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# Normative Law Regarding the Settlement of Land Disputes in the Capital City of Ibu Kota Negara (IKN) Nusantara, Indonesia

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SRI SUDARTI<sup>1</sup> AND BONAVENTURA NGARAWULA<sup>2</sup>

## ABSTRACT

*Based on Law No. 3 of 2022 concerning IKN, the Archipelago's National Capital City (IKN) development plan aims to progress through five distinct phases between 2022 and 2045. IKN's foundation requires the first phase, which is expected to occur between 2022 and 2024. An estimated 256,142 hectares of land are needed for the relocation of IKN from Jakarta Province to Kutai Kartanegara Regency in East Kalimantan Province and North Paser Penajam Regency. A significant concern arises as this area includes land owned by communities governed by customary law, who fear that the development of IKN may lead to the displacement of their lands. The assurance of land rights is vital for these communities, as it pertains to their livelihoods, biological conservation, and their cultural and group identity. This article seeks to explore strategies to mitigate land-related issues faced by customary law communities during the IKN development phase. The application of a qualitative methodology employing analytical descriptive techniques reveals a critical necessity for initiatives aimed at protecting Indigenous Peoples. Recommended actions include the finalization of the Indigenous Peoples Bill, the establishment of a legal entity for customary law communities, the formal recognition of these communities and their assets through Regional Regulations, the provision of alternative livelihood opportunities, the development of facilities for these communities, the resolution of land overlaps between IKN and customary lands, and, if necessary, the relocation of customary law communities within IKN.*

**Keyword:** *IKN Development, Normative Approach, Customary Law Communities.*

## I. INTRODUCTION

President Joko Widodo declared that the Republic of Indonesia's future State Capital (IKN) would be the Samboja District in Kutai Kartanegara Regency in East Kalimantan Province and the Sepaku District in North Penajam Paser Regency. This region is home to a significant number of indigenous tribes and communities whose livelihoods are primarily based in the

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<sup>1</sup> Author is a student at Postgraduate School, University of Merdeka Malang, Indonesia.

<sup>2</sup> Author is a Professor at University of Merdeka Malang, Indonesia.

vicinity of the IKN area are farming, collecting forest products, and fishing. The natural environment is a place they depend on to meet their living needs, and the place where they take shelter has also become their ancestral heritage which they preserve to this day<sup>3</sup>.

Land control and ownership within communities governed by customary law is characterized not only by individual land ownership but also by communal land, often referred to as customary land rights. In statutory frameworks, the term "customary rights" is frequently employed<sup>4</sup>. These customary rights encompass various land types, including agricultural fields, plantations, grazing areas, burial sites, ponds, rivers, and forests. The Dayak Paser tribe, an ethnic group native to the southeastern region of Kalimantan, also known as Borneo, is located in the southern region of East Kalimantan province in Indonesia. The Paser tribe has been engaged in conflicts with both corporations and government entities.

The land they used for farming and living was confiscated by the government and given to large plantation companies, both private and state, for plantation development. A series of small acts of resistance or resistance was carried out by the local community at that time, but they had to give in and accept the fact that their land and source of livelihood had been lost. However, this big plan raises concerns for Indigenous Peoples in the area that will be occupied by the IKN<sup>5</sup>.

Unfortunately, in modern times, customary law is increasingly marginalized. Positive laws that apply in society are often formulated without paying attention to customary laws that already exist in society. The government should be aware of this and provide legal certainty to Indigenous Peoples who live in the IKN area<sup>6</sup>. The Indonesian government constitutionally acknowledges customary law communities, necessitating the establishment of regulations that protect the rights of Indigenous Peoples, including the Paser tribe. Such regulations are essential to ensure that development in the IKN area does not disrupt or harm the existence of Indigenous Peoples who have resided there for an extended period. Furthermore, these regulations aim to provide justice, benefits, and legal certainty to Indigenous Peoples who will be impacted by the establishment of the new National Capital in Kalimantan.

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<sup>3</sup> Nugroho, B. E. (2022). Perlindungan hak masyarakat adat dalam pemindahan ibukota negara. *JISIP UNJA (Jurnal Ilmu Sosial Ilmu Politik Universitas Jambi)*, 83–97. <https://doi.org/10.22437/jisipunja.v6i1.17417>.

<sup>4</sup> Article 1 of the Regulation of the Minister of State for Agrarian Affairs/Head of the National Land Agency Number 5 of 1999 concerning Guidelines for the Settlement of Customary Land Rights Problems of Customary Law Communities.

<sup>5</sup> Firnaherera, V. A., & Lazuardi, A. (2022). Pembangunan Ibu Kota Nusantara: Antisipasi Persoalan Pertanahan Masyarakat Hukum Adat. *Jurnal Studi Kebijakan Publik*, 1(1), 71–84. <https://doi.org/10.21787/jskp.1.2022.71-84>.

<sup>6</sup> Armies, J., Verauli, A., & Baiquni, M. I. (2022). Urgensi Perlindungan Hak Kepemilikan Atas Tanah Masyarakat Adat di Wilayah Ibu Kota Negara Nusantara. *Recht Studiosum Law Review*, 1(2), 14–27. <https://doi.org/10.32734/rslr.v1i2.9670>.

**(A) Method**

This research seeks to provide an overview of the government's expectations regarding the development of the IKN in relation to matters concerning customary law communities. The study employs a qualitative approach utilizing descriptive methods. Qualitative research is a process of understanding carried out through inquiry methods in seeking meaning from social or humanitarian problems. Data and information were collected through a literature review that is relevant to the study of moving the country's capital city<sup>7</sup>. The data analysis technique is executed in three distinct phases. After the data is collected, steps are then taken to reduce the data and information, present the data, and the final step, namely the interpretation of the data and information that has been processed using theory and various relevant laws and regulations.

This research falls under the category of normative law, which involves the identification of legal rules, principles, and doctrines to address existing legal challenges. Normative research relies on library resources as its primary data source, employing a method that gathers information from a variety of literature. The methodologies applied include a legal framework and a theoretical framework. The statutory approach specifically pertains to the District Regional Regulations, including North Paser No. 4 of 2019, as well as the legal protections afforded to Indigenous Peoples.

**II. LAND CONTROL RIGHTS OF TRADITIONAL LAW COMMUNITIES**

The relationship that Indigenous Peoples have with their land goes beyond simple economic factors, incorporating both social and spiritual aspects as well. Professor Robert A. Williams articulates this profound relationship, highlighting that Indigenous Peoples assert their cultural identity is deeply rooted in their unique ties to their ancestral territories, which have been preserved over generations. As noted by Eddie Sius Riyadi in "Weaving Tips for Fighting for Community Rights Customs in Indonesia,"<sup>8</sup>. Various elements characterize the relationship of indigenous communities in relation to their territory:

1. Indigenous Peoples maintain a profound connection with their lands, territories, and resources.
2. Numerous sociocultural, spiritual, political, and economic facets and responsibilities are included in this partnership.

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<sup>7</sup> Clark, V. L. P., Creswell, J. W., Green, D. O., & Shope, R. J. (2008). *Mixing quantitative and qualitative approaches: An introduction to emergent mixed methods research*.

<sup>8</sup> Clark, V. L. P., Creswell, J. W., Green, D. O., & Shope, R. J. (2008). *Mixing quantitative and qualitative approaches: An introduction to emergent mixed methods research*.

3. The communal aspect of these relationships holds great importance, and the intergenerational elements are vital for the identity, survival, and cultural heritage of Indigenous Peoples.

From the viewpoint of Indonesian customary law, land rights are categorized into two types: community land rights, often referred to as customary rights, and individual land rights. Community land rights, commonly known as Ulayat Rights, pertain to the authorities and obligations of a community governed by customary law with regard to land located within its borders. The legal association and its members are supposed to gain from these rights, as well as the interests of the local populace. For individuals outside the customary law community, such as foreigners or immigrants, access to these lands is permitted only with the consent of the legal association, which involves the payment of a recognition fee<sup>9</sup>.

The legal acknowledgment of customary rights is subsequently addressed not through Government Regulations, but solely via the regulations set forth under PMA/KBPN Number 5 of 1999, the Minister of State for Agrarian Affairs, which offers rules for settling disputes pertaining to customary law groups' land rights. This ministerial regulation provides an explanation of customary rights from those regulated in the UUPA; this explanation is contained in Article 2 which states that:

1. The relevant customary law community upholds customary rights in accordance with local customary law standards as long as they are still acknowledged.
2. Customary rights within a community governed by customary law are deemed to persist under the following conditions:
  - A collective of individuals continues to feel a sense of obligation to their customary legal framework as members of a specific legal association, which acknowledges and implements the rules of that association in their everyday activities,
  - There exists a designated Ulayat land that serves as the habitat for the members of the aforementioned legal association, providing for their daily necessities, and
  - There is an established customary law that regulates the management, oversight, and utilization of customary land, which is adhered to by the members of the legal federation.

The provisions outlined in this article indicate that paragraph (1) addresses the recognition of Indigenous Peoples, which aligns with the stipulations found in Article 3 of the UUPA.

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<sup>9</sup> Supriyadi, B. E. (2013). *Hukum agraria kehutanan: Aspek hukum pertanahan dalam pengelolaan hutan negara*.

Furthermore, the Ministerial Regulation underscores the authority granted to district regional governments in the management of land-related matters, in compliance with Regional Government Law Number 22 of 1999, which was later replaced by Law Number 32 of 2004. Conversely, the Ministerial Regulation imposes limitations on the acknowledgment of rights. Article 3 specifies that the application of customary law pertaining to land cannot be executed on certain plots of land:

1. An individual or legal entity that possesses land control rights in accordance with UUPA has owned it.
2. Owned or handed over by a government agency, legal entity, or individual referring to and by existing laws and regulations<sup>10</sup>

Customary Law Communities (MHA) have various types of land tenure and natural resource management. It contains private rights, collective rights, and communal rights. These three characteristics of land ownership are known in customary law communities. In this context, the "ulayat rights" that are following the UUPA (i.e. community public rights) are only nagari ulayat, while ulayat at the level below are customary property rights, both communal and private<sup>11</sup>. Registration of land rights, called a "Land Certificate", is very important because the registration issued will be proof of legal ownership of the land which has been given legal certainty and legal protection so that its existence is maintained. Land registration can be done with systematic land registration and sporadic land registration<sup>12</sup>.

### **III. PROTECTION OF THE RIGHTS OF CUSTOMARY LEGAL COMMUNITIES IN IKN BY THE GOVERNMENT**

Customary law communities are subjects of state law recognized by the 1945 Constitution and various statutory regulations. In paragraph (2) of Article 18 B of the 1945 Constitution, the State recognizes and respects the cohesion of established legal communities and their traditional rights, as long as these rights are pertinent and align with societal progress and the principles of the Unitary State of the Republic of Indonesia, as outlined by law. Additionally, paragraph (3) of Article 28I reinforces that "The cultural identity and rights of traditional communities are to be respected in harmony with the progress of time and civilization."

Determining regional boundaries is necessary to implement the mandate of the law regarding

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<sup>10</sup> Komnas HAM, Komnas HAM Position Paper on Constitutional Court Decision Number. 35/PUU-X/2012, Jakarta, 2013.

<sup>11</sup> Safitri, M. A., & Moeliono, T. (2010). *Hukum Agraria dan Masyarakat di Indonesia*. HuMa Jakarta, pp. 93–94.

<sup>12</sup> Land Registration, <http://scholar.unand.ac.id/35833/2/2.%20Bab%201.pdf>, Accessed May 2023.

the formation of regions and create certainty in government administrative areas in a systematic and coordinated manner. The presence of the new IKN Nusantara region at the provincial level has changed the boundaries of the East Kalimantan region, even though technically the most important aspect in confirming regional boundaries is geodesy or mapping surveys<sup>13</sup>.

The modification of regional boundaries necessitates changes in various laws and regulations, specifically: Article 1, number 3 of Law No. 25 of 1956, which concerns the establishment of autonomous regions in the provinces of West Kalimantan, South Kalimantan, and East Kalimantan; Articles 5 and 6 of Law No. 47 of 1999, which pertains to the formation of Nunukan Regency, Malinau Regency, West Kutai Regency, East Kutai Regency, and Bontang City; and Articles 3 and 5 of Law No. 7 of 2002, which relates to the creation of North Penajam Paser Regency in East Kalimantan Province. Furthermore, the boundaries of IKN Nusantara are delineated as follows: to the south, it borders Penajam District, North Penajam Paser Regency, Balikpapan Bay, and the districts of West Balikpapan, North Balikpapan, and East Balikpapan, including Balikpapan City; to the west, it shares borders with Loa Kulu District, Kutai Kartanegara Regency, and Sepaku District, North Penajam Paser Regency; to the north, it is adjacent to Loa Kulu District, Loa Janan District, and Sanga Sanga District, all within Kutai Kartanegara Regency; and to the east, it is bordered by the Makassar Strait.

Development should focus on the welfare of the people and provide opportunities to contribute as widely as possible to the people. The main priority in this case includes protecting the rights of indigenous peoples. Development goals will be achieved if the community is empowered through full participation and contribution from the community. Indigenous/indigenous communities as a category of vulnerable groups should be given first attention. If there are problems with access to customary land, then Indigenous peoples will be at risk of becoming very vulnerable. There must be efforts to protect Indigenous peoples' land (including forests, livestock land, and other publicly owned resources) on which they depend for food<sup>14</sup>. Indigenous communities in the IKN area have carried out economic, social, and cultural activities for generations. This will be disrupted if they cannot do the activities they have been doing for a long time. According to Article 2 of Presidential Regulation Number 65 of 2022, which pertains to Land Acquisition and Land Management in the Archipelago Capital, the process of land acquisition in IKN is governed exclusively by two methods: the release of forest

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<sup>13</sup> Sulistyono, S. (2014). PROGRAM DIVERSIFIKASI ENERGI MELALUI KONVERSI BBM KE BBG DAN KENDALA PERKEMBANGANNYA. *Swara Patra: Majalah Ilmiah PPSDM Migas*, 4(2).

<sup>14</sup> Firdaus, N., Sudomo, A., Suhaendah, E., Widyaningsih, T. S., & Kuswanto, D. P. (2013). *Status Riset Agroforestri di Indonesia*. Ciamis (ID): Balai Penelitian Teknologi Agroforestry.

control and/or land acquisition.

The release of forested areas must prioritize the protection of community land rights, individual entitlements, and communal rights. Concurrently, land acquisition should be conducted through established mechanisms that serve development or public interests, while also respecting the land rights of local communities and indigenous groups. It is imperative for the government to address the challenges associated with land acquisition in the new capital city (IKN). The initiative to relocate the nation's capital is a strategic endeavor that necessitates careful and systematic planning. Accordingly, the process of relocating the capital should adhere to legal frameworks that guide both the government and relevant stakeholders. These frameworks ought to be thorough and actionable. Indigenous populations maintain a multifaceted connection to their lands and territories. Land is not only an economic resource, but also various traditional rituals as well as a source of traditional knowledge. To anticipate land problems related to customary law communities in IKN during the IKN development process, several things need to be done:

- a) Recognize and protect customary law communities through identification, verification, and validation, as well as determining customary law communities;
- b) Improving regulations related to customary law communities;
- c) Mitigating the impact of the loss of livelihoods on indigenous communities and preparing alternative livelihoods.

Law Number 5 of 1960 regarding Agrarian Principles establishes that land is under the control of the state, which serves as the governing body for all citizens. Nevertheless, the state may delegate its control over land to autonomous regions and communities governed by customary law, provided that such delegation is essential and does not contradict national interests, in accordance with the stipulations set forth in Government Regulations. Furthermore, this legislation requires that customary rights be exercised in alignment with national and state interests, as long as they do not conflict with superior regulations.

Customary rights according to the Minister of State for Agrarian Regulation Number 5 of 1999 have the following definition:

Ulayat rights refer to the entitlements held by specific customary law communities, as defined by customary law, over designated territories that form the habitat of their members. These rights enable the communities should make use of the land and other natural resources found in these locations in order to maintain their existence. These rights stem from encounters with the outside world and are based on an established, continuous relationship between the community



governed by customary law and the relevant region.

If the government intends to grant a right to land, then as a sign of recognition, the customary law community concerned will have their opinion heard and will be given "recognition", if they have the right to receive the land as holders of customary rights. Along the way, customary rights will generally disappear naturally because communities that have rights to customary land will strengthen their rights and take land owned by each member of the traditional community. When these customary rights are lost, they will not be created again or new customary rights will emerge<sup>15</sup>.

Mochtar Kusumaatmadja articulated that in Indonesia, law serves not merely as an instrument but also as a vehicle for societal transformation. He further emphasized that employing law as a mechanism to shape society in alignment with executive policy objectives is particularly essential for developing nations. This contrasts with developed industrial countries, where legal frameworks are already established to facilitate societal changes. Additionally, proponents of the Sociological Jurisprudence perspective contend that law functions not solely as a means to sustain power but also as a mechanism for social engineering. Law should act as a guiding force to steer society toward the aspirations of the nation. In extreme cases, it may even be utilized to eradicate behaviors deemed detrimental<sup>16</sup>.

As explained in the previous section, law must be an incarnation of the soul of a nation or *volksgeist*. The soul of the Indonesian nation has been explained in the constitution, one aspect is the acknowledgment of communities governed by customary law. Therefore, social engineering in Indonesia must continue to prioritize the conservation of existing culture and customs, not merely lead to modernization which eliminates local wisdom. In utilizing positive law as a tool for carrying out social engineering, it is necessary to identify two types of problems, namely cultural problems and legal problems. Cultural problems are often non-neutral because they contain emotional, psychological, and religious magical aspects. Meanwhile, legal issues are closely related to neutral law which is easier to handle because there is a clear legal basis.

Reflecting on practices in other countries, it can be concluded that what needs to be done is to provide a valid legal basis to Indigenous Law Communities as reinforcement from a legal perspective. At the time of this writing, the Indigenous Law Communities Bill had not yet been

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<sup>15</sup> Fatmi, S. R. (2018). Permohonan Tanah ulayat di Minangkabau menjadi Tanah hak milik. *Lentera Hukum*, 5, 415. <https://doi.org/10.19184/ejllh.v5i3.8291>.

<sup>16</sup> Djasmani, H. Y. (2011). Hukum Sebagai Alat Rekayasa Sosial Dalam Praktek Berhukum di Indonesia. *Masalah-Masalah Hukum*, 40(3), 365–374. <https://doi.org/10.14710/mmh.40.3.2011.365-374>.

passed. The Customary Law Community Law can be a strong basis for formulating forms of social engineering in IKN. To create good social engineering and fulfill the interests of all existing parties, every interested subject must have their aspirations heard. Thus, existing policies are not top-down. Top-down policies often do not accommodate the opinions of all parties, so resistance and sectoral egos often arise.

Several prerequisites for recognizing the rights of Indigenous peoples are as follows<sup>17</sup>

- Recognize that people's rights to their living areas are genuine
- The rights of Indigenous peoples must be by human rights, not rights granted by the State
- Indigenous communities are dynamic, so the communities themselves determine whether they still exist or not

These prerequisites emphasize that recognizing the right to a living area is a genuine right that must be fulfilled. Then, human rights must be prioritized in providing rights to indigenous peoples. Also, customary law communities must be considered as independent subjects who can determine their existence.

#### **IV. CONCLUSION**

The decision to relocate Indonesia's capital city to East Kalimantan, ratified by President Jokowi, marks a significant historical event for the nation. This transition considers multiple factors, including the rights and interests of Indigenous Peoples. The construction of the New National Capital is set to commence in 2023; however, the current measures for safeguarding the rights of Indigenous Peoples in the region remain inadequate, leading to a spectrum of opinions on the matter. The government's initiative to seek a judicial review of the IKN Law at the Constitutional Court may undermine the legitimacy of the capital's relocation. As the development of the New National Capital progresses, it is crucial to prioritize the rights of Indigenous Peoples, especially given the ambiguities in Regional Regulations that hinder fair treatment for these communities regarding projects in their ancestral lands. The engagement of Indigenous Peoples should be meaningful and substantial, rather than merely symbolic or procedural.

The rights of indigenous peoples must of course continue to be protected even though there is major development in their territory. Indigenous land issues existed before IKN. Customary

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<sup>17</sup> Yumantoko, Y. (2020). Kajian Kebijakan dalam Merecognisi Masyarakat Adat. *Jurnal Belantara*, 3(1), 48–58. <https://doi.org/10.29303/jbl.v3i1.423>.

Law Communities are currently not fully recognized as equal legal subjects. In the development of IKN development, several areas of Indigenous Law Communities have installed development benchmarks, while communities or leaders of Indigenous Law Communities have not felt consulted on this matter. Thus, there is concern that the construction of the IKN will displace the Indigenous Law Community that has lived in the area for generations. Therefore, appropriate steps are needed to protect the interests of Indigenous Peoples by statutory regulations. Efforts to anticipate land problems of Indigenous communities in IKN that can be done include:

- Completion of the Indigenous Peoples Bill in the first IKN development stage in 2022-2024. The problems that arise in the ratification of the Indigenous Peoples Bill are the lack of political will and concerns that the ratification of the Bill will hamper investment in areas where there are still Indigenous communities, especially in the plantation, forestry, and mining sectors<sup>18</sup>. The point of view taken should be that by clarifying the position and status of Indigenous communities, investors will have confidence that their investments will not conflict with the interests of Indigenous communities, which could give rise to potential conflicts. Communication and involvement of indigenous communities are necessary so that development and investment can continue without harming the community. This has also been confirmed in protecting the entire Indonesian nation and all of its bloodshed is one of the goals of the Indonesian government, according to the Preamble to the 1945 Constitution.
- Establishment of an Association Legal Entity for indigenous communities. So far, the legal position of Indigenous Law Communities is quite weak. In some cases, submitting a lawsuit to the Constitutional Court as an individual is more recognized than a lawsuit filed by an Indigenous Law Community. By strengthening this legal position, Indigenous Law Communities can have a basis to fight for their rights. One of the efforts that must be made is to accelerate the identification of Indigenous Law Communities in the IKN area and the legal recognition of Indigenous Law Communities' assets.
- Recognition of Customary Law Communities through Regional Regulations. In the IKN development process, customary law communities in the IKN area need to be immediately recognized by the government. If there is no recognition as a customary law community, it will have implications for the uncertainty of their legal status

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<sup>18</sup> Wardah, F. (2021). Mengapa RUU Masyarakat Hukum Adat Tak Kunjung Disahkan. Diakses melalui <https://www.voaindonesia.com/a/mengapa-ruu-masyarakathukum>.

according to the law. This can result in the absence of customary territorial boundaries and guarantees of security of customary territories.

- Providing alternative livelihoods for customary law communities whose land is used for IKN, for example by opening opportunities in the tourism sector or providing work-ready training. For example, several maraes in New Zealand open visits to general tourists to gain experience of living amidst the traditional culture of the local community. Providing a similar place for Indigenous Peoples in the IKN area will also provide tourism options for immigrants to understand local traditions and culture.
- Construction of facilities for indigenous communities in phase II of IKN development in 2025-2029. The facilities provided can include building houses, building health and education facilities, improving roads, and good sanitation
- Settlement of overlapping IKN land and customary land. The IKN infrastructure development process in the first stage requires certainty of rights to land and various other natural resources. The government needs to immediately resolve overlapping land rights, for example by reviewing land rights that overlap with customary law community territories.
- Relocation of customary law communities to the IKN center. If necessary, relocation options can be implemented without alienating customary law communities from their customary territories. The government is expected to continue to consider the existence, territory, rights, and cultural traditions of indigenous peoples in managing land, water, and forests.

The government, through the IKN Authority, can provide suitable places or land for indigenous peoples in the IKN area to be able to carry out activities without abandoning their traditional habits. This provision should also be carried out by involving representatives from each indigenous community that has been identified as occupying the IKN area. Involvement of the IKN community should use self-mobilization and connectedness type participation, where indigenous communities can convey their aspirations independently. With these various efforts, it is hoped that the land problems of Indigenous communities in IKN in this first development stage can be minimized.

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