



Legal Politics of The Movement and Development of The Indonesian Capital City Regarding Legal Protection of The Rights of The Community and Customary Legal Community (MHA)

Linda Setia Ningsih¹, Elviandri², Aullia Vivi Yulianingrum³, Muhammad Nurcholis Alhadi⁴

¹Universitas Muhammadiyah Kalimantan Timur, Indonesia

²Universitas Muhammadiyah Kalimantan Timur, Indonesia

³Universitas Muhammadiyah Kalimantan Timur, Indonesia

⁴Universitas Muhammadiyah Kalimantan Timur, Indonesia

Corresponding Author: Linda Setia Ningsih

E-mail: lindasetia14@gmail.com

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ABSTRACT

The relocation of the National Capital (IKN) to East Kalimantan has had a significant impact on the rights of indigenous peoples (MHA), including 22 indigenous groups such as the Balik, Bajao, and Dayak tribes. Although Articles 18B and 28I of the 1945 Constitution provide the basis for constitutional recognition, their implementation is often inconsistent, resulting in the marginalization of MHA. This study uses a normative legal method with a legislative and conceptual approach. The results of the study show that agrarian legal politics have not expressly protected MHA rights, marked by the dominance of state law that ignores variations in customary law. Injustice in land conversion often occurs without adequate compensation, causing conflicts of values and interests. Gustav Radbruch's theory of legal certainty is an important framework to ensure that IKN development regulations respect customary rights clearly and predictably. Equitable legal protection is needed through formal recognition of customary land, equal compensation, and active involvement of indigenous peoples in the development process. The government needs to integrate customary law into agrarian policies to balance economic, ecological, and cultural interests. The legal pluralism approach can realize substantive justice, harmonize national development with the preservation of local values. Inclusive legal politics can make the IKN a symbol of modernization without sacrificing MHA rights, providing sustainable benefits for indigenous peoples as an integral part of the Indonesian nation.

Keywords: *Civilized, Customary Law Community, Indonesian Capital City, Legal Politics, Legal Protection.*

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INTRODUCTION

There are many terms used to refer to customary law communities, in some literature and laws and regulations there are two mentions of the term customary community, customary community and there are also those who call it customary law community. According to Taqwaddin, the term customary law community was born and used by customary law experts who functioned more for theoretical-academic purposes (Lisman Sumardjani, 2007). Constitutionally, the recognition of customary law communities is emphasized in Article 18B of the 1945 Constitution of the Republic of Indonesia and is strengthened by the provisions of Article 28I paragraph (3) of the 1945 Constitution. This article provides a constitutional position for customary law communities in relation to the state, and is a constitutional basis for state administrators, how a customary community should be treated (Taqwaddin, 2010).

Thus, the article is a declaration of the constitutional obligation for the state to recognize and also respect indigenous peoples, and as the constitutional right of indigenous peoples to obtain recognition and respect for their traditional rights (Lestari, R., & Sukisno, D. 2021). Even based on the United Nations (UN) Declaration on the Rights of Indigenous Peoples, this protection is part of human rights (Muazzin, 2015). Literally, human rights are rights that are inherent in humans, are universal and eternal, therefore they must be respected (*to respect*), protected (*to protect*) and fulfilled (*to fullfil*) as stated by Suteki (Suteki, 2010), there is no power whatsoever that can reduce, seize and ignore it. The relationship between the government and citizens within the framework of human rights gives rise to human rights for citizens, on the one hand, and the state's obligations on the other (Sri Lestari Rahayu and Mulyanto, 2023). The relocation of the Indonesian Capital City (IKN) from Jakarta to East Kalimantan Province still leaves problems, especially related to the rights of the community and indigenous peoples. This is because the location of the IKN is between Penajam Paser Utara (PPU) Regency and Kutai Kartanegara Regency and there are six sub-districts that are directly adjacent to the IKN, namely: Pemaluan Village, Bumi Harapan Village, Bukit Raya Village, Telemow Village, Binuang Village, and Maridan Village. Of course, the government must continue to pay attention to the existence of indigenous peoples in the IKN area to remain a top priority in the development of the country.

The spirit of IKN development should be intertwined with the recognition and respect of the rights of the community and customary law communities so as not to violate the rights of the customary community living in the development area. In order for this goal to be achieved, a strong legal policy that sides with the community is needed. Mahfud MD said that legal policy is a legal policy or official line (policy) regarding the law that will be enforced either with new laws or by replacing old laws, in order to achieve the goals of the State (Mahfud MD, 2009). Legal policy as a statement of the will of the state ruler regarding the laws that apply in the territory of a country and regarding the direction in which the law is to be developed. Legal policy as a tool *or* means and steps that can be used by the government to create the desired national legal system, and with that national legal system the ideals of the Indonesian Nation will be realized (Sarkowi, 2023).

Legal Politics built in the development of the Indonesian Capital City towards the legal protection of the rights of the community and the Customary Law Community (MHA) need to fulfill the following institutions and prerequisites : *first*, development must have a strong policy basis. *Second*, development projects must bring clear benefits to the indigenous community. *Third*, ensure mitigation of the potential negative impacts of the policy . *Fourth*, there needs to be an effort to minimize the occurrence of negative implications. In addition, participatory requirements are also needed to ensure the involvement of the community and the customary law community in the policy process.

Various development projects (in this context, the development of the IKN) often intersect with the interests of indigenous communities. Substantive and participatory steps must be taken to ensure that the interests of a development project remain in line with the principles of human rights protection. Substantive steps include four things, namely: *first* , a development project objective must have legitimacy, *second* , ensuring that the results of the work will benefit indigenous communities, *third*, there are mitigation efforts against the potential for negative impacts that will be faced by indigenous communities, and *fourth* , ensuring that there are efforts to minimize these negative impacts. In addition to the four substantive steps, another important thing is to ensure that the entire process takes place in a participatory manner. Indigenous communities must be ensured to be able to be involved and participate in planning and programs that impact their lives.

The Indigenous Peoples Alliance of the Archipelago (AMAN) has identified at least 22 indigenous communities currently living in the area where the new capital will be built. Other estimates put the number of individuals who are part of the indigenous community groups at 20,000 (Mantalean, 2021). In Pemaluan Village in PPU Regency, for example, there are at least 150 indigenous families from the Balik tribe. Indigenous groups live in both PPU and Kukar Regencies. In terms of the distribution of traditional groups, there are at least two large indigenous groups identified as indigenous communities living in PPU and Kukar Regencies, namely the Bajao and Dayak indigenous groups.

The development of the IKN is included in the national strategic project (PSN). The location of the IKN is not an empty plot of land that has no owner, but is related to various things. First, this area still has the status of a Forestry Cultivation Area (KBK) which is an area designated with the main function to be cultivated, managed or maintained as a forest based on the conditions and potential of its various resources. So that makes the existence of the local community worried that they are very vulnerable to relocation. Second, the existence of indigenous communities around the IKN area who have maintained their existence for generations. Indigenous communities depend on nature for their livelihood and live by occupying land with customary rights status (customary land).

Land ownership and control in indigenous communities in general, in addition to being known as individual land rights, is also known as communal land which is commonly referred to as customary land rights. These customary rights are in the form of agricultural land, plantations, grazing fields, cemeteries, ponds, rivers, and forests and their contents. The Paser Balik tribe is the indigenous population of the IKN area in Sepaku District, Penajam Paser Utara Regency, East Kalimantan. The Paser Balik tribe

has around 5000-6000 hectares of ancestral land that has not received a certificate of ownership. The land is the only support for life, so it can be imagined that if their forests run out, then all livelihoods will also run out.

Data from the Ministry of Public Works and Public Housing (PUPR) in June 2023 showed that the construction progress of IKN phase 1 reached 29.45 percent. All IKN phase 1 projects are targeted for completion in 2024, the 2024 independence commemoration ceremony was held at IKN. Of course, in the midst of the IKN infrastructure project, there are many issues concerning indigenous peoples that have not been resolved.

Indigenous communities in the IKN area feel they were not involved in the relocation of the IKN. This shows the minimal participation of indigenous communities in Paser. The Academic Manuscript which is the basis for the preparation of the IKN Bill (RUU), clearly states the existence of indigenous communities. There are at least seven indigenous tribes mentioned in the academic manuscript. However, when translated into the Bill, it actually disappeared. In fact, the IKN Law does not mention indigenous communities at all, even though they are among the most affected. The academic manuscript functions as *quality control* for the Bill so that its value is lost. In its implementation in the field, the IKN Development process also does not involve the participation of indigenous communities. They should be consulted in a context known as full and effective participation. This process has actually been regulated in various legal instruments.

The second thing is that the indigenous people were never given the opportunity from the start to express their agreement or disagreement regarding the development there. Unilaterally, it seems as if assuming that the land where the IKN will be built is an uninhabited empty land. Based on the indicative map prepared by the Indigenous Peoples Alliance of the Archipelago (AMAN) in 2022, there are around 51 indigenous communities that will be affected by the IKN. A total of 17 communities are in North Penajam Paser and 34 communities in Kutai Kertanegara. In 2014-2016, Komnas HAM conducted a national study related to indigenous peoples containing recommendations and recognition for indigenous peoples, including in Kalimantan. However, it failed because since the report was completed, it has not been implemented properly. The fact is that indigenous peoples are still experiencing problems and even neglect by stakeholders who have the authority. When they have not been recognized as legal subjects, as a community, as part of society, it has an impact on their ownership, their customary areas and even their customary forests not being recognized.

More than 2,500 indigenous communities throughout Indonesia need recognition from the state according to Komnas HAM records. There are two different perspectives in viewing this issue. First, from the perspective of indigenous peoples, of course there is anxiety because they feel intimidated because there is no recognition and protection for indigenous peoples. Second, on the other hand, the entire process of developing the IKN is stated in a master plan that contains comprehensive data including regarding land ownership.

The current legal regulations do not fully support indigenous peoples, especially in the context of the IKN. The Law on Land Acquisition for Public Interest, including the IKN, does require landowners to relinquish their rights for development and for the public interest. Although Law No. 2 of 2012 on Land Acquisition for Development in the Public Interest provides a framework for land acquisition, indigenous peoples are still often in a disadvantageous position.

The IKN project must truly place indigenous peoples living in IKN areas as an important part of the policy. Schemes and guarantees for the protection of indigenous peoples' interests must be prepared carefully and in detail. Guarantees for the protection of indigenous peoples must be more than just a display space for indigenous cultural symbols in urban architectural designs. The most important thing is the guarantee of livelihood and welfare. In relation to the government's attention to indigenous symbols in the development of the IKN.

In relation to the ongoing and ongoing IKN development policy process, studies with a legal, socio-political, and socio-cultural perspective related to the relocation and development of the IKN have not been carried out massively. Research related to the IKN that has been published generally examines the legal, urban planning, and environmental aspects. This study offers that the IKN Development should prioritize fair legal politics as an effort to fulfill the rights of the community and the Customary Law Community (MHA).

RESEARCH METHODOLOGY

The writing of this article uses a normative (doctrinal) legal research method, with the Approach used; 1) Statute approach, which is carried out by reviewing the laws and regulations related to the discussion of this research. 2) Conceptual approach *from* the aspect of the legal concepts that underlie it, or can even be seen from the values contained in the norming. This research has a research target in the form of a set of norms (*black letter law*) at the application level (*professional constituency*), or at a certain level this approach reaches the analysis of legal theory (legal norms (*black letter law*) at the application level (*professional constituency*), or at a certain level this approach reaches the analysis of legal theory (*legal theory*), legal science (*jurisprudence*), and legal philosophy (*legal philosophy*) as *an academic constituency* . The type of data used is secondary data consisting of primary legal materials, namely laws and regulations, secondary legal materials in the form of books, documents, journals, electronic data and secondary laws in the form of books, documents, journals, electronic data and various articles that support this research. Tertiary legal materials, in the form of dictionaries and encyclopedias. Data processing techniques will be analyzed descriptively qualitatively. Analysis of legal materials will be carried out first by identifying the collected materials, then reviewed based on legal theory, then processed and analyzed using systematic interpretation analysis, namely by reviewing the legal problems studied together with other relevant articles, both in one law laws or in other laws, in order to obtain results the problem to be studied.

RESULT AND DISCUSSION

Rights of Communities and Customary Law Communities (MHA)

Indonesia is a country rich in cultural, linguistic, religious, and legal diversity, including customary law that lives and thrives in local communities. Customary law functions to maintain social order and protect natural resources in the customary areas of indigenous communities. As part of everyday life, customary law has binding power based on customs. However, in practice, the existence of customary law is often ignored by state law which tends to be uniform and centralistic.

Forests have an important meaning for indigenous peoples as a source of economic, social, and cultural life. Management of forest resources by indigenous peoples is carried out wisely, reflecting religious-magical local wisdom. However, the conversion of forest land for plantations often causes conflict because it conflicts with customary values. This policy is considered to prioritize economic and development interests without considering the close relationship between indigenous peoples and forests as a source of life.

The dominance of state law over customary law gives rise to various conflicts, both conflicts of interest and values. State law often ignores variations in local law that have long existed in society. Recognition of customary law by state law is often accompanied by conditions that limit its implementation, so that the existence of customary law tends to weaken. In fact, customary law should be respected and integrated into national law without eliminating the essence of its local values Salle, (Kaimuddin, 2006).

The existence of customary law needs to be seen as a complement to state law in achieving development goals that prosper the people. In the context of forest land conversion, the government needs to balance economic, ecological, and socio-cultural aspects. The policies taken must be able to accommodate the interests of indigenous peoples, protect their rights, and preserve the environment, while still providing economic benefits to the wider community.

Law Number 5 of 1960 concerning the Basic Agrarian Law (UUPA) establishes the basis for legal recognition of communities and customary rights in the national agrarian law system. This law reformed the previous land law, contributed to the management of oil, land, and housing contracts, including flats, and introduced the principle of horizontal separation in the UUPA. However, the recognition and protection of customary law in the UUPA is often a mere formality. Customary law is gradually losing its relevance because national legal policies do not explicitly protect indigenous communities from state legal intervention. For example, in the process of land registration through certification, indigenous communities do not receive support from state law and must fight against forest management companies that have official certificates. This situation shows that state law tends to favor the legitimacy of land certificates over the social and cultural existence of indigenous communities.

Article 28I paragraph (4) of the 1945 Constitution of the Republic of Indonesia emphasizes that the cultural identity and rights of indigenous peoples must be respected. The existence of indigenous peoples is closely related to efforts to fulfill human rights, where the state has a legal and moral responsibility to recognize and respect these rights. Customary law includes legal and juridical aspects that support its existence, with implementation involving social bodies consisting of various elements of society. Customary law is very closely related to the values internalized by (Siregar et al, 2024) indigenous peoples themselves, so that it becomes an important internal factor.

The irregularity in the recognition and legal protection of Indigenous Legal Communities (MHA) is caused by various factors, including differences in terms,

dimensions, and the number of institutions that handle MHA. This has implications for the treatment of MHA in its operations which is often inconsistent. In addition, Article 18B paragraph (2) of the 1945 Constitution, although it has been clarified through the Decision of the Constitutional Court (MK), shows that there are contradictions between the conditions stipulated, thus complicating the implementation of laws related to MHA.

Several significant Constitutional Court decisions, such as Constitutional Court Decisions 001-21-22/PUU-I/2003, Number 3/PUU-VIII/2010, Constitutional Court Decision 10/PUU-I/2003, and Constitutional Court Decision 35/PUU-X/2012, have provided an important legal basis for clarifying the position and rights of MHA. These decisions, among others, emphasize the difference between customary forests and state forests and provide a basis for constitutional impairment of MHA. However, although these decisions should encourage progress in the recognition and protection of MHA, their implementation is still far from optimal and often not in line with the concept of a welfare state.

Traditional land tenure patterns of indigenous peoples are increasingly marginalized due to agrarian legal policies that do not firmly protect the rights of indigenous peoples. Policies that tend to prioritize investment and development interests often ignore the principle of justice for indigenous peoples who have managed the land for generations. In addition, changes in people's lifestyles that have begun to abandon the principle of Adat Se Atorang (behavior according to customs) have also weakened their position in defending land rights. The lack of clarity in these regulations opens up space for land disputes, both by the government, entrepreneurs, and between members of the community themselves (Bauw et al, 2009).

The dominance of a centralistic approach in agrarian legal politics often causes indigenous peoples to lose their land rights without adequate compensation. Land that has been the source of their life and cultural identity is taken over in the name of development, without considering its historical and social value. As a result, indigenous peoples feel neglected and do not get benefits from their land. This condition demands a renewal of agrarian legal politics that is fairer, more inclusive, and supports the protection of indigenous peoples' rights for the sake of their continued welfare and local wisdom (Alting, H, 2011).

The orientation of national legal politics must adopt a more inclusive approach to MHA, not only through the production of regulations, but also through changes in the state's perspective. Customary law, which is unwritten and a combination of history and legal reality, needs to be recognized as an integral part of the national legal system. Recognition of MHA as a legal subject that has the right to regulate itself is an important step to ensure the sustainability of protection for MHA, both in the context of the past, present, and future (Sulaiman, et al, 2019).

Land rights (HAT) of communities, including indigenous communities, must be considered in the land ownership process. This is also regulated in Article 16 of Law of the Republic of Indonesia Number 21 of 2023 concerning Amendments to Law Number 3 of 2022 concerning the National Capital, which states that the individual and communal rights of indigenous communities are protected. Article 21 of the law emphasizes that cultural values that reflect local wisdom, such as spatial planning, land ownership, transfer of land rights, the environment, disaster mitigation, and defense and security, must be protected.

Land in the IKN is identified as state property or state ownership in accordance with applicable regulations. Customary law also regulates land management so that each

community gets the portion that is their right. When land is managed by the entitled indigenous community, the affinity relationship with the customary land becomes stronger. Recognition of land ownership by indigenous communities is an important part of protecting customary rights. However, the transformation of customary rights into official proof of ownership is still needed through the process of replacing old rights with new rights (Siregar, et al, 2024).

When the government plans to grant land rights as a form of recognition, indigenous peoples are given the opportunity to express their views. If they meet the requirements, these views will be considered valuable. However, the reality shows that customary rights tend to shrink because indigenous peoples prefer individual rights over collective rights to land. When customary rights are lost, new customary rights are difficult to re-form. Therefore, strategic efforts are needed to protect and strengthen the rights of indigenous peoples within the national legal framework.

Just Legal Politics in Fulfilling the Rights of Communities and Customary Law Communities (MHA) in the Capital City of the Archipelago (IKN)

The relocation of the National Capital (IKN) to East Kalimantan has raised various pros and cons, one of which is related to the rights to land that has been inhabited, cared for, and inherited by the Paser Tribe. The land is not only a source of life for them but also an integral part of their cultural identity and the survival of their generations. However, the decision to move the IKN has raised concerns among indigenous peoples, especially the Paser Tribe, regarding the status of land that has been passed down from generation to generation. Paser Regency Regional Regulation Number 4 of 2019 concerning the Recognition and Protection of Indigenous Legal Communities is expected to be able to provide legal protection for indigenous communities. However, the implementation of the Regulation still causes problems, because the norms regulated therein are considered unclear and vague. As a result, indigenous peoples are often treated unfairly and do not receive the protection they deserve. To ensure justice, a comprehensive evaluation of the regulation is needed, as well as the formation of new regulations that are more in favor of the recognition and protection of the rights of indigenous legal communities (Oktaviany, et al, 2023).

Local communities had carried out various small acts of resistance to defend their land and livelihoods. However, in the end they had to accept the bitter reality that the area had been lost from their grasp. The concerns felt by Indigenous Peoples living in the area of the prospective National Capital City (IKN) are increasing (Firnaherera, et al, 2022). Ironically, in this modern era, customary law is increasingly marginalized. Positive laws that are applied are often drafted without considering the existence of customary law that has long been a part of people's lives. The government should be more sensitive and provide legal certainty for Indigenous Peoples in the IKN area (Armies, et al, 2022).

The development of the Indonesian Capital City (IKN) has brought major changes to land and natural resource control in East Kalimantan, which has a direct impact on the rights of the Indigenous Legal Community (MHA). As a group that has a spiritual and historical relationship with its customary land, MHA faces challenges from development dynamics that often prioritize national investment interests. In this condition, the implementation of a just legal policy is very important to ensure legal certainty and legal protection that protects MHA rights in a concrete manner.

According to Gustav Radbruch, legal certainty is a fundamental element in law that aims to provide clarity, firmness, and predictability in the implementation of regulations

(Julyano et al, 2019). In the context of the IKN, this theory is the basis for ensuring that regulations related to development do not ignore MHA rights. Legal certainty in the development of the IKN must be realized through clear regulations regarding customary land rights, in accordance with Article 18B paragraph (2) of the 1945 Constitution. This includes formal recognition of the existence of customary land and protection mechanisms against unilateral claims by the state or investors that can override the rights of indigenous peoples.

Furthermore, fair legal protection requires the role of the state as a guardian of the human rights of indigenous peoples through policies that protect their collective rights. Relocation or transfer of customary land for development purposes must be accompanied by equal compensation. This compensation is not only financial, but also includes access to social services, education, and economic opportunities in the IKN area. Thus, indigenous peoples do not only lose their land but also gain a sustainable future.

The theory of legal certainty according to Gustav Radbruch emphasizes that the law must be clear, consistent, and predictable to provide fair protection for all parties. In the development of the IKN, this theory must be realized by ensuring that regulations related to land acquisition, relocation, and compensation are carried out transparently and consistently. In addition, indigenous peoples must be actively involved in the planning and implementation process of development to avoid marginalization. This includes the implementation of inclusive dispute resolution mechanisms, such as recognition of customary justice in handling conflicts involving customary land. The existence of customary law, which reflects *the volksgeist* or soul of the people, must be integrated into the national legal system so that MHA rights can be maintained sustainably.

In addition, legal protection for MHA must include effective complaint and dispute resolution mechanisms, which do not only rely on positive law but also integrate local wisdom in resolving conflicts that require active participation of indigenous peoples in every stage of decision-making related to the development of the IKN. This participation not only ensures that the voices of MHA are heard, but also increases the legitimacy of state law in the eyes of local communities. In this regard, the principle of transparency must be the main guideline so that indigenous peoples understand their rights and the processes that will affect them.

Equitable development must also pay attention to the social and cultural sustainability of MHA. This includes respect for local wisdom and traditions that have become an integral part of the lives of indigenous peoples. As part of the legal pluralism approach, recognition of customary law must not stop at mere symbols but must be realized in concrete operational arrangements .

The state must also ensure harmonization between national law and customary law through inclusive agrarian law policies. Law Number 5 of 1960 concerning Basic Agrarian Principles (UUPA) can be a relevant framework to accommodate customary rights in the development of the IKN. This recognition must pay attention to the principle of substantive justice, namely the balance between the rights of indigenous peoples and the interests of national development.

In practice, policies that do not prioritize legal certainty and legal protection will trigger structural inequalities that are detrimental to MHA. Disputes over customary land, neglect of compensation, or relocation without a strong legal basis will create the potential for prolonged conflict. Therefore, a just legal policy must ensure that the development of the IKN not only serves economic interests but also maintains the social and cultural integrity of indigenous communities. In this context, a just legal policy must be the main

foundation for ensuring that development does not sacrifice MHA rights. This can be realized through strict regulations in the IKN Law and its derivative regulations, which provide formal recognition of the existence, land rights, and cultural protection of indigenous communities. Based on Article 18B paragraph (2) of the 1945 Constitution, the state is obliged to guarantee the recognition of the continuity of customary law as an integral part of the national legal system.

A just legal policy in the development of the IKN can only be achieved if the government is able to integrate the theory of legal certainty and legal protection simultaneously. Legal certainty guarantees regulations that do not harm the rights of MHA, while legal protection ensures that indigenous peoples are not only protected normatively, but also receive substantive justice. With this approach, the development of the IKN can be a symbol of harmony between modernization and the preservation of local values, providing benefits to the entire community, including MHA, as an important part of the Indonesian nation.

As a manifestation of just legal politics, the development of the IKN can be a symbol of inclusive development that respects the values of legal diversity. By applying Gustav Radbruch's theory of legal certainty and the principle of legal protection, MHA rights can be integrated into the framework of national development without sacrificing their identity.

The success of the IKN as the new capital city will be more meaningful if it can become a model of harmony between modernization and preservation of local wisdom. This approach will not only strengthen the legitimacy of the IKN project at the local level but also make it a symbol of a country that respects justice and humanity.

CONCLUSION

Recognition and protection of the rights of Indigenous Peoples (MHA) are the main challenges in the development of the Indonesian Capital City (IKN). The dominance of state law which tends to be centralistic often ignores the existence of customary law as an integral part of the national legal system. The lack of clarity in regulations and the neglect of local values cause indigenous peoples to lose their rights to their customary land without proper compensation. The development of a just IKN requires an approach that not only involves the theory of legal certainty but also ensures substantive justice for MHA through the protection of collective rights, equal compensation, and recognition of local wisdom. In the context of IKN development, the state is obliged to integrate customary law as part of an inclusive national legal policy. Active participation of indigenous peoples in decision-making, respect for traditional values, and harmonization of customary law with national law are the keys to realizing fair and sustainable development. With this approach, IKN can become a symbol of harmony between modernization and the preservation of local values, while strengthening the legitimacy of development as an effort to improve the welfare of all elements of society, including MHA.

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