Mirza Satria Buana*, Prischa Listiningrum, Prasetyo Adi Nugroho and Ade Yusniar Marbun

The Nusantara Capital City Project: Why Development and Human Rights Do Not Always Mix

Law and Development Review 2023; 16(1): 185-223
https://doi.org/10.1515/ldr-2022-0063
Published online December 5, 2022

Abstract: This article examines the Nusantara capital city project and its sociological impact on individuals and groups' rights in the East Kalimantan regions of Penajam Paser Utara (PPU) and Kutai Kartanegara. The Nusantara Act was enacted to legalize the building of this mega-project and was finalized within a period of only 43 days. Thus, the legitimation of the Act is contentious. It is predicted that there will be widespread political, cultural, environmental and economic effects that will be likely to affect society in general and marginalized groups in particular. It raises two important questions, "what are the public rights that could potentially be breached by the Nusantara development project?" and "Is it possible to identify the influence of national and local elites on the process of promoting and legitimizing the Nusantara Act?" This article describes the concept of Nusantara as stipulated in the Act, which is linked to human rights values that are specifically related to the right to development. Based on the mentioned framework, this article finds evidence of autocratic practices in terms of the government's efforts to acquire land for the project. It has been found that these autocratic practices have been exacerbated by 'cooperation' with extractive industries and local elites. As a result, indigenous groups and the local communities in the area have suffered a loss of autonomy and land rights due to lack of legal protection within the Act.

Keywords: Nusantara project, Indonesia, human rights, the right to development.

* **Corresponding author: Mirza Satria Buana,** Constitutional Law, Lambung Mangkurat University Faculty of Law, Banjarmasin, 70123, Indonesia, E-mail: mirza.buana@ulm.ac.id. https://orcid.org/0000-0002-8518-3162

1 Introduction

On August 26, 2019, the President of Indonesia, Jokowi Widodo (Jokowi) announced the new capital city's site in several parts of the two regions of Penajam Paser Utara (PPU) and Kutai Kartanegara, East Kalimantan.[1] The President agreed to name the capital, Nusantara.[2] On January 11, 2022, both the President and the national legislature (the *Dewan Perwakilan Rakyat*, DPR) passed the Law on the Nation's Capital (hereafter "the Nusantara Law"). The Law was expedited quickly, taking only 43 days to finalize.[3] The Law consists of 11 chapters and 44 articles, a concise and likely inadequate length for preparing and regulating the administration of the new capital city of Indonesia. It can be predicted that the effects will be widespread politically, culturally, environmentally and economically.

This article examines the Nusantara Law and its sociological impacts on individuals' and groups' rights in both regions. It aims to answer several questions. First, what are the public rights that could be breached by the development of Nusantara (hereafter, "the project")? This question arises because the project may jeopardize the public rights owned by communities, particularly that of marginalized and/indigenous people. The hasty law-making behind the Nusantara Law is one of the symptoms of elite consolidation through the legal framework and structure in the service of illiberal and autocratic agendas.[4] Thus, it is also essential to check whether the Nusantara Law is in line with human rights norms enshrined in the 1945 Indonesian

Prischa Listiningrum, Department of Constitutional Law, Brawijaya University, Malang, East Java, Indonesia
Prasetyo Adi Nugroho and Ade Angelia Yusniar Marbun, National Commission for Human Rights, Jakarta, Indonesia

[1]Kompas, *Jokowi Umumkan Lokasi Ibukota Senin Siang Ini*, available at: <https://nasional.kompas.com/read/2019/08/26/08130121/jokowi-umumkan-lokasi-ibu-kota-baru-senin-siang-ini?page=all>, accessed in April 30, 2022.

[2] Kementerian Pekerjaan Umum dan Perumahan Rakyat, *Menteri Basuki: Pembangunan IKN Tantangan dan Peluang Besar bagi Para Arsitek*, available at: <https://pu.go.id/berita/menteri-basuki-pembangunan-ikn-tantangan-dan-peluang-besar-bagi-para-arsitek>, accessed in March 30, 2022. Nusantara is the Javanese term for archipelago, thus linking the new capital with Indonesia's ancient history. The government promises to construct the new capital into a Future Smart Forest City of Indonesia. The capital's pillars of development are Smart Workplace, Smart Living, Smart Mobility, Smart Nature Preservation, and Smart Transformation of Nation and Culture.

[3]Dewan Perwakilan Rakyat, *UU IKN sebagai Landasan Hukum Ibu Kota Baru*, available at: <https://www.dpr.go.id/berita/detail/id/37053/t/UU+IKN+Sebagai+Landasan+Hukum+Ibu+Kota+Baru>, accessed in March 30, 2022.

[4] Kim L Scheppele, *Autocratic Legalism*, 85 The University of Chicago Law Review, no. 545 (2018), 545-583, at 548. Schepple describes 'autocratic legalism' as a phenomenon "when electoral mandates plus constitutional and legal change are used in the service of an illiberal agenda." The scripts of the legalistic autocrats are: (1) win elections on populist platforms, promising major change, (2) make key institutions politically dependent, (3) ensure loyalists are in particular offices, (4) rewrite crucial laws on democracy and checks and balances mechanism, and (5) legislate, change or amend the constitution or other key laws quickly. We assume that the Nusantara Law falls into scripts number four and five.

Constitution and the ratified human rights covenants, particularly the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR), and other relevant conventions. The term 'development' then must be viewed through a human rights' lens.[5] This article will utilize civil and political rights, particularly the right to participate in public affairs guaranteed by Art.25 of the ICCPR and further elaborated by the Human Rights Committee in general Comments 25. This parameter is used to assess whether the project has been informed equally to affected communities, especially people living nearby the project. This article argues that providing political choices and protecting civil and political rights are the basic level of development. Unlike previous research by BRIN,[6] this study employs a socio-legal approach; that is, an inter-disciplinary approach that includes sociological and political perspectives.[7] Data collection through fieldwork and Focus Group Discussions (FGDs) consisting of semi-structured interviews through selected sampling and observation was used for this research.[8] The information was sensitive, thus some informants asked not to disclose their identities.

The second question is whether the underlying power relations among interest groups helped to enable the project. And what are the roles of national and local elites in supporting the project? The study considers the Nusantara Law as an example that legislation has a crucial role in regulating the development process, notwithstanding enormous national and local political and economic interests of the elites. Under the pressure of these interests, the Nusantara Law could be used by elites as a tool of power consolidation.[9]

To answer those questions and provide arguments, this paper flows as follows. Section 2 briefly describes the administrative and local political context of the Nusantara regions, taking insights from scholarship on the right to development: one crucial right that can bond all rights together. Section 3 builds the framework on how development should be undertaken while protecting human rights and ensuring livelihoods and culture can coexist during the transition. This section shows that both generations of human rights: civil and political, as well as the economic, social, cultural rights are indivisible and inter-related.[10] Section 4 is based on a human rights analysis of the legal

[5]Arjun Sengupta, "Elements of a Theory of the Right to Development," in Kaushik Basu and Ravi Kanbur (eds.), *Arguments for a Better World: Essay to Honour Amartya Sen* (Oxford: Oxford University Press, 2009), p. 25. See Peter Uvin, *From the Right to Development to the Rights-based Approach: How 'human rights' entered Development*, 17 Development in Practice, no. 4-5 (2007) 597-606, at 598.

[6] BRIN, *Broker Tanah dan Potensi Eskalasi Konflik Berbasis Lahan di Lokasi Ibu Kota Negara Baru,* policy brief (Jakarta, 2021).

[7] Reza Banakar and Max Travers, *Theory and Method in Socio-Legal Research* (Oxford: Hart Publishing, 2005).

[8] Terry Hutchinson, *Developing Legal Research Skills: Expanding the Paradigm,* 32 Melbourne University Law Review, no. 3 (2008), 1065-1096, at 1083.

[9] Scheppele (2018), *supra* note 4, at 548.

[10] Thomas F Jackson, *From Civil Rights to Human Rights: Martin Luther King Jr and The Struggle for Economic Justice* (Pennsylvania: University of Pennsylvania Press, 2009), p. 11.

framework of the Nusantara administration and its political rights' guarantee. This section shows that civil and political rights are the most crucial parts of the right to development, because they can provide protection to individuals' rights from unequal social opportunities and protection under the rule of law, free from fear, discrimination and repression. Section 5 examines the land acquisition issues that intermingle with social and economic rights. This section shows that the land issue of the Nusantara capital city project cannot be divorced from both the civil and political rights of affected individuals and groups, especially in relation to the complex issue of eminent domain. Subsections 5.1 and 5.2 expose the underlying power relations encompassing eminent domain in regard to controversial concessions and extractive industries in the Nusantara areas. Subsection 5.3 moves to an in-depth discussion of the most affected and marginalized individuals and communities: indigenous and local residents. Section 6 is a brief conclusion.

2 A Context: The Nusantara Regions

The appointed Nusantara regions are two autonomous regions within the Province of East Kalimantan. The province is well-known for its wealth of natural resources: rubber, palm oil, crude oil, and coal. Due to its lucrative industries, it is also notorious for land-based disputes between government-backed corporations and military corporate entities against local and marginalized-indigenous communities. Disputes are mostly caused by the rapid change from the communities that still exist within a 'use-values' framework (*e.g.*, indigenous groups) to those that function within an 'exchange-values' paradigm (*e.g.*, government-backed extractive and forestry interests). These land-based conflicts tend to occur latently. It is also important to note that The East Kalimantan Province in general, and both districts of PPU and Kutai Kartanegara, are not terra nullius (unoccupied and uninhibited). They have a long history of political dynamics and cultural-indigenous heritage. These factors combined have meant that the Nusantara project is considered highly controversial. [11]

In the early years of the decentralization era, many regions, particularly rich-natural resources regions demanded a proliferation of their governmental affairs from the existing local governments. Therefore, they gained autonomy to manage several affairs unique to their interests. Regional autonomy provides a huge incentive for local governments to manage their own political and fiscal affairs, including regulating and deregulating lucrative industries. In 2000, the national government granted the division of Paser Regency into two autonomous regions, namely Paser Regency and PPU Regency, to accommodate local political aspirations.[12] Meanwhile, its neighbor region, Kutai Kartanegara, has been a predominant region prior to the regional

[11] BRIN (2021), *supra* note 6.
[12] Law Number 7 of 2000 on the establishment of Penajam Paser Utara (PPU).

autonomy era.[13] Hence, the project's proposed areas, the PPU and Kutai Kartanegara regions have a different decentralization story.

Under the newly-legislated Law on Nusantara, the proposed nation capital is located strategically between two big cities: Samarinda, the capital city of East Kalimantan Province on the northern border, and Balikpapan, a center of trading and business, on the southern border.[14] The eastern border is on the Makassar Strait, a waterway, making the new capital city a hub in the region. Locating the new capital in the eastern part of the archipelago is crucial for addressing the imbalance between the developed 'west,' where the remaining areas of PPU and Kutai Kertanegara are located, and the under-developed 'east.' Nusantara's land area comprises of 256.142 ha, in which 56. 180 ha will be a core city area (red area); within it is the Core Area of the Nusantara (KIPP), with the remaining 199.962 ha is reserved as a development area (yellow area). The sea area comprises approximately 68.189 ha.[15] This article is concerned with the land area, particularly its vast chunk of the core city, including KIPP and development areas.

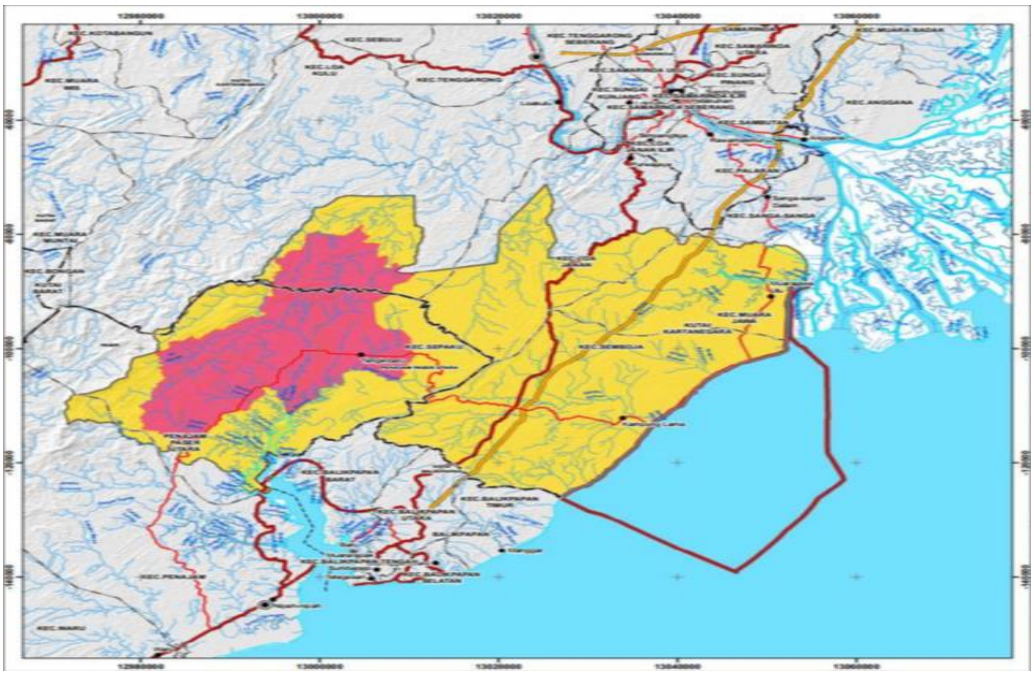

Figure 1. Map of the Location of the Nusantara Capital Plan[16]

Before analyzing the provisions of the Nusantara Law, this paper will explore the concept of the right to development, its dynamics and current challenges in the international human rights development setting.

[13] Law Number 27 of 1959 on the establishment of regionals third-tier in Kalimantan.
[14] It is important to note that Indonesia is unitary state, thus its regions are divided into Provinces not State.
[15] Law Number 3 of 2022 on the establishment of Nusantara capital city, art. 6 (2), (3).
[16] *Ibid.*, at Appendix I of the Nusantara Law.

3 Human Rights Enters Development

This paper argues for the belief that the main characteristics of human rights are inalienable, indivisible and inter-related. In this sense, the concept of human rights is a comprehensive one, rather than dichotomized between the first (civil and political) and second (economic, social and cultural) generations of rights, leading to a contrast between 'negative' and 'positive' rights.[17] The right to development enables people to conceptualize a sense of equality and justice,[18] as well as the relationship between a state and its citizens.[19] It is a conglomeration of claims, encompassing economics, political liberties and civil rights for all.[20] Furthermore, the United Nations' Declaration of the Right to Development states: "the right to development is an inalienable human right by virtue of which every human person and all people are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development…"[21] The United Nations Working Group on the Right to Development, describes the right as being "…multidimensional, integrated, dynamic and progressive. Its realization observes the full observance of economic, social, cultural, civil, and political rights."[22] Thus, it can be concluded that there is an inseparable and inter-linked process of economic, social, cultural, and political development, in which human rights become a constitutive part of development.[23] The right to development should recognize the "right to survival," described below, in the legal system of rights and remedies. It is a customary international *jus cogens* norm, elaborated out of the recognition of the consensus of non-binding instruments claiming the right to development.[24] Even within the subject of climate change, its mitigation efforts, materialized in the 2015 Paris Agreement, also recognized the importance of the right to development and other human rights fulfillment.[25]

Under this perspective, the process of development is not equal to economic growth nor the increase of income, but is focused on the human capacity to survive development.[26] The right to survival in the development

---

[17] Rhonda Copelon, *The Indivisible Framework of International Human Rights: A Source of Social Justice in the U.S*, 3 New York City Law Review, no. 1 (1998), 59-80, at 60.
[18] Upendra Acharya, *The Future of Human Development: The Right to Survive as a Fundamental Element of the Right to Development*, 42 Denver Journal of International Law and Policy, no. 3 (2014), 345-372, at 345.
[19] Uvin (2007), *supra* note 5, at 600.
[20] Amartya Sen, "Human Rights and Development" in Bård A. Andreassen and Stephen P Marks (eds.), *Development as a Human Rights: Legal, Political and Economic Dimensions, a Nobel Symposium Book* (Massachusetts: Harvard University Press, 2006), p. 5.
[21] The Declaration of the Right to Development, G.A. Res. 41/128, U.N. Doc. A/RES/41/128, (Dec. 4, 1986), art I, para. 1.
[22] UNDP, *Integrating Human Rights with Sustainable Development*, policy document no. 2 (New York, 1998), p. 3.
[23] Uvin (2007), *supra* note 5, at 601.
[24] Acharya (2014), *supra* note 18, at 360.
[25] The 2012 Paris Agreement, available at: < https://unfccc.int/sites/default/files/english_paris_agreement.pdf >, accessed in November 6, 2022.
[26] *Ibid.*, at 346.

perspective is contrary to the old paradigm of development. In the post-Cold War era, international financial agencies dictated 'a recipe of development' called the Washington Consensus, which focused on development through economic growth, "to assist in reconstruction by facilitating the foreign direct investment of capital, to promote private foreign investment and to promote the long-range balanced growth of international trade."[27] This created a paradigm which extolled "the free-market or neo-liberal model, which emphasizes a small state, deregulation, private ownership, and low taxes."[28] Development projects were understood as operating within the capital accumulation process, in which the capital eventually would create a 'trickle-down effect' to the bottom of the economic hierarchy.[29] However, in practice, it mainly benefitted wealthy individuals and high strata government officers and failed to incorporate many aspects of human rights and development. This political-economy paradigm unfortunately remains largely hegemonic within many developing countries, including Indonesia.[30]

In contrast to the economic growth model of development, the survival right to development focuses on the ability of communities to survive development processes. In order to create a conducive ability to survive, development should be guarded by a set of legal mechanisms and provisions that can elevate and defend people's rights *vis-à-vis* government actions, forcing legislators to adopt rights-based policies, in turn promoting and creating a rights-enabling economic environment.[31] Citizens need rights that are claimable through legal remedies.[32] Those claimable rights should be of paramount importance in the provisions regarding development. This is the essence of the survival right to development.

This paper modifies Sen's concept of development that should have both legitimacy and coherency. The Nusantara Law and its provisions should pass two tests: the legitimacy and the coherence test.[33] Both of them are important to assess whether or not the development is in line with right to development. The legitimacy test emphasizes the existence and accessibility of the norm-creating process. The process aims to empower the people. This test has some crucial criteria. First, this set of rules must provide political choice and leverage for citizens, so they have strong bargaining power to negotiate the

[27] International Bank for Reconstruction and Development, Article of Agreement, 2 U.N.T.S. 134 (December 27, 1945), art IV.
[28] Nancy Birdsall and Francis Fukuyama, *The Post-Washington Consensus: Development after the Crisis*, 90 Foreign Affair, no. 2 (2011), 45-53, at 47.
[29] Thorstein Veblen, *The Theory of the Leisure Class* (New Brunswick: Transaction Publishers, 2000).
[30] International Monetary Fund, Letter of Intent of the government of Indonesia, available at: <https://www.imf.org/external/np/loi/1113a98.htm>, accessed in March 30, 2022.
[31] Sengupta (2009), *supra* note 5, at 82. See Uvin (2007), *supra* note 5, at 602.
[32] Cekli Setya Pratiwi, Prischa Listiningrum, and Muhammad Anis Zhafran Al Anwary, Critiques on Contemporary Discourse of International Human Rights Law: a Global South Perspective, 1 *Human Rights in the Global South*, no. 1 (2022), 1-12, at. 9.
[33] Amartya Sen, *Development as Freedom* (New York: Oxford University Press, 2001), pp. 228-231.

development process. The stress point of the right to development is human development through civil and political rights. In a concrete example, people's choices in elections, law-making, and decision-making will directly and indirectly affect their lives and survival mode in a development setting.[34] They are a safeguard for other rights within the development framework. To make sure the benefits of development are fairly divided among the poorest and the most marginalized groups, development should be exercised through participatory, accountable, and transparent mechanisms.

Second, this paper proposes the need to provide a prior mechanism for citizens which guarantees that the development has plausible and responsible processes and is well-suited to citizen's needs and conditions.[35] The issue of 'consent' has its own internationally-recognized concept, known as, FPIC (Free, Prior and Informed Consent), that should be exercised prior development project begins.[36] The consent is conducted without pressure and intimidation and the people involved must have access to comprehensive information on the planned project. Expanding people's choice in the development setting corresponds to democracy, a concept inherently related to the question of governance, which affects all aspects of development.[37] Development would create an enabling environment for people to enjoy long, healthy and equitable lives.[38] The implementation of FPIC becomes more critical when it is related to the development that corresponds with the right of indigenous peoples. Indigenous people and their land have a unique interplay that mainly intersects in socio-anthropologic and eco-spirituality, which cannot be resolved if the segregation or another type of marginalization takes place with something like compensation for their land.[39]

Third, established legal norms must provide accountability mechanisms for citizens to question and demand remedies if development jeopardizes their rights.[40] Accountability has two important elements: 'rights' and 'power.' The

---

[34] Sultan M Zakaria, *Without Civil and Political Rights, Development is Incomplete*, available at: < https://www.amnesty.org/en/latest/news/2019/12/without-civil-and-political-rights-development-is-incomplete/ >, accessed in May 11, 2022.

[35] Marcus Colchester, Sophie Chao, Patrick Anderson, and Holly Jonas, *Free, Prior, Informed Consent: Guide for RSPO Members,* document given at the RSPO Board of Governors Meeting (Kuala Lumpur, November 20, 2005), p.6.

[36] The United Nations Declaration on the Rights of Indigenous People (UNDRIP), Resolution adopted by the General Assembly, A/RES/61/295 (September 13, 2007), art 10. See Indigenous and Tribal Peoples Convention, International Labour Organization (ILO) No. 169 (1989).

[37] United Nations, *An Agenda for Development: Report of the Secretary-General*, policy document no. 2 (New York, May 6, 1994), para.120.

[38] Mahbub ul Haq and Amartya Sen, *About Human Development*, U.N. Development Programme: Human Development Representatives, available at: <http://hdr.undp.org/en/humandev/>, accessed in April 1, 2022.

[39] Kathryn Tomlison, Indigenous Rights and Extractive Resource Projects: Negotiations over The Policy and Implementation of FPIC, 23 *The International Journal of Human Rights,* no. 5 (2019), 880-887, p.881.

[40] In Indonesia's context, remedy lies in judicial institutions. The administrative court which is under the Supreme Court's jurisdiction has authority to hear cases regarding executive and administrative conducts and policies. Meanwhile, the Constitutional Court has judicial review

first stresses on "the substantive rights and transparency of process establishing by legal frameworks," while the second emphasizes "the importance of citizen actions, power and politics in public accountability."[41] These mechanisms are also known as a claim-based rights approach, which makes claiming rights possible.[42] By having these two accountability mechanisms, people are empowered to know their worth, then claim their rights and accept legal remedies. The accessibility of these three elements of legitimacy can assist people to survive development practices.

The coherence test stresses assigned duties to specified duty-bearers. The coherence of duty aims to pressure the government to enforce their human rights duties and obligations. This test consists of important criteria. First, the provisions should have an explicit norm containing duties to put pressure on duty-bearers to protect and realize the citizens' rights (a government bound by law).[43] The explicitness of the duties aims at maintaining order legally. In this sense, duties have moved to obligations, which are tied to legal responsibilities. Thus, the government must uphold the obligations under international human rights law, such as the obligation to respect, protect and fulfil.[44]

Second, for the sake of legal certainty, the provisions must consist of unambiguous, clear and consistent authorities to instill a constitutional norm to enable the issuing of sanctions against government or specific duty-bearers that could obstruct or delay the fulfillment of citizens' rights.[45] The sanctions are to make sure that the government will exercise development project in a responsible way. Therefore, it needs a strong judicial foundation that can examine the government's conduct and policymaking impartially, and enforce judicial decision-making independently.

Third, the duty-bearers must pro-actively ensure that the written rules are consistent with their real and effective implementation, so as to achieve legal certainty and responsible development.[46] This criterion is grounded in

---

authority. The Court can 'strike down' legislation if it breaches constitutional norm. See Law Number 5 Year 1986 on Administrative Court. The Law has been revised twice. See Law Number 24 Year 2003 on Constitutional Law. The Law has been revised third times.

[41] Emely Polack, Lorenzo Cotula and Muriel Côte, *Accountability in Africa's Land Rush: What Role for Legal Empowerment?* (London: IIED and IDRC, 2013), p. 1.

[42] Leif Wenar, *The Nature of Claim-Rights*, 123 Ethics, no. 2 (2013), 202-229, at 203.

[43] John Bell, "Certainty and Flexibility in Law," in Peter Cane and Joanne Conaghan (eds.), *The New Oxford Companion to Law* (Oxford: Oxford University Press, 2008). See Brian Tamanaha, *The Rule of Law and Legal Pluralism in Development*, 3 Hague Journal on Rule of Law, no. 3 (2015), 1-17, at 2.

[44] United Nations Human Rights Office of the High Commissioner, *International Human Rights Law*, available at: <https://www.ohchr.org/en/instruments-and-mechanisms/international-human-rights-law>, accessed in September 1, 2022.

[45] Adriaan Bedner and Barbara Oomen (eds.), *Real Legal Certainty and Its Relevance: Essays in honour of Jan Michiel Otto* (Leiden: Leiden Publications, 2018), p. 9. On a short definition of real legal certainty, Prof Otto says "the government institutions apply these rules consistently and themselves comply with them."

[46] *Ibid.*, p. 10.

institutions and procedures. Legislation and its implementation is one of the main institutional mechanisms to influence society.. However, development is embedded not only in legal rules (otherwise, it would turn into an inward-looking perspective), but also in the wider social context. The effectiveness of legal institutions depends on social structure, competition and conflict in society. Plain textualism may not suffice. Therefore, there is a need for an empirical perspective on development that puts citizens' civil and political rights at the heart of the inquiry, an issue that will be elaborated in our fieldwork's findings.

The next part of the legal analysis on the Nusantara Law will scrutinize provisions relating to the civil and political rights that purport to empower constitutional rights on economic, social and cultural issues, while also promoting a rights-enabling economic environment. It will be argued that the law and regulations under review do not fulfill the minimum human rights standards.

4 Discussing The Nusantara Law: Perspectives of Rights to Development

The target of this legal research is on the government's authority as primary duty bearer because its conduct and policies legalized by this legislation have the most significant effects on the fulfilment of constitutional rights. Moreover, through its authority, the government has the capacity to persuade other duty bearers to carry out their human rights obligations in a coordinated manner.[47]

This section of the paper begins with analyzing the role and authority of the appointed Head of Otorita (HO), the main administrator of Nusantara.

4.1 The Roles of the HO: The Autocratic Administrator

Based on the Nusantara Law, the HO is "the Regional Head of Nusantara, the capital city, and it is in the same hierarchy with Ministries, where it is appointed and terminated by the President in consultation with the National Legislature."[48] This provision is problematic even at its most basic level. The HO has two significant yet contradictory roles: first as the Regional Head which is part of the regional government regime, and second, as the executive national government. To make things more complicated, the following provision states that the HO has "authorities in exercising regional affairs, thus part of regional government regime, in the same level as a provincial government."[49] Therefore, there is a great deal of ambiguity about its roles, whether the HO is the Regional Head or the representative of the executive

[47] Sengupta (2009), *supra* note 5, p. 87.
[48] Law Number 3 of 2022 on Nusantara Capital City, art. 4 (1) (b) and art. 5 (4).
[49] Law Number 3 of 2022 on Nusantara Capital City, art. 1 (2), (8), (9) and (10).

national government. In Indonesia's Regional Autonomy Law, no institution can combine the two roles.[50]

Furthermore, placing the HO as part of the regional government is highly questionable because the term 'government' implies the collegial presence of both executive and legislative branches whose roles are to formulate and implement government's policies. The HO is the sole administrator, because the Nusantara Law has not mentioned the establishment of a local legislature to install democratic control.[51] To administer regional government affairs, the HO has law-making authority to "…stipulate regulations on preparation, development and transitional processes of the capital city."[52] This law-making authority is strengthened by the Presidential Regulation.[53] It is, however, uncertainbecause there is no regional regulation based on the Regional Autonomy Law that can be legislated without the consent of the local legislature. The making of regional regulation needs both the Regional Head's initiative and the local legislature's approval.[54] Judging from these ambiguous provisions, the HO is a product of 'a dual state,' a combination of the normative state whose authority derives from legislation, and the prerogative state, the purely political or arbitrary will of those in power. It is authoritarian by nature, but the measures are cast in a legal form.[55] In this setting, the prerogative policies always take priority over the normative state. Arbitrary will operates with the legitimacy of the law but there is an absence of constraint and minimum protection for citizens.[56] Legality merely constitutes an instrument of authoritarian rule.[57]

In other words, the HO's regulation is undemocratic and potentially unconstitutional, based on several factors. First, the HO is appointed, not elected, directly from the constituency. Second, the regulation has closed public accountability and responsibility in creating public policy because there is an absence of a local legislature to scrutinize the public policies of the HO. By not having a local legislature, it is hard to imagine that the HO will be a responsible regional government. Therefore, the government is liable to violate citizens' rights through active conduct (commission) or ignorance (omission). The absence of democratic political channels will put affected communities in a vulnerable position, because arbitrary conduct of the government would not be challenged through legal constitutional review mechanisms. It is important to note that the Indonesian Constitutional Court rejected six petitions of 'formal-

[50] Simon Butt and Tim Lindsey, *Indonesian Law* (Oxford: Oxford University Press, 2018), p. 56.
[51] Law Number 3 of 2022 on Nusantara Capital City, art. 5 (3) and art. 13 (1). Through this provision, Nusantara region is negated from local legislative election, thus there will be no local legislature in Nusantara.
[52] Law Number 3 of 2022 on Nusantara Capital City, art. 5 (6).
[53] Presidential Regulation Number 62 Year 2022 on the Head of Otorita (HO).
[54] Law Number 23 of 2014 on Regional Autonomy.
[55] Bas Schotel, *Administrative Law as a Dual State: Authoritarian Elements of Administrative Law*, 13 Hague Journal of the Rule of Law (2021), 195-222, at 197.
[56] *Ibid.*, at 202-203.
[57] *Ibid.*, at 201.

procedural law-making review' of the Nusantara Law on the basis of mere technicality that the petition had been filed more than 45 days after the enactment of the Law. As the Law on Constitutional Court has been revised several times by the Legislature, the Court's decisions have gradually shifted into more compromised decisions to soothe the tension between the Legislature and the President.[58]

Moreover, based on the Nusantara Law, the HO's accountability is only to the President. Thus, the HO is merely a hand of the President's will . No further elaboration can be found in the Law regarding how people can question the HO's regulation and policies, let alone how to provide administrative-legal remedies for affected citizens. The HO's authority contains the ability to be utilised as a tool of political strategy by deploying the law to achieve political aims.[59]

The Nusantara Law also describes many strategic roles and authorities of the HO, including its role as a sole administrator of goods and state budgeting, in which the HO has authority to draft project proposals and plan budgets.[60] The HO's work is based on the Grand Plan of the Nusantara City, which is solely drafted by the President through Presidential Decree.[61] These provisions mean that first, the HO is simply the subordinate to the President through Presidential Decree. Second, there will be no interference from the National Legislature as a democratic safeguard in drafting the Grand Plan; the National Legislature has an insignificant role in the consultation stage of the Grand Plan's revision.[62] Third, both in drafting and revising the Grand Plan, there is no democratic channel to convey local aspirations and participation. The provisions on the HO's authorities have failed the legitimacy test because the provisions cannot fully elaborate how the HO runs its policy accountability processes while hindering citizen's participation and active involvement.

Despite ambiguity and controversy, the HO has 30 special authorities in exercising regional affairs,[63] with most strategic duties encompassing the

---

[58] Stefanus Hendrianto, *Law and Politics of Constitutional Court: Indonesia and the Search of Judicial Heroes* (London: Routledge, 2018), p. 74. See generally Simon Butt, *The Constitutional Court and Democracy in Indonesia* (Leiden: Brill Nijhoff, 2015), p. 123. See specifically Simon Butt, *Conditional Constitutionality, Pragmatism and the Rule of Law*, 09 The University of Sydney Legal Studies Research Paper Number (2009), p. 2. The Constitutional Court has gradually shifted to Weak-form review, despite on paper, the Court has Strong-form review. The shifting is a result of a political constitutionalism. Some of the authors have argued that the Court has gradually lost its crucial role as a guardian of constitutional norm.

[59] Scheppele (2018), *supra* note 4, at 548.

[60] Law Number 3 of 2022 on Nusantara Capital City, art. 25 (1).

[61] Law Number 3 of 2022 on Nusantara Capital City, art. 7 (1).

[62] Law Number 3 of 2022 on Nusantara Capital City, art.7 (5) (a).

[63]Tempo, *Pemerintah serahkan 30 urusan ke Otorita IKN, 4 hal ini tidak*, available at: <https://nasional.tempo.co/read/1580234/pemerintah-serahkan-30-urusan-ke-otorita-ikn-4-hal-ini-tidak/full&view=ok>, accessed on April 9, 2022. See Presidential Decree Number 62 of 2022 on the Head of Otorita (HO). Those authorities are: (1) educational; (2) health; (3) infrastructure and spatial design; (5) housing; (6) public order; (7) labour; (8) women's empowerment and child protection; (9) food security; (10) land tenure; (11) environment; (12)

handling of infrastructure and land acquisitions. Those special authorities are legally authorized through the Government Regulation, which is a regulation stipulated solely by the Executive, without involvement from the National Legislature. Moreover, the HO, as a public entity, has an authority to establish the Authority of Business Entity (ABE), which is a private entity, meaning that there is blend between public and private interests on its establishment. The merging between public and private entities may lead to conflict of interests. The Nusantara project will be conducted in all processes of preparation through the ABE, including development and transition of the new capital.[64] The Regulation stipulates that the HO cannot be held legally responsible if there is budget loss during the transition in conditions which (1) the HO can prove that the loss is not caused by its negligence or fault, (2) the HO has exercised policies based on its authority, with a good intention, (3) the HO has no conflict of interests, and (4) the HO has not earned illicit benefits from the projects.[65] This type of immunity has strong potential to be abused, worsened by weak legal enforcement and integrity.[66] Granting special authorities and immunity clauses which directly affect the public sphere without active participation of the parliament can be considered undemocratic and are in blatant breach of the Rule of Law that requires separation of power and checks and balances mechanism. By facilitating unchecked prerogative power and ignoring the HO's duties in protecting citizens' rights, the provisions on the HO fail the coherence test.

This paper predicts that the Nusantara capital city will be constructed and administered in an undemocratic way, thus failing to provide meaningful development for citizens in general and marginalized/minority communities.

4.2 Rights to Public Participation and Transparency

As previously mentioned, the lawmaking processes of the Nusantara Law has been both controversial and problematic. Most notably, there was no meaningful public participation in the lawmaking process. Both the regional governments of PPU and Kutai Kartanegara were not well-informed about the project, despite the two regions being significantly affected.[67] Most of the land area of the PPU will become the central area of Nusantara, and most of the land and sea area of Kutai Kartanegara will become the "strategic

citizenry administration; (13) birth control; (14) transportation; (15) communication; (16) small and medium businesses; (17) investment; (18) youth and sport; (19) espionage; (20) culture; (21) library; (22) shore area; (23) fishery; (24) tourism ; (25) agriculture; (26) forestry; (27) natural resources; (28) trading; (29) industry; and (30) transmigration.

[64] Presidential Regulation Number 62 Year 2022 on the Head of Otorita (HO), art. 29 (1), (2), (3).

[65] Presidential Regulation Number 62 Year 2022 on the Head of Otorita (HO), art. 30.

[66] Butt and Lindsey, supra *note* 50, p. 280. See Keebet Benda-Beckmann, "Indeterminacy, Uncertainty, and Insecurity," in Adriaan Bedner and Barbara Oomen (eds.), *Real Legal Certainty and Its Relevance: Essays in honour of Jan Michiel Otto* (Leiden: Leiden Publications, 2018), p. 89. Corruption in Indonesia is considered as a major obstacle to legal enforcement. It is in fact corruption that makes the system so uncertain and unpredictable.

[67] Interview with the Regional Secretary of the PPU District, April 7, 2022.

development area" of Nusantara. Affected communities such as the indigenous peoples of Balik in the Sepaku area, which will become the Nusantara's core area, were ignored by the project. They were never invited to sit together or given any explanation about the project to be carried out, including how their fate would be in the future. The Balik's indigenous lands are in threat of being delineated as state land, with the likely result of eviction.[68] An indigenous group in the Pemaluan area has expressed concern and anger toward the national government ignoring their existence, and aspirations.[69] Other local, non-indigenous communities have expressed similar concerns. One community living near the core area of development was distressed when the Land Agency's officer, without prior informed consent, put a mark of land delineation in their front yards.[70] Fishing communities in Jenebora[71] and Kuala Semboja,[72] which are included as a development area of Nusantara, have also suffered from a lack of communication.[73] Moreover, two NGOs concerned with indigenous people and land issues,[74] along with academics located in East Kalimantan, did not receive a proper and detailed description of the Bill of Nusantara.[75] This article argues that by not including and ignoring citizens' concerns in the early process of the Bill of Nusantara, the project of Nusantara has failed in its basic level of sustainable and just development. A sign that proves contradictory to a rights-based development that should provide a bridge between a state and its citizens,[76] and not leave them behind.

Moreover, the Nusantara Law does not recognize the term FPIC (Free, Prior and Informed Consent). It only highlights several key terms, such as public participation, which does not emphasize the importance of consent.[77] The listed principles (i.e., public participation) are undermined by softer language such as 'may be involved' or 'be considered,' and its applicability is close to the practice of autocracy. There are intentionally vague on legal texts so as to be manipulated for political power.. The lack of supporting public participation also manifests in regulations concerning HO's authorities on public policies, where "… public participation may be considered in drafting Working and Budget Plans of the HO.[78] This provision is meaningless for two reasons: first, regarding the verb 'may be considered'; secondly, the legal foundation of the HO's strategic authorities in drafting the Road Map of Nusantara and Strategic Plan of Nusantara, is based on Presidential Regulation. This provision means that all strategic policies are top-down by the

[68] Interview with anonymous, Sepaku, April 6, 2022.
[69] Interview with anonymous, Pemaluan, April 6, 2022.
[70] Interview with anonymous, Sepaku, April 6, 2022.
[71] Interview with local traditional fishermen and residents, Jenebora, April 7, 2022.
[72] Interview with anonymous, Kuala Semboja, April 5, 2022.
[73] This land and living space issues will be elaborated in the next section.
[74] Interview with local NGOs, Balikpapan, April 4, 2022.
[75] Interview with academia in Balikpapan University and Institute Technology of Kalimantan, Balikpapan, April 5, 2022.
[76] Uvin (2007), *supra* note 5, at 600.
[77] Presidential Regulation Number 63 of 2022 on Detailed Plaining of Nusantara Capital City, art. 3 (1) g 5.
[78] Presidential Decree Number 62 Year 2022 on the Head of Otorita (HO), art. 27 (4).

President. In other words, public participation is not mandatory in the preparation, development, or management processes of the Nusantara Law. The Nusantara Law only acknowledges some methods of participation, including public consultation, deliberative meeting, partnership, conveying aspirations through meetings and consultations, and other public involvement.[79] Nevertheless, there is no further explanation on how the participation processes will be conducted and no guarantee that the government will hear or respond to people's aspirations and participation.

These provisions instill only pseudo-public participation. They are too general, procedural, and merely a practice of tokenism. With only a one-way flow of information, from officials to citizens, there is no room for feedback, and no power for negotiation.[80] There is also no assurance that concerns and ideas will be taken into account.[81] Moreover, public consultation appears designed to provide citizens with minimal roles and influence. Participants of the public are chosen mostly on their political affinity with interested groups of the proposed policies. It indicates cronyism, which further erodes public participation. The process places a few hand-picked 'worthy' to be put on decision-making processes.[82] This is merely a 'sugar-coated' public participation that contradicts to the Constitution's norms regarding right to democracy,[83] public involvement and participation,[84] and the right to obtain information.[85] These provisions fail the legitimacy test because of the absence of the democracy mechanism; citizens are not the given option of development, political choice, nor the leverage to question the HO's policies. Democracy itself is a fundamental human right, because people's involvement and participation in policy-making processes which affect their lives is a fundamental tenet of development.[86] They are not provided legal remedies for affected parties and have no direct information regarding the purpose and terms of the development project. This is a breach of the 'informed' principle in a consent mechanism. Moreover, it is also a breach of the right to equally participate in public affairs guaranteed by Art. 25 of the ICCPR.[87]

The Presidential Office declared the local legislative assembly in Nusantara to be replaced by the Advisory Chamber of Nusantara (ACN). The role of the latter is to provide advice to the HO, channel public participation,

---

[79] Law Number 3 Year 2022 on Nusantara Capital City, art. 37 (1) and (2).
[80] Sherry Arnstein, *The Ladder of Citizen Participation*, 35 JAIP, no. 4 (1969), 216-224, at 218.
[81] *Ibid.*, at 219.
[82] *Ibid.*, at 220.
[83] The 1945 Constitution (Amended), art. 1 (2). "Sovereign is in the hand of the people …"
[84] Ibid., art. 28C (2). "Every person shall have the right to improve him/herself through collective struggle for his/her rights to develop his/her society, nation and state."
[85] Ibid., art. 28F. "Every person shall have the right to communicate and to obtain information for the purpose of the development of his/herself and social environment, and shall have the right to seek, obtain, possess, store, process and convey information by employing all available types of channels."
[86] Uvin (2007), *supra* note 5, at 601.
[87] See General Comment No. 25: The right to participate in public affairs, voting rights and the right of equal access to public service (Art. 25). 12/07/96. CCPR/C/21/Rev.1/Add.7.

and open transparency to the public.[88] Nevertheless, this paper argues that the ACN lacks legitimacy because, first, its roles and authorities are again derived from the Presidential Regulation, without deliberation from the National Legislature's control. Second, the appointment process of the members of the ACN is unclear. Third, the appointment of the members of the ACN has no democratic justification because they are not the product of a democratic election, thus not representatives of Nusantara's citizens. Last, the Regional Autonomy Law has not acknowledged, let alone regulated, the ACN's roles and authorities. It thus can be concluded that the ACN's roles and authorities stipulated in the Presidential Regulation itself is unconstitutional, because the regulation has no direct reference to the higher legislation and constitutional norm. These oddities lead to an unclear function of the ACN in channeling citizens' aspirations, and, more importantly, how citizens can utilize the ACN to question the HO's policies.

The following section will analyze fundamental political rights and some of democracy's main tenets: the right to vote and the right to be elected. The absence of local legislature and the excessive authority of the HO are the result of the absence of fair local elections in Nusantara.

4.3 Rights to Vote and Right to be Elected

The absence of local elections to elect both the Head of Region and legislative members is a consequence of the ambiguities of the HO's roles and authorities. The HO is considered a special law (lex specialis) in a regional autonomy regime. Thus it can negate some rights including rights to vote and right to be elected.[89] A special regional government, or a so-called special autonomous region, is legally recognised in Indonesia, but with special conditions.[90] In the Special Province of Yogyakarta, the last monarch in Indonesia, the Sultan of Yogyakarta, due to his role as a traditional leader of the region, is automatically appointed as the Governor of Yogyakarta. Despite the appointment of the Sultan not being done through elections, the people of Yogyakarta have the right to vote in local legislative elections, as well as the right to be elected as legislative members.[91] This stands in contrast to Nusantara, where both rights are absent.[92]

---

[88] Presidential Decree Number 62 of 2022 on Head of Otorita, art. 20. This statement was also orally expressed by the officers from Presidential Office in Focus Group Discussion, Jakarta, April 26, 2022.

[89] Lex specialis (special law) is derived from the legal maxim in the interpretation of law. This concept is often associated with a principle 'lex specialis derogate legi generali' means special law repeals general laws. See Oxford Reference, <https://www.oxfordreference.com/view/10.1093/acref/9780195369380.001.0001/acref-9780195369380-e-1303>, accessed in October 31, 2022.

[90] The 1945 Constitution (Amended), art. 18B (1). "The State recognizes and respects unit of regional authorities that are special and distinct …"

[91] Yogyakarta received its special autonomy status in 2012, due to the historical facts as the cultural city of Java and the stronghold of Indonesia's revolution era. See Law Number 13 Year 2012 on Special Autonomy of Yogyakarta.

[92] Law Number 3 Year 2022 on Nusantara Capital City, art. 5 (4) and 9 (1).

Consequently, the citizens of Nusantara, who were citizens of the two regions: the PPU and Kutai Kartanegara, will lose their right to vote for the Head of the Region and for the members of the local legislative assembly. This provision is unconstitutional because the Constitution acknowledges several political rights, including the right to vote and non-discrimination.[93] Additionally, this provision is not legitimate due to its limitation of rights, because it fails to meet the requirements of limitation: no emergency condition and no exact duration of limitation. The provision, therefore, contradicts the democratic principle of empowering society.[94]

Related to the absence of public participation and transparency, most citizens of Nusantara, especially marginalized groups, are unaware that they cannot vote for the Head of the Region and the members of the local legislative assembly in the next scheduled election in 2024.[95] As a result, approximately 1.5 million citizens will lose their constitutional right to vote. Without local elections, citizens' bargaining power will be significantly reduced in relation to the HO's autocratic policies. Both regional governments of PPU and Kutai Kartanegara have questioned the technicalities of local elections in 2024, because the two regions' constituency will be significantly altered, and it could potentially jeopardize their citizens' right to vote.[96] The provisions are silent in these local election issues, meaning the government has no lawful requirement to fulfil its duty and obligation to install democracy in Nusantara. If the commitment to human rights in Nusantara is genuine, then the rights focus cannot be limited to projects.[97] There can be no compromise of civil and political rights in development.[98] The government's propositions lack coherency in commitment, duty, and obligation to those rights.

Additionally, due to the direct appointment of the HO and the absence of local representatives, local citizens cannot participate in local elections as candidates. In other words, local citizens will not be able to be fully and actively involved, participate, or control public policies in Nusantara. This is a potential violation of the right to be elected. It is further proof of the inconsistency of the Nusantara Law, which has proclaimed itself as a regional government consisting of authorities and functions of governance.[99] Some local and

---

[93] The 1945 Constitution (Amended), art. 28D (3). "Every citizen shall have the right to obtain equal opportunities in government." See art. 28I (1). "Every person shall have the right to be free from discriminative treatment based upon any grounds whatsoever and shall have a right to protection from such discriminative treatment."

[94] Ibid., art. 28I (2). "…for the sole purpose of guaranteeing the recognition and respect of the rights and freedoms of others and of satisfying just demands based upon considerations of morality, religious values, security and public order in a democratic society." See Siracusa Principles on the Limitation and Derogation Provisions in the ICCPR 1985, <https://www.icj.org/wp-content/uploads/1984/07/Siracusa-principles-ICCPR-legal-submission-1985-eng.pdf >, accessed in April 23, 2022.

[95] Interview with some local residents in Kuala Semboja Village, April 5, 2022.

[96] Interview with the Regional Secretary of Penajam Paser Utara (PPU) District, April 7, 2022.

[97] Uvin (2007), *supra* note 5, at 604.

[98] Acharya (2014), *supra* note 17, at 345.

[99] Law Number 3 Year 2022 on Nusantara Capital City.

traditional leaders, both in formal and informal institutions, such as Tribal Council and CSOs working on indigenous peoples' issues, have expressed their concern on this issue because they firmly believe that local people should be actively involved.[100] In other words, the development of Nusantara has failed to connect with democracy and development.

Nusantara's provisions on citizens' political participation are insufficient to protect their rights. This crucial political instrument is a prerequisite for sustainable development which aims to empower human development through democracy, political channels and institutions.[101] In the tenet of democracy, increasing the choice in citizens' lives would lead to fundamental increases in the quality of life for both individuals and societies.[102] Therefore, the Nusantara project has failed on the basic level of legitimacy because it does not aim to improve the well-being of the entire population and of all individuals on the basis of their active, free and meaningful participation in development and in the fair distribution of benefits resulting therefrom.[103]

When civil and political rights are weakened, other rights also tend to decrease in quality. The most crucial issue in the Nusantara project is land, how it is acquired for the public good (for the sake of development), and whether citizens will obtain benefits from the acquisition.

5 Nusantara's Land Acquisition: Who benefits? And who doesn't?

The analysis in this section starts from the legal analysis of the Nusantara Law and its delegated regulations, exposing the intended legal norms that could affect marginalized communities and their land. Then the analysis moves to deepen an understanding of the power dimensions of Nusantara.

5.1 Autocratic Provisions on Land Acquisition

The Nusantara Law has granted significant authority to the HO, especially in regard to land management and acquisition. The Law states: "the HO has authority to create a private agreement with individuals and private legal entities concerning land acquisition."[104] Based on this provision, the HO, which is known as a "public legal entity," is converted to a private legal entity, because the HO can involve in a private agreement with business actors or corporations. In other word, the HO and business/corporations are in the footing in a private agreement which erodes the sovereignty of the HO as public entity. . It also may lead to conflict of interests. Thus, it has a legal right to enter agreements with individuals and private legal entities. The term

[100] Interview with anonymous, Sepaku, April 8, 2022.
[101] Sen (2006), *supra* note 20, p. 87.
[102] Acharya (2014), *supra* note 18, at 346.
[103] The Declaration on the Right to Development (1986), *supra* note 20.
[104] Law Number 3 of 2022 on Nusantara Capital City, art. 16 (7).

'agreement' is elaborated further as an "agreement on land purchase, in which the HO has a right to be prioritized (privilege)."[105]

The above provisions are problematic for two reasons: first, as the HO has a right to enter into private agreements, the government has created a purchase mechanism to 'own' land. This is in contradiction with the state's right of disposal enshrined in the Constitution.[106] The state's right of disposal posits the role of the government as an administrator of land management, not as an owner of the land. As an administrator, the government 'controls' the land mostly as a public entity in which it can empower authorities to stipulate, regulate policies, administer, and control the administration of land for the purpose of public welfare.[107] Clearly, the Constitution stresses the role of the government as a public, not private, entity.[108] If the government requires land for public use and infrastructure, the legal mechanism to acquire it is through a public interest acquisition process.[109] The public interest mechanism is prone to miscalculation and controversies,[110] indicating the purchase mechanism will be no better. The second issue is regarding the HO's right to be prioritized. This authority is prone to be misused by the HO because the HO through its privilege given by the Law could jeopardize citizens' property rights [111] The provision can easily lead to domination, power concentration, and cooptation of land in the Nusantara. This provision can be a threat for land rights owned de jure (legally) by citizens, or occupied de facto (factually) by indigenous people.

The Law stresses that in the abovementioned agreement, the duration of private agreement to 'own' land is based on 'needs.' The word 'needs' is too ambiguous because the Indonesian government often interprets it merely based on 'the state needs', not on the basis of people's needs. The ambiguity of the word 'needs' is worsened by the right to be prioritized above. Additionally, with regard to land management, the Law authorizes the HO to give "… a guarantor to expand and renew the right of land."[112] And the Law

---

[105] Ibid., art. 17.
[106] The 1945 Constitution (Amended), art. 33 (3). "The land, the waters and the natural resources within shall be under the powers of the State and shall be used to the greatest benefit of the people."
[107] See *Indigenous Peoples' Alliance of the Archipelago v. Indonesia*, Case No. 35/PUU-X/2012. *Indonesian Human Rights Committee for Social Justice v. Indonesia*, Case No. 50/PUU-X/2012. *Indonesian Human Rights Committee for Social Justice v. Indonesia,* Case No. 3/PUU-VIII/2010.
[108] Maria Sumardjono, *Kebijakan Pertanahan: Antara Regulasi dan Implementasi [Land Policy: Regulation and Implementation]* (Jakarta: Kompas Gramedia, 2009), p. 47.
[109] Law Number 2 Year 2012 on Land Acquisition for Development in the Public Interest.
[110] Jamie S Davidson, "Eminent Domain and Infrastructure under the Yudhoyono and Widodo Administrations," in John F McCarthy and Kathryn Robinson (eds.), *Land and Development in Indonesia: Searching for the People's Sovereignty* (Cambridge: Cambridge University Press, 2017), p. 180.
[111] Law Number 3 of 2022 on Nusantara Capital City, art. 17. When the government has a strong authority with less accountability in development project, issues of eminent domain may arise. See Davidson (2017), supra note 111.
[112] Law Number 3 of 2022 on Nusantara Capital City, art. 16 (8).

also asserts that “the transfer of land rights must receive a clearance notice from the HO.”[113] These new authorizations matter because the HO can interfere land administration processes. The authority of the HO is far too powerful and overlaps with other state institutions, including the Land Agency. This provision could jeopardize policy coordination among state institutions while creating legal uncertainties in practice.

All provisions above have the potential to breach citizens’ right to receive equal and non-discriminatory public services, especially in land management.[114] Thus, the Nusantara project has lost its legitimacy in creating a fair and equal process of development, because there is no presence of a free and equal condition for people to choose and consider the terms of development due to the overly dominant roles of the HO and its privileges.

Moreover, the coordination between the HO and the Land Agency is arbitrary in practice. Local residents living within and nearby the Core Area of the Nusantara (KIPP) reported that officers of the Land Agency posted signs and demarcated the capital’s boundary in front of residents’ houses and properties without the consent of local residents.[115] This situation shows two things. First, there is an absence of ‘prior’ and ‘informed’ aspects of development, meaning that both the HO and the Land Agency failed to uphold their promise or transparency. This is a breach of local residents’ civil and property rights, as most of the land being marked is legally owned by the residents with the proof of land certificate. Second, the land status in the Core Area of Nusantara (KIPP) is still contested, contrary to the government’s claim. These acts are proof that both the HO and Land Agency have no integrated spatial and land planning, no participatory mechanism for land acquisition, and no real and effective implementation of legal norms. In this respect, the development of Nusantara is deficient under the coherency test. More proof that the development of Nusantara was completed hastily, with poor public participation and a disregard for the constitutional rights of citizens and their property rights.[116]

In discussing land acquisition amidst a massive development project, the issue of eminent domain is unavoidable. It refers to the power of the government to ‘legally’ take private property (including land) and convert it into public use.[117] The Law on Land Acquisition states that land acquisition for development in the public interest should consider the ‘interest of

---

[113] Ibid., art. 16 (12).
[114] See generally the 1945 Constitution (Amended), art. 27 (1). See Universal Declaration on Human Rights (UDHR), art 21 (2), “everyone has the right to equal access to public service…” International Covenant on Civil and Political Rights (ICCPR), art 25 (c) and 26, “… to have access, on general terms of equality, to public service in his country.” See specifically Law Number 25 of 2009 on Public Services, art. 20 (4).
[115] Interview with anonymous, Sepaku, April 6, 2022.
[116] The 1945 Constitution (Amended), art. 28H (4) “every people shall have right to own personal property, and such property may not be unjustly held possession of by any parties.”
[117] Cornell Law School, available at: <https://www.law.cornell.edu/wex/eminent_domain>, accessed in September 8, 2022.

development' and 'the interest of society,' and balance between the two.[118] However, the Law fails to explain how the two interests should be balanced.[119] The Law only defines 'public interest' in an idealistic fashion as "…the interest of the nation, the state and the society that must be realized by government and be utilized to the greatest extent possible for the prosperity of the people."[120] There is insufficient explanation about how those interests should be realized. Provisions on the amount of monetary compensation to those whose land is acquired are inconsistent among many laws and regulations. The Law states that both the type and amount of compensation must be determined in a deliberative meeting between the interested parties and government.[121] However, the Presidential Regulation states that a deliberative meeting among interested parties and government is only a venue to determine the type of compensation, while the exact amount of monetary compensation is determined by the appraisal team.[122]

The government revised the Law by stressing the crucial role of the appraisal team to determine the exact amount of monetary compensation, and the verdict is final and binding.[123] However, this change has several implications: first, it renders worthless the consultative process and meetings as they determine only the type rather than the exact amount of compensation. Second, it is unlikely that the rate of compensation will be set at fair market rates, let alone rates that would recognize the land has more value to its inhabitants than it does to private investors.[124] It is because the interest of investors is more important than citizens' property rights. Last, and most seriously, the final and binding decision of the appraisal team in determining the amount of monetary compensation cannot be challenged by citizens to the Land Agency or courts, meaning the provision negates the citizen's constitutional right to an effective remedy.[125] These provisions are undemocratic and do not provide a fair and equal process of development for its citizens.

Back to Nusantara's context, the Land Agency is not the only authority that has the capacity to act as executor of involuntary land acquisition in the public

---

[118] Law Number 2 of 2012 on Land Acquisition for Development in the Public Interest, art. 9 (1).
[119] Davidson (2017), *supra* note 111, p. 180.
[120] Law Number 2 of 2012 on Land Acquisition for Development in the Public Interest, art. 1 (6).
[121] Ibid., art. 37 (1).
[122] Presidential Regulation Number 71 of 2012 on The Technical Guidance for Land Acquisition for Development in the Public Interest, art. 74 (2).
[123] The Law on Land Acquisition for Development in the Public Interest has partially changed by The Omnibus Law Number 11 of 2020 on Work Creation, art. 34 (3) and (4). See Government Regulation Number 19 of 2021 on the Practice of Land Acquisition for Development, art. 71 (2).
[124] Davidson (2017), *supra* note 111, p.181.
[125] Law Number 12 of 2005 on the Ratification of International Covenant on Civil and Political Rights (ICCPR), art. 2.

interest.[126] The HO also has a crucial role in planning and preparing eminent domain practices, and may carry out other tasks to make sure preparation processes of the Nusantara Capital City run as planned.[127] The HO is also the holder of the right to land utilization in Nusantara, in which it has a right to utilize the land and transfer the right to private entities based on private agreements. The duration of transfer of land utilization to private entities is uncertain as it is based on investment interests.[128] In this provision's context, this paper argues that there is no 'public use' because it might not directly benefit the public, but certainly it will benefit investors. These provisions have a minimum degree of legal certainty and protection of a citizen's property rights. They threaten the property of the vulnerable. By utilizing the dominant power of the HO and its affinity to investment actors, the practice of eminent domain in Nusantara is prone to be solved through 'the back door,' disregarding discussion and deliberation in equal footing, free consent, and equitable procedures.[129]

Due to the complexities of eminent domain in areas related to Nusantara, and by considering the Nusantara capital city as a strategic national project, President Jokowi recently reshuffled his Ministries, appointing the former Commander of Army as the Ministry/Head of the National Land and Spatial Agency.[130] The majority of land conflicts in Indonesia are initiated by the occupation of hybrid military-corporate entities,[131] including some extortive industries in Nusantara areas. This 'military' appointment may be a strong indication that coercive state power will supplant the rule of law, especially in facilitating the process of land acquisition in Nusantara.

This article argues that without sufficient protection of civil rights, including the right to enjoy an equal public service in land management, the protection of property rights, and effective remedy from eminent domain, Nusantara's democratic promises are meaningless. This fails the coherency test because there is an absence of legal responsibility for the government in the system of laws and remedies.[132] Some rights cannot be enjoyed fully if the government fails to provide basic services in civil rights, because there are indivisible and

---

[126] Presidential Decree Number 71 of 2012 on the Practice of Land Acquisition for Development, art. 1 (16).
[127] Presidential Regulation Number 65 of 2022 on Land Acquisition in Nusantara Capital City, art. 5 and 7 (4) (f).
[128] *Ibid*., art. 15 (3).
[129] David Beito, *Eminent Domain through the Back Door*, available at: <https://reason.com/2009/04/28/eminent-domain-through-the-bac/>, accessed in June 12, 2022.
[130] Kompas, ***President Jokowi's Opportunity***, available at: <https://www.kompas.id/baca/english/2022/06/16/president-jokowis-opportunity>, accessed in June 11, 2022.
[131] Ikrar N Bakti, Sri Yunarti, and Mochamad Nurhasim, *Military Politics, Ethnicity and Conflict in Indonesia*, CRISE Working Paper No. 62 (2009). See specifically, Hendy Setiawan, *Military and Control of Land Resources: Conflict TNI and Magelang City Government*, 1 Journal of Government and Political Issues, no. 1 (2021), 3-22, at 14.
[132] Acharya (2014), *supra* note 18, p. 347.

interdependent relations among them.[133] Admittedly, developmental interests from the government and corporate entities are strong in Nusantara land issues. However, those interests should be in line with human rights' values.[134] Human rights should be a constitutive aspect of development.[135] Land has complex societal relations with humans and society, encompassing social, economic, ecological, and cultural matters, especially in an agrarian country like Indonesia.[136] Land plays a central function for humans to strive and survive in their everyday life. Thus, land cannot be reduced to mainly an economic commodity; a reality that unfortunately has happened in today's Nusantara.

5.2 Concessions, Extractive Industries and Local Elites

The Nusantara capital city project has many existing land issues. Its land status is not, in fact, clear and uncontested. The East Kalimantan Province is the stronghold of many extractive industries, including timber, coal mining and palm oil plantations. The land issues are rooted in President Soeharto's developmental regime, as in the 1960s he stipulated three development-oriented pieces of legislation: the Law on Forestry,[137] the Law on Mining,[138] and the Law on Foreign Investment.[139] Those Laws formed a web of corruptive legislation. The 1967 Forestry Law mimicked the Dutch colonial land policy of *domein verklaring*[140] which manifested in three sequences. First, the government took control of land that local and indigenous people could not prove to be their communal lands. The proof of land ownership was deemed to be a legal document or land certificate. This requirement was unfair for local and indigenous peoples, many of whom had ancestral connections to the land but lacked the necessary legal documentation to prove ownership. Thus, the government was able to take over their land arbitrarily. Second, the government set boundaries as a manifestation of the state's control over the land and its natural resources. The criminal law provisions on trespassing were, and continue to be, implemented strictly for local and indigenous people living nearby. Last, the government issued mining permits, which were

[133] Richard B Lillich, "Civil Rights," in Theodor Meron (ed.), *Human Rights in International Law: Legal and Policy Issues* (Oxford: Oxford University Press, 1989), p. 80.
[134] United Nations (1994), *supra* note 37.
[135] Uvin (2007), *supra* note 5, at 112.
[136] Muhammad Z. Rakhmat and Muhammad B. Saputra, *Making Indonesia an Agrarian Nation Again: Indonesian needs to take better care of its farmers*, available at:< https://thediplomat.com/2016/12/making-indonesia-an-agrarian-nation-again/ >, accessed in October 31, 2022.
[137] Law Number 5 of 1967 on Basic Forestry Provisions.
[138] Law Number 11 of 1967 on Basic Mining Provisions.
[139] Law Number 1 of 1967 on Foreign Investment.
[140] According to art. 1 of *Agrarische Besluit* (1870), *domein verklaring* is translated as domain declarations. It is a policy used by the Dutch colonial power to take land that cannot be proved as a private ownership (*eigendom*). Thus, the land was owned (*domein*) to the state's control. The colonial government began to expropriate large tracts of land for plantation economy. These expropriations created an enormous sense of insecurity among the indigenous populations. See Benda-Beckmann (2018), *supra* note 66, p.85.

concessions for extractive industries, without the consent, participation or involvement of local people. This was a top-down state process that compulsorily evicted people from their land. This generated land conflict and inequality, leaving a legacy of unresolved land governance issues.[141]

In Nusantara's areas, especially in the Sepaku district, extractive industries have existed since 1969, when a corporation namely ITCI Hutani Manunggal (IHM) was granted a logging concession (Hak Penguasaan Hutan/HPH) which was then converted into a right to exploit (Hak Guna Usaha/HGU). The establishment of this military and infantry-owned company was supported by the military regime of Soeharto. The company took control of local citizens' land, and set the boundaries among citizens' housing. Since 2006, thousands of hectares have been under dispute between local residents and ITCI IHM. The people believe their land was taken by force.[142] Having the same problem, people in three neighboring districts: Binuang, Maridan, and Telemo have been experiencing tenure conflicts with a concession hold by ITCI Kartika Utama (KU). The concession was granted a right to build (Hak Guna Usaha/HGB) where the location overlaps with the residents' land. Some local people were arrested on allegations of trespassing on the company's property areas. They claimed around 85 hectares of land from 305 hectares of ITCI KU's concession.[143] The situation continues to be hostile, as the company often intimidates local and indigenous people living nearby the concession area.[144] This dispute has yet to be resolved and stands as a warning of the damaging effects of prerogative land and forest management.

The ITCI IHM's right to exploitation ceased in 2011 and its sites were abandoned for several years until a recent concession was issued. In a nearby area, ITCI (KU) granted a new concession of a right to build (HGB) in 2017. The shifting of the concessions' status from a logging concession (HPH) to a right of exploitation (HGU), and then to a right to build (HGB), is vulnerable to abuse. This concession-based process invites no public participation, nor the transparency of the local government.[145] Moreover, the practice of concession permits showcases that there is problem of legal uncertainty and incoherency of provision implementation. By having this crucial flaw on real legal certainty means there is a gap between the laws' goals and their actual implementation. Proving once again, that the development of Nusantara does not satisfy the coherency test.[146]

---

[141] John F McCarthy, Kathryn Robinson, and Ahmad Dhiaulhaq, "Addressing Adverse Formalisation: The Land Question in Outer Island Indonesia," in Adriaan Bedner and Barbara Oomen (eds.), *Real Legal Certainty and Its Relevance: Essay in Honour of Jan Michiel Otto* (Leiden: Leiden Publication, 2018), p. 25, 33.

[142] Martinus Nanang, *Identifying appropriate solutions to the land dispute within the area of PT. ICTI IHM in the District of Penajam Paser Utara and Kutai Kartanegara*, paper given at the Centre for Social Forestry (Samarinda, February 10, 2006), p. 6.

[143] Interview with local residents in Telemo, Sepaku, April 6, 2022.

[144] Interview with local and indigenous people in Pemaluan district, April 6, 2022.

[145] Interview with anonymous, Sepaku, April 8, 2022.

[146] Bedner and Oomen (2018), *supra* note 45, p. 14. See Benda-Beckmann (2018), *supra* note 66, p. 93.

Additionally, the Nusantara regions have many pre-existing environmental issues regarding post-mining conservation. There are approximately 149 post-exploitation mining pits spread out in 5 (five) districts within the Nusantara regions, which some of them are the result of illegal mining practices[147] The companies have admitted that they have paid a 'reclamation fee' to the local government to rehabilitate the pits.[148] Through the Nusantara city project, the government will cover the pits with the infrastructure projects, meaning that the government will be able to nullify its, and the companies', responsibility to rehabilitate the pits and the surrounding areas. Especially, with regard to illegal mining pits, the responsibility for reclamation will be problematic, so it is feared that the state will bear a large amount of funds.

Based on local residents' testimonies and observations, in the Kutai Kartanegara districts of the Nusantara's development, there are new mining concessions being issued. The Ministry of Energy and Mineral Resources has denied the allegation, but conceded that there are still 72 mining concessions operating in Nusantara's development areas. The government is adamantly opposed to ceasing the concession contract to maintain the appearance of investment reliability and economic sustainability.[149] It is clear the government is prioritizing investment over environmental and citizens' rights.

Prior to the announcement of the Nusantara capital city, the Province of East Kalimantan was notorious for being the stronghold of extractive industries and political dynasties. In the authoritarian era, most of the industries were owned and protected by the military and bureaucrats. In the post-authoritarian era, the situation has hardly changed. Extractive industries play a role as an economic 'lubricant' for local politics. In the early regional autonomy regime, in which there was an emphasis on decentralization and local leaders' involvement in the political sphere, primordial identity became a tool to gain support from local communities. This tool was exploited in the process of gaining consensus for the establishment of Nusantara. Local elites, masked with an indigenous or ethnic identity and mobilized through local NGOs, supported the establishment of Nusantara as an opportunity to elevate their own political bargaining, not necessarily to genuinely support the rights of indigenous people.

Both districts were, and are, led by political dynasties intermingling with the extractive industries, creating many loops of conflicts of interest. The Regional Head of PPU, Abdul Gafur Mas'ud, was arrested by the KPK (the Commission of Corruption Eradication) due to bribery for road projects.[150] His brothers are both Members of the National Legislature and the Provincial

[147] Interview with anonymous, Samarinda, April 8, 2022.
[148] Interview with anonymous, Samarinda, April 8, 2022.
[149] Focus Group Discussion (FGD) with the Ministries, organized by the National Commission of Human Rights, May 24, 2022.
[150] VOI, *KPK Says Penajam Paser Utara Regent is arrested in Jakarta*, available at: <https://voi.id/en/news/123570/kpk-says-penajam-paser-utara-regent-is-arrested-in-jakarta>, accessed July 12, 2022.

Legislature (the East Kalimantan *Dewan Perwakilan Rakyat Daerah*, DPRD). Moreover, the Vice Head of Kutai Kartanegara is a controversial figure as the son of a local businessman from the Samboja district, who has a strong link to ruling parties at the national level.[151] His father is one of a few people that was approached personally by President Jokowi when he proposed Nusantara's location in East Kalimantan.[152] Additionally, the appointment of deputies of the HO is also controversial as one of the deputies is the former head of Sinar Mas, the biggest property development company in Indonesia, .[153] It is clear that there are elites at both the local and national levels that have orchestrated Nusantara's development plan for their own economic motives. Factors relevant to powerful actors are the most dominant consideration.

Realistically, the government would favor the politically and economically powerful over the weak, particularly when the general public cannot easily scrutinize complex issues, such as eminent domain. The next section elaborates the "weakest" and the most marginalized groups amidst the development of the Nusantara: indigenous and local people.

5.3 The Oppressed Parties: Indigenous and Local People

The Ministry of National Development Planning promises that the development of Nusantara will not evict indigenous and local people from their social and historical sites; in fact, it is proposed that they will thrive because of it.[154] However, judging by the analysis of the Nusantara Law and its regulations so far, this promise seems unrealistic. The regulations provide only minimal legal protection for both indigenous and local people, particularly relating to their land and property rights. The Nusantara Law states, "The project considers human rights in its land purchase and acquisition processes."[155] The word 'consider' is a very weak legal protection for people, because the verb 'consider' implies a mere 'contemplation of,' 'to think' or 'to regard' the rights, not an assertive obligation to enforce the rights. The people of Nusantara need an explicit and stronger verb such as 'must' or 'obligates' aiming to force the duty-bearers to uphold the right to development principle. This weak legal "protection" is repeated in the regulation stating that "land acquisition processes 'consider' indigenous and local people's land rights."[156] There is no indication of duty and responsibility of the HO and government to protect indigenous and local people's land rights, thus the provision fails the

[151] Indonesia Corruption Watch, *Calon Wakil Bupati Kabupaten Kutai Kartanegara*, available at: <https://antikorupsi.org/id/node/87844>, accessed July 12, 2022.
[152] Interview with local residents of Kuala Semboja, Kuala Semboja, April 6, 2022.
[153] BBC News Indonesia, *Wakil Kepala IKN Nusantara dipegang pimpinan Sinar Mas*, available at: <https://www.bbc.com/indonesia/indonesia-60687463>, accessed July 13, 2022.
[154] Focus Group Discussion (FGD) with the Ministries, organized by the National Commission of Human Rights, May 23, 2022.
[155] Law Number 2 of 2012 on Land Acquisition for Development in the Public Interest, art. 21.
[156] Presidential Regulation Number 65 of 2022 on Land Acquisition in Nusantara Capital City, art. 4 (3).

coherency test. The lack of explicit language for legal protection does not impose a duty or obligation to the government, nor does it provide the ability to sanction duty-bearers. This pseudo-legal protection is uncertain and insufficient because eminent domain affects indigenous, racial and ethnic minorities more often and more profoundly.[157]

Indigenous people are one of many marginalized groups in Indonesia. However, they have a distinct characteristic related to the issue of land acquisition and development in which they have a socio-spiritual connection with their communal land. Indigenous people are marginalized legally, because the Constitution only 'recognizes' and 'respects' their existence,[158] without giving further explanation on how the recognition works. Indigenous peoples are often further marginalized precisely because of their lack of legal certainty and protection.[159] Legislation which purports to provide the mechanism to recognize and authorize the status of indigenous people's land rights is highly bureaucratic. To belong to an indigenous people, one must have: (1) an organized group, both territorially, culturally and combined; (2) own indigenous/traditional areas; (3) own indigenous/traditional institutions; (4) own both material and spiritual goods.[160] These requirements are questionable for several reasons. First, due to assimilation and interaction between indigenous and local people and the spreading of 'modern' religions, it is hard to find an indigenous group that fits all the cumulative requirements. Second, in assessing the status of indigenous peoples' existence, the government often uses 'modern' and legalistic measurements. For instance, in deciding the boundaries of indigenous or traditional territory, the government rejects traditional boundaries such as rivers, ancient trees, and so on. Third, the status of their existence must be legalized through the Regional Regulation. Prior to the authorization by the law, the local government needs to identify and verify indigenous groups based on the cumulative requirements above.[161] All these processes require political processes in the Local Legislature.

---

[157] U.S Commission on Civil Rights, *The Civil Rights Implications of Eminent Domain Abuse,* briefing report of (Washington, DC, 2014), p. 7.

[158] See generally the 1945 Constitution (Amended), art. 18B " the state recognizes and respects traditional communities along with their traditional customary rights as long as these remain in existence and are in accordance with the societal development and the principles of the Unitary State of the Republic of Indonesia, and shall be regulated by law." See specifically Law Number 5 of 1960 on Basic Agrarian Law, art. 5. In its General Elucidation states "if indigenous people and their communal lands continue to exist, they must adjust to conform to the national interest."

[159] Gerard A Persoon and Tessa Minter, "Can Free, Prior and Informed Consent (FPIC) Create Legal Certainty for Hunter-Gatherers," in Adriaan Bedner and Barbara Oomen (eds.), *Real Legal Certainty and Its Relevance: Essay in Honour of Jan Michiel Otto* (Leiden: Leiden Publication, 2018), p. 43.

[160] Law Number 41 of 1999 on Forestry.

[161] Regulation of Internal Affair Ministry Number 52 of 2014 on Mechanisms for Recognition of Indigenous People, art. 4 and 5.

Moreover, any communal land granted a concession cannot be returned to indigenous people, for the sake of investor's legal certainty.[162] This means that the government has no obligation to provide a legal remedy in restoring indigenous people's communal land once the land is granted a concession. The reasoning stems from the textual interpretation of the Constitution which says: "The State recognizes and respects traditional communities along with their traditional customary rights as long as their remain in existence…"[163] The government interprets the sentence 'remain in existence' to mean that when a concession had been issued on a communal land, the traditional customary rights have also ceased and cannot be restored. The land should return to the state instead of the original owner (indigenous peoples).[164] In this regard, the government reduces indigenous people's recognition in procedural legitimacy processes by taking away any leverage they might have in land ownership. In the post-authoritarian setting, "legality" often constitutes a crucial instrument of autocratic rule.[165] Jokowi's administration appeared to support local and indigenous people when it exercised a program to hasten land registration, issuing many land certificates for smallholders and local and indigenous communities.[166] However, the program was suspectedly populist because the certificates were for individual land ownership, not communal land ownership. And most of the land was located in areas that were not contested through agrarian conflict or overlapping claims between local.[167] The program was not based on a social justice paradigm aiming to restitute the land (land reform: land to the tillers),[168] but was rather strongly influenced by an economic growth strategy to accumulate land as capital and establish a free land market where land is merely considered as commodity by disregarding its social functions.[169] This policy does not solve the rooted causes of agrarian conflicts.

In East Kalimantan, there are many villages that have been granted the status of 'Cultural Villages,' in which indigenous people are encouraged to express their cultural traditions and ceremonies, such as thanksgiving parties (Erau), dancing, and communal feasts. However, their cultural expression and ceremonies are merely to attract and boost tourism.[170] The status of 'Cultural Village' does not recognize their communal lands or protect their living spaces

---

[162] Regulation of Land and Spatial Ministry Number 18 of 2019 on Mechanisms for Authorization of Indigenous Lands.
[163] The 1945 Constitution (Amended), art. 18B.
[164] McCarthy, Robinson, and Dhiaulhaq (2018), *supra* note 142, p. 27.
[165] Schotel (2021), *supra* note 55, at 201.
[166] Cabinet Secretariat of the Republic of Indonesia, *President Jokowi Hands Over 1 Million Land Certificates in Virtual Ceremony*, available at: <https://setkab.go.id/en/president-jokowi-hands-over-1-million-land-certificates-in-virtual-ceremony/>, accessed September 4, 2022.
[167] McCarthy, Robinson, and Dhiaulhaq (2018), *supra* note 142, p. 37 and 41.
[168] Ronald J. Herring, *Land to the Tiller: The Political Economy of Agrarian Reform in South Asia* (Connecticut: Yale University Press, 1983).
[169] *Ibid.*, p. 27. See Annelies Zoomers, *Globalization and the Foreignization of Space: Seven Processes Driving the Current Global Land Grab*, 37 The Journal of Peasant Studies, no. 2 (2010), 429-447, at 430.
[170] Mirza Satria Buana, Can Human Rights and Indigenous Spirituality Prevail over State-Corporatism? A Narrative of Ecological and Cultural Violation from East Kalimantan Indonesia, 1 Journal of Southeast Asian Human Rights, no.1 (2017), 1-15, at 11.

from the extractive industries located nearby. In the PPU District, there is local legislation regarding the preservation and protection of the indigenous Paser people.[171] However, the legislation does not regulate the mechanisms to identify, verify, and authorize the status of indigenous people and their rights. In fact, the local legislation only regulates cultural traditions and ceremonies. The local legislation is only the delivery of aid and charity rather than a manifestation and entitlement of rights. In other words, indigenous and local people do not feel safe and secure from the development processes, because national, local legislation, and regulations that purport to protect indigenous people in fact serve to undermine their rights. Thus, these provisions on the process of acknowledgement and authorization fail both the legitimacy and coherence tests. The former fails because the provisions have no given sufficient political leverage and consent mechanism for indigenous people to live nearby the Nusantara project. The latter is futile because the legal language containing duties, obligations, and authorities of the government are weak and too formalistic, thus could not effectively enforced.

Indigenous people are located within 6.671 hectares of the Core Area of Nusantara (KIPP). They live in the ancestral villages of Sepaku, Mentawer, Maridan and Pemaluan. As mentioned in the previous section, the existence of indigenous people is being ignored by the government, due to the land administrative record that they have no land certificates or status of legality as indigenous people.[172] To be clear, they have not been conferred with legal status. At Nusantara's establishment ceremony, the Tribal Chief of the Balik indigenous people, who lives nearby, was not invited.[173] The indigenous people of Balik have at least three demands: first, the government must guarantee that there will be no eviction and relocation of indigenous people from their existing areas; second, they demand a land restitutive policy to return their 3000 to 5000 hectares of indigenous lands, and a recognition of indigenous villages. Third, indigenous people must get direct and indirect benefits from the Nusantara project as part of an affirmative action policy.[174] So far, neither the government nor the HO have responded to these demands.

To elevate their bargaining position, in 2010, the indigenous people of Balik once attempted to lobby the Local Legislature to execute an identification, verification and authorization of their existence, but to no avail.[175] Once the location of Nusantara was determined to be within their region, indigenous people tried to register their land with the Land Agency, despite not having the legal status of "indigenous people."[176] In response, the HO, taking the authority of the Land Agency, closed its land administration services on the pretense that land brokers could potentially cause the land's price to

[171] Local Legislation of PPU District Number 2 of 2017 on Preservation and Protection of Paser Indigenous Traditions.
[172] Interview with anonymous, Sepaku, April 6, 2022.
[173] Interview with anonymous, Sepaku, April 6, 2022.
[174] Interview with anonymous, Sepaku, April 6, 2022.
[175] Interview with anonymous, Pemaluan, April 6, 2022.
[176] Interview with anonymous, Pemaluan, April 6, 2022.

skyrocket.[177] All transfer of land rights, recognition and legalization of land status is authorized by the HO.[178] This provision makes registration and recognition of indigenous people's land even more difficult. These politically and economically vulnerable indigenous groups are thus more susceptible to violation and abuse of their rights. Lacking knowledge of legal procedures and relevant documentation, the indigenous people of Balik in Sepaku and Pemaluan face the threat of eviction and relocation.[179] Once indigenous and local people relocate, their most significant bargaining tool (refusing to vacate their land) will be neutralized.

Additionally, the situation of indigenous and local people in ancestral villages stands in contrast to those in some Javanese immigrant villages, especially in Bumi Harapan and Bukit Raya Villages.[180] Due to the transmigration policy applied between the late 1960s and early 1970s, the central government sent thousands of Javanese residents to Kalimantan and other Indonesian islands, granting them two hectares of land with a legal land certificate. Javanese immigrants believe that they will get fair payment and compensation for government acquisition of their land because they have a legitimate land certificate,[181] unlike the indigenous people. These contradictory conditions and contrasting outcomes could trigger social conflict among tribes and communities in the Nusantara area.

6 Conclusion

This paper has shown that the Nusantara Law has provided only a minimum legal protection for local residents and marginalized groups. The Law fails the legitimacy and coherency tests. The former implies the absence of political choices for citizens in considering the purpose and terms of the development. Even in the early process of lawmaking, the Law failed to satisfy the legitimacy test. The channel of public participation and accountability through local elections is also closed. As a consequence, the absence of political rights will be detrimental for the sustainable rights-based development of Nusantara, because the people of Nusantara do not have any legal safeguards to protect and challenge the HO's policies. This paper reaffirms its argument that without a strong commitment to civil and political rights, the development will fail at the basic level because citizens, especially the most marginalized groups, will not be able to survive the rapid economic development of Nusantara.

[177] Interview with indigenous and local people in Jenebora and Kuala Semboja, April 6, 2022. The information then affirmed by Regional Secretary of the PPU District, April 7, 2022. See also Presidential Regulation Number 65 of 2022 on Land Acquisition in Nusantara Capital City, art. 19.
[178] Presidential Regulation Number 65 of 2022 on Land Acquisition in Nusantara Capital City, art. 20.
[179] Interview with anonymous, Pemaluan, April 6, 2022.
[180] Interview with anonymous, Sepaku, April 8, 2022.
[181] Interview with anonymous, Sepaku, April 6, 2022.

The Nusantara Law consists of many weak rights and legal protections. It merely encourages the government and HO to take the “right to development” into consideration, while failing to enforce and fulfil the legal duties and responsibilities of the government for its citizens. Moreover, most of the HO’s authority has no direct or plausible connection to the the Constitution. With these inconsistences and ambiguous authorities and duties, the implementation of the provisions is mostly autocratic with what seems to be an intentional ignorance to citizens’ rights. In this setting, the human rights and future potential conflicts are continually being ignored for the sake of development.

As might be expected, land and concession issues in East Kalimantan are highly political, especially when it comes to eminent domain for the new capital city of Nusantara. The first stage of the development of Nusantara is expected to be finished in 2024 when President Jokowi is due to finish his second term. The elites hope the project will continue after Jokowi has stepped down. The inter-mingling of business and political interests are clearly manifested in the lawmaking process and have the potential to undermine the public interest, especially as it applies to the rights of marginalized groups. The development of Nusantara is insensitive toward citizens and marginalized groups’ rights because of a centralized and autocratic policy being imposed on the people of East Kalimantan.

Eminent domain in Nusantara requires processes that will protect racial and ethnic minorities and low-income communities. Eminent domain should be exercised in an open and transparent manner and guarantee the full participation of any affected communities. The government should take measures to provide them with legal protection, so they are able to participate in society in an equitable way. If indigenous and local peoples are to be evicted and relocated (a realistic scenario), the HO must provide fair and just compensation covering replacement costs for the takings, not just the appraisal, so that they are not left worse off. Ultimately, without addressing the concept of human rights in the context of human development, Nusantara will remain merely an economic project to the detriment of its people.

Acknowledgement

The writing of this article is the result of a collaboration between the National Human Rights Commission of the Republic of Indonesia (KomnasHAM) and the Indonesian Consortium of Human Rights Lecturers (SEPAHAM Indonesia), specifically related to the data collection process through field research conducted in the prospective new capital city regions, Penajam Paser Utara (PPU) and Kutai Kartanegara Districts. In addition to field visits, the authors have also actively communicated with the commissioners in various forums, both formal and informal, such as in Focus Group Discussion (FGD), seminars and workshops. KomnasHAM published some of the data and information obtained through field visits in the form of a policy brief (in Indonesian). However, this article is an expansion and upgraded version of previous work with KomnasHAM. KomnasHAM has granted its permission to submit and publish this article. We have secured ethics clearance for this research. Additionally, there has also been communication with the mainstream media to obtain comprehensive data and information, especially those that cannot be obtained in the field such as professional opinions and arguments regarding the issues written about this article. However, this article does not represent the opinions of the two institutions. This article is purely the thoughts of the authors.

References

Acharya, Upendra, *The Future of Human Development: The Right to Survive as a Fundamental Element of the Right to Development*, 42 Denver Journal of International Law and Policy, no. 3 (2014).

Agrarische Besluit (1870).

Arnstein, Sherry, *The Ladder of Citizen Participation*, 35 JAIP, no. 4 (1969).

Bakti, Ikrar N, Sri Yunarti, and Mochamad Nurhasim,, *Military Politics, Ethnicity and Conflict in Indonesia*, CRISE Working Paper No. 62 (2009).

Banakar, Reza and Max Travers, *Theory and Method in Socio-Legal Research* (Oxford: Hart Publishing, 2005).

BBC News Indonesia, *Wakil Kepala IKN Nusantara dipegang pimpinan Sinar Mas*, available at: <https://www.bbc.com/indonesia/indonesia-60687463>.

Bedner, Adriaan and Barbara Oomen, (eds.), *Real Legal Certainty and Its Relevance: Essays in honour of Jan Michiel Otto* (Leiden: Leiden Publications, 2018).

Beito, David, *Eminent Domain through the Back Door*, available at: <https://reason.com/2009/04/28/eminent-domain-through-the-bac/>.

Bell, John, "Certainty and Flexibility in Law," in Peter Cane and Joanne Conaghan (eds.), *The New Oxford Companion to Law* (Oxford: Oxford University Press, 2008).

Benda-Beckmann, Keebet, "Indeterminacy, Uncertainty, and Insecurity," in Adriaan Bedner and Barbara Oomen (eds.), *Real Legal Certainty and Its Relevance: Essays in honour of Jan Michiel Otto* (Leiden: Leiden Publications, 2018).

Birdsall, Nancy and Francis Fukuyama, *The Post-Washington Consensus: Development after the Crisis*, 90 Foreign Affair, no. 2 (2011).

BRIN, *Broker Tanah dan Potensi Eskalasi Konflik Berbasis Lahan di Lokasi Ibu Kota Negara Baru,* policy brief (Jakarta, 2021).

Buana, Mirza Satria, *Can Human Rights and Indigenous Spirituality Prevail over State-Corporatism? A Narrative of Ecological and Cultural Violation from East Kalimantan Indonesia*, 1 Journal of Southeast Asian Human Rights, no.1 (2017).

Butt, Simon and Tim Lindsey, *Indonesian Law* (Oxford: Oxford University Press, 2018).

Butt, Simon, *Conditional Constitutionality, Pragmatism and the Rule of Law*, 09 The University of Sydney Legal Studies Research Paper Number (2009).

Butt, Simon, *The Constitutional Court and Democracy in Indonesia* (Leiden: Brill Nijhoff, 2015).

Cabinet Secretariat of the Republic of Indonesia, *President Jokowi Hands Over 1 Million Land Certificates in Virtual Ceremony*, available at: < https://setkab.go.id/en/president-jokowi-hands-over-1-million-land-certificates-in-virtual-ceremony/>.

Colchester, Marcus, Sophie Chao, Patrick Anderson, and Holly Jonas, *Free, Prior, Informed Consent: Guide for RSPO Members,* document given at the RSPO Board of Governors Meeting (Kuala Lumpur, November 20, 2005).

Copelon, Rhonda, *The Indivisible Framework of International Human Rights: A Source of Social Justice in the U.S*, 3 New York City Law Review, no. 1 (1998).

Cornell Law School, available at: <https://www.law.cornell.edu/wex/eminent_domain>.

Davidson, Jamie S, "Eminent Domain and Infrastructure under the Yudhoyono and Widodo Administrations," in John McCarthy and Kathryn Robinson (eds.), *Land and Development in Indonesia: Searching for the People's Sovereignty* (Cambridge: Cambridge University Press, 2017).

Dewan Perwakilan Rakyat, *UU IKN sebagai Landasan Hukum Ibu Kota Baru*, available at: <https://www.dpr.go.id/berita/detail/id/37053/t/UU+IKN+Sebagai+Landasan+Hukum+Ibu+Kota+Baru>.

Government Regulation Number 19 of 2021 on the Practice of Land Acquisition for Development.

Haq, Mahbub ul and Amartya Sen, *About Human Development*, U.N. Development Programme: Human Development Representatives, available at: <http://hdr.undp.org/en/humandev/>.

Hendrianto, Stefanus, *Law and Politics of Constitutional Court: Indonesia and the Search of Judicial Heroes* (London: Routledge, 2018).

Herring, Ronald J, *Land to the Tiller: The Political Economy of Agrarian Reform in South Asia,* (Connecticut: Yale University Press, 1983).

Hutchinson, Terry, *Developing Legal Research Skills: Expanding the Paradigm,* 32 Melbourne University Law Review, no. 3 (2008).

Indigenous and Tribal Peoples Convention, International Labour Organization (ILO) No. 169 (1989).

Indigenous Peoples' Alliance of the Archipelago v. Indonesia, Case No. 35/PUU-X/2012.

Indonesia Corruption Watch, *Calon Wakil Bupati Kabupaten Kutai Kartanegara*, available at: <https://antikorupsi.org/id/node/87844>.

Indonesian Human Rights Committee for Social Justice v. Indonesia, Case No. 50/PUU-X/2012.

Indonesian Human Rights Committee for Social Justice v. Indonesia, Case No. 3/PUU-VIII/2010.

International Bank for Reconstruction and Development, Article of Agreement, 2 U.N.T.S. 134 (December 27, 1945).

International Monetary Fund, Letter of Intent of the government of Indonesia, available at: <https://www.imf.org/external/np/loi/1113a98.htm>.

Jackson, Thomas, *From Civil Rights to Human Rights: Martin Luther King Jr and The Struggle for Economic Justice* (Pennsylvania: University of Pennsylvania Press, 2009).

Kementerian Pekerjaan Umum dan Perumahan Rakyat, *Menteri Basuki: Pembangunan IKN Tantangan dan Peluang Besar bagi Para Arsitek*, available at: <https://pu.go.id/berita/menteri-basuki-pembangunan-ikn-tantangan-dan-peluang-besar-bagi-para-arsitek>.

Kompas, *Jokowi Umumkan Lokasi Ibukota Senin Siang Ini*, available at: <https://nasional.kompas.com/read/2019/08/26/08130121/jokowi-umumkan-lokasi-ibu-kota-baru-senin-siang-ini?page=all>.

Kompas, *President Jokowi's Opportunity*, available at: <https://www.kompas.id/baca/english/2022/06/16/president-jokowis-opportunity>.

Law Number 1 of 1967 on Foreign Investment.

Law Number 11 of 1967 on Basic Mining Provisions.

Law Number 12 of 2005 on the Ratification of International Covenant on Civil and Political Rights (ICCPR).

Law Number 2 of 2012 on Land Acquisition for Development in the Public Interest.

Law Number 23 of 2014 on Regional Autonomy.

Law Number 25 of 2009 on Public Services.

Law Number 27 of 1959 on the establishment of regionals third-tier in Kalimantan.

Law Number 3 of 2022 on *Nusantara* Capital City.

Law Number 41 of 1999 on Forestry.

Law Number 5 of 1960 on Basic Agrarian Law.

Law Number 5 of 1967 on Basic Forestry Provisions.

Law Number 7 of 2000 on the establishment of Penajam Paser Utara (PPU).

Law Number 13 Year 2012 on Special Autonomy of Yogyakarta.

Law Number 5 Year 1986 on Administrative Court.

Law Number 24 Year 2003 on Constitutional Law.

Lillich, Richard B, "Civil Rights," in Theodor Meron (ed.), *Human Rights in International Law: Legal and Policy Issues* (Oxford: Oxford University Press, 1989).

Local Legislation of PPU District Number 2 of 2017 on Preservation and Protection of Paser Indigenous Traditions.

McCarthy John F, Kathryn Robinson, and Ahmad Dhiaulhaq, "Addressing Adverse Formalisation: The Land Question in Outer Island Indonesia," in Adriaan Bedner and Barbara Oomen (eds.), *Real Legal Certainty and Its Relevance: Essay in Honour of Jan Michiel Otto* (Leiden: Leiden Publication, 2018).

Nanang, Martinus, *Identifying appropriate solutions to the land dispute within the area of PT. ICTI IHM in the District of Penajam Paser Utara and Kutai Kartanegara*, paper given at the Centre for Social Forestry (Samarinda, February 10, 2006).

Oxford Reference, <https://www.oxfordreference.com/view/10.1093/acref/9780195369380.001.0001/acref-9780195369380-e-1303>.

Persoon, Gerard A and Tessa Minter, “Can Free, Prior and Informed Consent (FPIC) Create Legal Certainty for Hunter-Gatherers,” in Adriaan Bedner and Barbara Oomen (eds.), *Real Legal Certainty and Its Relevance: Essay in Honour of Jan Michiel Otto* (Leiden: Leiden Publication, 2018).

Polack, Emely, Lorenzo Cotula, and Muriel Côte, *Accountability in Africa’s Land Rush: What Role for Legal Empowerment?* (London: IIED and IDRC, 2013).

Pratiwi, Cekli Setya, Prischa Listiningrum, and Muhammad Anis Zhafran Al Anwary, *Critiques on Contemporary Discourse of International Human Rights Law: a Global South Perspective*, 1 Human Rights in the Global South, no. 1 (2022), 1-12

Rakhmat, Muhammad Z. and Muhammad B. Saputra, *Making Indonesia an Agrarian Nation Again: Indonesian needs to take better care of its farmers*, available at:< https://thediplomat.com/2016/12/making-indonesia-an-agrarian-nation-again/ >

Presidential Decree Number 62 Year 2022 on the Head of Otorita (HO).

Presidential Decree Number 71 of 2012 on the Practice of Land Acquisition for Development.

Presidential Regulation Number 63 of 2022 on Detailed Plaining of Nusantara Capital City.

Presidential Regulation Number 65 of 2022 on Land Acquisition in *Nusantara* Capital City.

Regulation of Internal Affair Ministry Number 52 of 2014 on Mechanisms for Recognition of Indigenous People.

Regulation of Land and Spatial Ministry Number 18 of 2019 on Mechanisms for Authorization of Indigenous Lands.

Scheppele, Kim Scheppele, *Autocratic Legalism*, 85 The University of Chicago Law Review, no. 545 (2018).

Schotel, Bas, *Administrative Law as a Dual State: Authoritarian Elements of Administrative Law*, 13 Hague Journal of the Rule of Law (2021).

Sen, Amartya, “Human Rights and Development” in Bård A Andreassen and Stephen P Marks (eds.), *Development as a Human Rights: Legal, Political and Economic Dimensions, a Nobel Symposium Book* (Massachusetts: Harvard University Press, 2006).

Sen, Amartya, *Development as Freedom* (New York: Oxford University Press, 2001).

Sengupta, Arjun, "Elements of a Theory of the Right to Development," in Kaushik Basu and Ravi Kanbur (eds.), *Arguments for a Better World: Essay to Honour Amartya Sen* (Oxford: Oxford University Press, 2009).

Setiawan, Hendy, *Military and Control of Land Resources: Conflict TNI and Magelang City Government*, 1 Journal of Government and Political Issues, no. 1 (2021).

Siracusa Principles on the Limitation and Derogation Provisions in the ICCPR 1985, <https://www.icj.org/wp-content/uploads/1984/07/Siracusa-principles-ICCPR-legal-submission-1985-eng.pdf >.

Sumardjono, Maria, *Kebijakan Pertanahan: Antara Regulasi dan Implementasi [Land Policy: Regulation and Implementation]* (Jakarta: Kompas Gramedia, 2009).

Tamanaha, Brian, *The Rule of Law and Legal Pluralism in Development*, 3 Hague Journal on Rule of Law, no. 3 (2015).

Tempo, *Pemerintah serahkan 30 urusan ke Otorita IKN, 4 hal ini tidak*, available at: <https://nasional.tempo.co/read/1580234/pemerintah-serahkan-30-urusan-ke-otorita-ikn-4-hal-ini-tidak/full&view=ok>.

The 1945 Indonesian Constitution (Amended).

The 2012 Paris Agreement, available at: < https://unfccc.int/sites/default/files/english_paris_agreement.pdf >

The Declaration of the Right to Development, G.A. Res. 41/128, U.N. Doc. A/RES/41/128, (December 4, 1986).

The International Covenant on Civil and Political Rights (ICCPR).

The Omnibus Law Number 11 of 2020 on Work Creation.

The United Nations Declaration on the Rights of Indigenous People (UNDRIP), Resolution adopted by the General Assembly, A/RES/61/295 (September 13, 2007).

The United Nations, *An Agenda for Development: Report of the Secretary-General*, policy document no. 2 (New York, May 6, 1994).

Tomlison, Kathryn, Indigenous Rights and Extractive Resource Projects: Negotiations over The Policy and Implementation of FPIC, 23 *The International Journal of Human Rights,* no. 5 (2019).

UNDP, *Integrating Human Rights with Sustainable Development*, policy document no. 2 (New York, 1998).

United Nations Human Rights Office of the High Commissioner, *International Human Rights Law*, available at: <https://www.ohchr.org/en/instruments-and-mechanisms/international-human-rights-law>.

U.S Commission on Civil Rights, *The Civil Rights Implications of Eminent Domain Abuse,* briefing report (Washington, DC, 2014).

Uvin, Peter, *From the Right to Development to the Rights-based Approach: How 'human rights' entered Development*, 17 Development in Practice, no. 4-5 (2007).

Veblen, Thorstein, *The Theory of the Leisure Class* (New Brunswick: Transaction Publishers, 2000).

VOI, *KPK Says Penajam Paser Utara Regent is arrested in Jakarta*, available at: <https://voi.id/en/news/123570/kpk-says-penajam-paser-utara-regent-is-arrested-in-jakarta>.

Wenar, Leif, *The Nature of Claim-Rights*, 123 Ethics, no. 2 (2013).

Zakaria, Sultan M, *Without Civil and Political Rights, Development is Incomplete*, available at: < https://www.amnesty.org/en/latest/news/2019/12/without-civil-and-political-rights-development-is-incomplete/ >.

Zoomers, Annelies, *Globalization and the Foreignization of Space: Seven Processes Driving the Current Global Land Grab*, 37 The Journal of Peasant Studies, no. 2 (2010).