Yang Terpinggirkan)," *Menara Riau: Jurnal Ilmu Pengetahuan Dan Pengembangan Masyarakat Islam* 12, no. 1 (2013): 41–47.

66 Conrad Miller, 2019. Affirmative Action and Its Persistent Effects: A new Perspective. *California Management Review* 2019, Vol. 61(3) 19-33. DOI:10.1177/0008125619849443.

obtain equal opportunities and benefits in order to achieve equality and justice,” so Indonesia also adopts the difference principle. This is the basis for constitutionally applying affirmative action or positive discrimination.⁶⁷ Furthermore, several regulations were made that contained the concept of affirmative action, such as Law Number 10 of 2008 concerning Political Parties⁶⁸ and Law Number 21 of 2001 concerning Special Autonomy for Papua Province.

Indigenous peoples have been recognized in Indonesia’s constitution and regulations.⁶⁹ However, the facts of inequality and injustice for indigenous peoples still occur. Indigenous peoples in the Nusantara capital development area⁷⁰ still experience inequality and injustice. The policy stating that indigenous peoples do not exist in the Nusantara Capital area is a systematic effort to eliminate the rights of indigenous peoples. Decision-making on the development of the Nusantara capital is carried out without the involvement of Indigenous peoples, who are in the area of the development of the capital.⁷¹

The situation of inequality and injustice faced by indigenous peoples requires a breakthrough through affirmative action measures. Five (5) Affirmative actions for Indigenous peoples in the development of the capital are first: Recognition of indigenous peoples; Second: Recognition of Indigenous Peoples’ Territories; third: Information Disclosure and Policy Transparency; fourth: Participation of Indigenous Peoples in the Nusantara Capital Policy; fifth: Implementation of the Protection of Indigenous Peoples’ Rights.

The first affirmative action is the recognition of the existence of indigenous peoples in the Nusantara Capital development area. The problem of inequality of indigenous peoples that has occurred in various sectors, and in particular when dealing with state policies, boils down to the absence of recognition of the existence of indigenous peoples. The arguments are built by relying on state regulations that have the substance to marginalize Indigenous peoples as groups of people who do not meet the requirements determined by state law made by the state unilaterally. Efforts to recognize the existence of indigenous peoples concretely must be made because, factually, indigenous peoples exist in the development area of the Nusantara capital. Existing administrative and technical obstacles cannot be used as an excuse to prevent the recognition of the existence of Indigenous peoples. The diversity of tribes and ethnicities within the Nusantara Capital is a reality that must be recognized by the state instead of trying to eliminate the ethnicity of indigenous peoples by avoiding the state’s recognition of indigenous peoples.

Secondly, the recognition of indigenous peoples’ territories in the Nusantara Capital development area should be done after the recognition of the existence of indigenous peoples. Recognition of the existence of indigenous peoples in the Nusantara Capital area is not enough without recognizing indigenous peoples’ territory as their living space. The Indigenous territory in question is certainly not only in the form of housing and yards but also in the form of recognition of cultural village areas.⁷² Recognition of indigenous peoples’ territories includes housing, yards, forests, gardens, water sources, and religious sites that are an integral part of indigenous peoples’ territories.

Third, information disclosure and policy transparency are important elements in affirmative action for indigenous peoples in the Nusantara Capital area. Closed information and non-transparent policies prevent Indigenous peoples from getting adequate, honest, and substantive information regarding the situation that will change with the state capital development project in the living space of Indigenous peoples. The right to information is part of the protection of human rights. Its fulfillment is part of the state’s obligation.

Fourth, the participation of indigenous peoples in the Nusantara Capital development policy. Indigenous peoples, as Indonesian citizens, have the basic right to participate fully and substantively in policy-making that will impact their lives, including the right to participate fully in the implementation of the development of the Nusantara Capital. Community participation is a human right that is protected by law.

Fifth, the implementation of protection of indigenous peoples’ rights. It is not enough for indigenous peoples’ rights protection policies to stop policy formulation. Protection policies must be concretely implemented

67 Sayuti, “Hakikat Affirmative Action Dalam Hukum Indonesia (Ikhtiar Pemberdayaan Yang Terpinggirkan).”

68 See, Article 55 paragraph 2 Law No. 10/2008 on Political Parties

69 See, article 18B paragraph (2) of the 1945 Constitution of the Republic of Indonesia

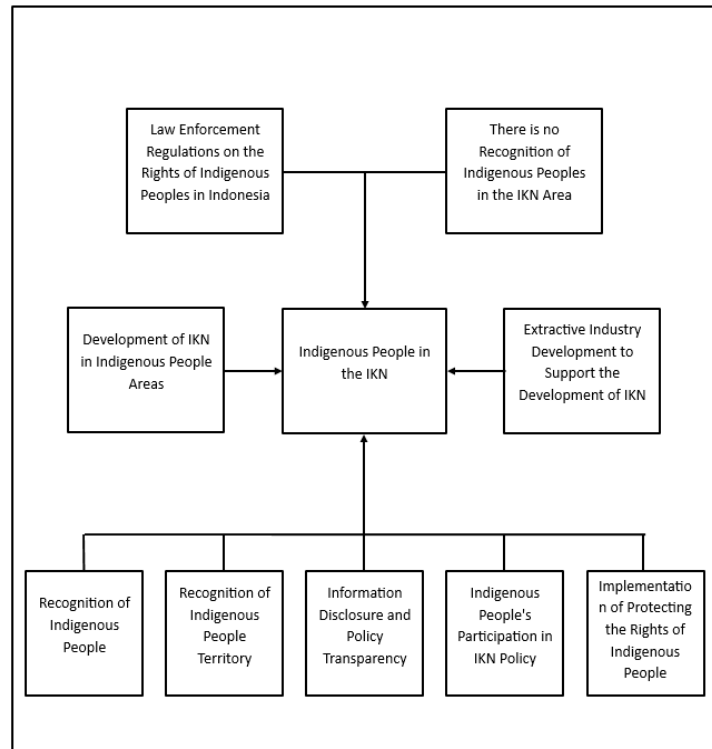
70 Eryan Masbanjar, “Tak Dianggap, Suku Paser Dan Dayak Di PPU Sepakat Tolak IKN,” *idntimes.com*, 2021, <https://kaltim.idntimes.com/news/kaltim/eryan-masbanjar-1/tak-dianggap-suku-paser-dan-dayak-di-ppu-sepakat-tolak-ikn>.

71 Vitorio Mantelan, “Walhi Dan AMAN Gugat UU IKN Karena Pembentukannya Tak Libatkan Partisipasi Penuh Warga,” *nasional.kompas.com*, 2022, <https://nasional.kompas.com/read/2022/04/01/13570061/walhi-dan-aman-gugat-uu-ikn-karena-pembentukannya-tak-libatkan-partisipasi>.

72 Regional Regulation Number 1 of 2016 concerning the Regional Spatial Plan (Rencana Tata Ruang Wilayah /RTRW) of East Kalimantan Province

in full.

Figures 2. The Model of Affirmative Action for Indigenous People in the Nusantara Capital (IKN) Area



Source: Author's design, 2023

The diagram above illustrates that the Affirmative Action model is appropriate for Indigenous peoples in the Nusantara Capital (IKN) area, which is besieged by the situation of law enforcement on the regulation of indigenous peoples' rights in Indonesia, which has been more declarative, the absence of recognition of indigenous peoples in the IKN area, the development of IKN in the territory of indigenous peoples and the development of extractive industries to support the development of IKN. The diagram shows that there are five (5) affirmative actions for Indigenous peoples in the development of the Nusantara Capital (IKN), namely preceded by First: recognition of Indigenous peoples; Second: Recognition of Indigenous Peoples' Territories; Third: Information Disclosure and Policy Transparency; fourth: Participation of Indigenous Peoples in the Nusantara Capital (IKN) Policy that will affect their lives; and fifth: Implementation of the Protecting the rights of Indigenous People.

3.6 Where to Put Affirmative Action Models?

The content of the affirmative action model is expected to be regulated explicitly and concretely in regulations related to IKN. The intended arrangement is through a special rule, namely in the Head of Authority Regulation. The Head of Authority Regulation in question refers to the IKN Law⁷³ Precisely in the explanation section of Article 12 paragraph (5), the Head of Authority Regulation is defined as a statutory regulation stipulated by the Head of the Nusantara Authority to implement higher laws and regulations or based on the authority that is regulating and generally binding. The implementation of the authority's governance in terms of 'spatial planning,' which is oriented towards 'providing protection for the rights of indigenous peoples,' is a logical consequence as a form of responsibility of regional administrators as authority holders.

Because the head of the Authority is the organizer of the special government of the Nusantara Capital as stipulated in Article 4 paragraph (3) and Article 5 of the Law a quo,⁷⁴ the head of the Authority should form a Regulation of the Head of the Authority on the Recognition and Protection of Indigenous Peoples which contains an affirmative action model in it, then indigenous peoples who are deemed to have met the requirements will

⁷³ Law Number 21 of 2023 Concerning Amendments to Law Number 3 of 2022 Concerning the Nusantara Capital.

⁷⁴ *Ibid.*

be determined through the Decree of the Head of the Authority as a form of recognition and protection to the indigenous peoples. Policy advocacy efforts to encourage an affirmative action model for indigenous peoples in the Regulation of the Head of the Authority, must be immediately realized for the full and real fulfillment and protection of the rights of indigenous peoples.

4. Conclusion

States parties, from a human rights perspective, must recognize and protect Indigenous Peoples and Indigenous Peoples with all their traditional rights and territories and prohibit the deprivation of the rights and territories of indigenous peoples for any reason. The protection of indigenous peoples is severely threatened by the regulation of the Law on the Nusantara Capital. A major threat to the cultural identity, living space, and freedom of movement of indigenous peoples is also posed by the non-enactment of the provisions of the Guidelines for the Recognition and Protection of Indigenous Peoples in East Kalimantan in East Kalimantan Regional Regulation No. 1/2015. This weakens the legal status and protection of Indigenous peoples in the capital area. The regulation on indigenous peoples in the regulation on the capital is only a declaration, without providing details of protection or guarantees of living space for Indigenous peoples.

The affirmative action model for the fulfillment of the rights of indigenous peoples in the new capital area can be carried out through, first, recognition of the existence of indigenous peoples in the development area of the capital. Second, recognition of Indigenous peoples' territories in the capital development area, covering housing, yards, forests, gardens, water sources, and religious sites that are an integral part of Indigenous peoples' territories. Third, information disclosure and transparency of policies are important elements in affirmative action for indigenous peoples in the capital area. Fourth, the participation of indigenous peoples in the development policies of the capital, especially policies that have a definitive impact on the lives of indigenous peoples. Fifth, concrete implementation of the protection of indigenous peoples' rights. Policies to protect the rights of indigenous peoples.

The content of this affirmative action model should be contained in the Regulation of the Head of the Authority on the Recognition and Protection of Indigenous Peoples. Then, indigenous peoples who are considered to have met the requirements are determined through the Decree of the Head of the Authority as a form of recognition and protection for indigenous peoples in the Nusantara Area.

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