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Planning Law Regimes In Asian Cities

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Andrew Harding (NUS) and Rawin Leelapatana (Thammasat University),
December 2025

CHAPTER 1

PLANNING LAW REGIMES IN ASIAN CITIES: AN INTRODUCTION

By Andrew Harding

Planning law does not, as yet, exist as a properly distinct field of legal study in Asian jurisdictions. It is not even offered as a distinct course in law schools across the region, not even in the guise of 'municipal law' or the like.[1] As Mathew Idiculla in his chapter on Bangalore states, '[w]hile issues concerning planning have received quite a bit of attention by scholars in various social science disciplines, it has been inadequately studied by legal scholars'.[2] Much the same can be said of the other countries whose cities are covered in this publication;[3] indeed it can also be said about most of the world. While a general literature on planning law exists in the West, even if in rather attenuated form, in Asia it is almost non-existent,[4] often inserted in the interstices of social sciences rather than legal literature. There is even very little factual information available relating to individual countries. There is a small number of relevant items of literature dealing with jurisdiction-specific issues, but no attempt to paint a large canvas or propose a theoretical perspective on urban planning in Asian cities. The footnotes to the various contributions here attest to a need to use primary sources

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[1] Some other disciplines such as built environment or real estate management offer a course on planning law.

[2] Mathew Idiculla, Chapter 3, 54.

[3] Bandung, Bangkok, Hong Kong, Johor Bahru, and Singapore.

[4] See, however, Robert K Home, *Of Planting and Planning: The Making of British Colonial Cities*, 2nd ed. (Routledge, London 2013) (Home's book is not directed mainly to Asia but does have useful material on Singapore and Bombay (Mumbai), at chapters 3, 4 and 5); Andrew Harding, 'Five-foot ways as public and private domain in Singapore and beyond' (2018) 10(1) *Journal of Property Planning and Environmental Law* 36. See also Andrew Harding, 'Planning, Environment and Development a Comparison of Planning Law in Malaysia and England' (2003) 5(4) *Environmental Law Review* 231; Patrick McAuslan, 'The best laid schemes o' mice and men: The diaspora of town and country planning law in Asia and Africa', in I Edge (ed), *Comparative Law in Global Perspective* (Transnational Publishers, Ardsley, NY 2000).

in the almost total absence of secondary sources. Such secondary sources as exist are cited in these footnotes.

This project seeks to overturn this bias by treating planning law regimes with the utmost seriousness as a distinct legal topic in Asia – possibly for the first time in comparative as opposed to national academic literature. A precondition to studying a new topic is, of course, to have a good deal of comparative information. Since this information is currently lacking and this project seeks to fill this gap in the literature, this book deliberately uncovers a good deal of it, especially on decision-making structures and the related issue of public participation in planning decisions, which is a theme of all of the contributions.

We can also consider legal education and legal practice in this context. Planning law is at best treated as a minor topic in property law classes, if it appears at all. Few law schools offer a course even in local government, let alone planning law. Clearly if law students graduate without knowing anything about planning law, it will not be readily established as an area of standard legal practice, and even those lawyers who work with or advise local authorities may well not be in a position to give good advice on planning law issues; indeed many planning authorities in Asia do not have in-house lawyers and may well not call upon a law firm very readily when faced with planning law problems, unless litigation is in question.[5] Planning litigation, as we shall see, is still in fact comparatively rare in Asian countries and the cases discussed in the contributions to this book are important but rather few in number. One explanation may be the lack of standing to bring matters before the courts, although even in Hong Kong, where standing rules are liberal, there are not many cases, albeit the cases that do occur tend to deal with very important issues such as the Hong Kong-Zhuhai-Macao Bridge.[6] One sees a cautious approach in the case law, where the courts have had to balance administrative against legislative powers; the merits of decisions against their legality; and legitimate expectations of private parties against planning flexibility.

[5] See, further, Andrew Harding, *Territorial Governance in Southeast Asia* (Oxford, Hart/ Bloomsbury, 2025), 22 ff.
[6] Swati Jhaveri, Chapter 5, 118.

There is also little evidence of any concerted use of planning appeal procedures; Hong Kong, for example, sees only about ten appeals per annum.[7]

Faced with little in the way of legal or empirical data, and in the absence of either a scholarly or a bar community of planning lawyers, scholarship will find it hard to engage with planning law in the manner suggested here. One might ask, why is this topic so neglected by legal scholarship? In Mathew Idiculla's opinion[8] this may have something to do with the informality this area of activity tends to involve.[9] Bandung, discussed by Tristam Moeliono, is another example of practical informality in city planning.[10] Informality, one might expect, would rather lead to important socio-legal inquiry than complete neglect. While informality may be a prominent factor in India and Indonesia, there is little evidence elsewhere amongst the contributions that it is a major factor elsewhere. Another explanation might be that in academia planning law is seen as a detail of administrative law, 'fairly dry and technical', as Jack Lee has it in his piece on Singapore,[11] featuring only when it raises general issues such as the extent of judicial review of administrative discretion, or statutory limitation clauses, or the standing of civil-society groups to challenge planning decisions. If hardly anybody teaches the subject and hardly anybody practises in this field, then a general atrophy is to be expected. In research on access to environmental justice conducted by one of the editors with a Malaysian colleague in Kuala Lumpur in the 1990s, it was found that planning matters were generally dealt with by architects rather than lawyers, unless there was a dispute such as an appeal or judicial-review litigation.[12] Even in highly regulated Singapore, which has sophisticated planning laws, Jack Lee shows that planning law has hardly emerged

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[7] Ibid, 148.
[8] Idiculla (n 2).
[9] Tristam Pascal Moeliono, Chapter 2, 25. One could even find here an example of what has been called 'a-legality', in which social phenomena exist in a limbo lying somewhere between legality and illegality: H Lindahl, *Fault Lines of Globalization: Legal Order and the Politics of A-Legality* (Oxford, Oxford University Press, 2013).
[10] Moeliono (n 9).
[11] Jack Tsen-ta Lee, Chapter 7, 178.
[12] Andrew Harding and Azmi Sharom, 'Access to environmental justice in Malaysia (Kuala Lumpur)' in A Harding (ed), *Access to Environmental Justice: A Comparative Survey* (Kluwer, The Hague 2007).

as a distinct area; and indeed his article is one of only two on this subject (the other is by Lee himself) that could be cited.[13]

Yet it does not have to be so and should not be so. Planning decisions deeply affect almost every aspect of the everyday lives of urban residents, especially in matters of infrastructure, transportation, building projects, and public amenities. Cities are turning into megacities before our eyes.[14] Development is rampant across almost the whole of Asia. Bangalore is predicted to have the largest GDP amongst world cities by 2035, while Jakarta is headed for the largest population.[15] Bangkok is busy swallowing up its surrounding provinces in a way that causes acute problems of jurisdiction and policy-coordination.[16] The Kuala Lumpur conurbation has spread far beyond the borders of the Federal Territory of Kuala Lumpur. Cities such as Bangkok, Bangalore, and Manila are acquiring greater autonomy,[17] especially in areas of planning and development; indeed, they have their own planning laws, as does Kuala Lumpur. Singapore as a republic and Hong Kong as a Special Administrative Region of the PRC already enjoy autonomy. There are heightened pressures on orderly development, environmental protection, efforts to combat climate change and resource depletion, and the preservation of heritage.

Framed by law, planning systems, raise the issue of balancing conflicting spatial, economic, social, and environmental interests—and, at times, contested constitutional ideologies. Planning decisions are very much the stuff of local and often even national politics, and are liable to create protest movements overnight, adding strain to central-local relations. The planning system is a means whereby the political system can engage, not just in furthering national development, but also in resolving acute conflicts over land, resources and amenities. We should know more about how these systems work and how they might be improved. In particular, the issues of public participation and heritage (natural and built)

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[13] Jack Tsen-ta Lee, 'We built this city: public participation in land-use decisions in Singapore' (2015) 10(2) *Asian Journal of Comparative Law* 213.
[14] Gavin W Jones and Mike Douglass (eds), *Mega-Urban Regions in Pacific Asia: Urban Dynamics in a Global Era* (NUS Press, Singapore 2008); Rann Hirschl, *City, State: Constitutionalism and the Megacity* (Oxford, Oxford University Press, 2020).
[15] 'These will be the most important cities by 2035' (*World Economic Forum*) https://www.weforum.org/agenda/2019/10/cities-in-2035/ accessed 30 March 2020.
[16] Andrew Harding and Rawin Leelapatana, Chapter 4, 89-92.
[17] Harding (n 5), 201-3.

preservation need to be highlighted, as they are in Jack Lee's contribution on Singapore. Crucially and typically overlooked by law scholars, the planning system can also serve to concretise and render visible to the public a dominant constitutional ideology. As the cases of Bangkok and Johor demonstrate, a constitutional actor—the monarchy—actively engages in planning regimes as a strategic means of preserving its socio-economic position and even sustaining political hegemony within a constitutional order where its authority appears formally limited.[18]

Historical development of planning law regimes

Before we embark on such an inquiry, it is important to understand the genealogy of the planning law regimes that are being studied. Such regimes do not necessarily have to be path-dependent, relying on colonial models and Western examples, but to a large extent that is exactly what they largely appear to be in practice. There has been plenty of legislation, but little of it radically changes the fundamental features of the planning law regimes. The contemporary Asian regimes are mainly based on colonial precedents and/ or legal transplants. This might be surprising in the sense that the priorities of colonial planning (sanitation and ethnic separation[19]) are hardly reflected in modern cities, even if the actual decisions made in the colonial period are still marked on the face of the city.[20] For example, colonial regimes certainly identified land-use types, or zones as we would now call them under modern structure plans (e.g., residential, commercial, industrial, military, official). However, they attempted to separate communities spatially on the basis of ethnicity or religion, where nowadays communities are more likely to be spread across the old colonial 'lines' and zones may well have substantially changed their use since the 19th or early 20th century. In particular, it is not necessarily the case that ethnic communities are confined in demarcated areas of historic origins. In Singapore, for example, such enclaves have been deliberately dispersed across the island.[21]

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18 Harding and Leelapatana, (n 16); cf. Ng Ik-Tien and Liaw Pey-Wen, 'How Malaysian states and their strongmen shape urban development: An examination of the Sibu Municipal Council', 43:2 *Journal of current Southeast Asian Affairs* 240 (2024).
19 See especially Idiculla (n 2); and Moeliono (n 9); also, Home (n 4).
20 As is painfully pointed out by Moeliono (n 9).
21 Harding (2018) (n 2).

In a way typical perhaps of 19^{th}-century British utilitarian thinking, it was public health that motivated much urban planning effort in the British empire. Whereas the Bombay Improvement Trust was set up in 1898 to ameliorate public health conditions after an outbreak of bubonic plague, in Singapore's Town Plan of 1822/3 an emphasis was laid on the need for more light, more air circulation, and the improvement of public health in areas that would be densely inhabited. In planning on the basis of shop-houses using the 'five-foot way' Raffles saw advantages in this system for ventilation and 'scavenging' (refuse collection).[22] The Singapore Improvement Trust was created in 1927. By that time India already had legislation establishing such Trusts for almost all of its main cities.[23] In its modern manifestations the improvement trust becomes the special planning board, and we see these in Hong Kong (Town Planning Board), Singapore (Urban Redevelopment Authority), Manila (Metropolitan Manila Development Authority), and Bangalore (Bangalore Development Authority). The idea has been to provide a specialist agency relatively free of oversight or accountability. This has consequences for accountability and public participation.

One question that encourages comparison of these cases is, from where do the planning law regimes actually derive? What are the precedents, the origins, the genealogy?

It is surprising to discover that this question has more or less a single answer: that they derive from the English model of planning law, as contained classically in the (England and Wales) Town and Country Planning Act 1947. This Act did not begin the art of planning legislation by springing out of nowhere, as it had many precedents, including in Asia, but has been extremely influential in Asia.

The system of planning law established in the 1947 Act has essentially been transplanted to Singapore, Malaysia, India, Hong Kong and (albeit filtered through American law) Philippines. Thailand too was influenced by the English precedent as it began its regulation of planning in the 1950s.[24] Since 1947, English planning law has evolved considerably. This is less true of the Asian jurisdictions considered here. For example, Swati Jhaveri points out that planning law in Hong

[22] Ibid.
[23] Idiculla (n 2), 58-9.
[24] Harding and Leelapatana (n 16), 89.

Kong remained virtually the same between 1939 and 2003.[25] In the case of India the first consolidated planning law was based on the 1947 Act and enacted right after independence in 1947, when the English Act was still innovative and hot off the press. In Malaysia, little has changed in the law since the 1970s. A major exception is the more recent introduction of environmental impact assessment in many but not all countries, which has a direct effect on planning decisions.

The 'classical model', as I have termed it, contains several easily identifiable features:

i) It embodies, as we have just seen, the 'improvement trust' system, where planning decisions are to a special statutory development agency which is largely unaccountable; otherwise to local government planning authorities.

ii) It facilitates the formation of a national policy with local implementation.

iii) Planning policy is outlined in structure and local development plans, and in soft-law documentation.

iv) Planning policy is then implemented via development control and administrative enforcement mechanisms.

v) There are standard definitions of 'development' and 'change of use';[26] planning permission is required for changes of use as well as development. Conditions may be attached to planning permissions.[27]

vi) Public participation features in the drafting of plans, and to some extent in relation to planning applications.

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[25] Jhaveri (n 6), 121.
[26] Singapore's Planning Act provides a typical example: the Act defines development at s.2 as 'the carrying out of any building, engineering, mining, earthworks or other operations in, on, over or under land, or the making of any material change in the use of any building or land'.
[27] Lee (n 11) provides standard examples: that the permission is only valid for a certain period, that any work must commence by a specific time, and that certain areas within the land must be maintained and kept open and accessible for public use as paths or open spaces.

vii) An appeal will usually lie to a special appellate body (or sometimes to the planning authority itself), with judicial review of the exercise of administrative discretion also an option, especially regarding procedural questions.

It is striking, when one considers the planning laws discussed in this book, that the classical model is still largely applicable and little has actually changed in the last several decades in terms of these classical features. What generally has changed is the structure of the decision-making powers, which have been vested in various agencies, presenting some considerable complexity, in terms of the number of agencies potentially involved, compared to the colonial period.

One might speculate as to why this is the case. One possible answer is that governments have seen little reason to change it. The classical model dates from a period of English post-war construction in which the state took a strong role in mapping out new towns and new infrastructure, for example.[28] This is not very much different from the role of the state in Asian developmental or regulatory states in taking charge of the economy and the use of land, and in mounting major infrastructural projects, special economic zones, and of course the expansion of cities. An example is the Bangalore-Mysore Infrastructure Project.[29]

Ideologies of Planning Law

This brings us to the purposes of planning law, an issue that Patrick McAuslan famously addressed in his towering and still unique book, *The Ideologies of Planning Law,* in 1980,[30] a starting point for much of the discussion presented here. According to McAuslan planning law regimes may have any of three purposes:

i) the protection of property rights;

ii) the implementation of the public interest; or

iii) democratic participation and balancing of competing interests.

[28] 14 new towns were built in the UK between 1945 and 1960, another 17 during the 1960s: Town and Country Planning Association, Explore the UK's New Towns - Town and Country Planning Association.
[29] Idiculla (n 2), 65.
[30] P McAuslan, *The Ideologies of Planning Law* (Oxford, Pergamon Press, 1980).

Thus planning law regimes may embody one or more of these three 'ideologies', that tend to be in tension with each other, the balance shifting sometimes radically in favour of one or another of these three purposes.[31] As Leslie Stein, commenting on McAuslan's work, says, planning law should 'no longer be envisaged as merely a set of statutory controls but instead must be perceived as an ideological struggle between individual claims to private rights and government control of the use of land in the public interest'.[32] A good example of this is the 2003 amendments to the Town Planning Ordinance in Hong Kong. The objectives as stated by the Hong Kong government steer a rather awkward path between efficiency and efficacy, on the one hand, and public participation on the other – two notions that do not always sit well together.[33] The amendment exercises thus 'attempted to solve the perennial problem of balancing the need for efficiency in processing planning applications against sufficient consultation and the need for the government to reflect carefully on contra-development concerns like the environment'.[34] In Singapore, on the other hand, the prevailing ideology is concertedly public interest based:

> The overall approach of the planning regime is largely top-down. This is evident from the way in which the legal framework usually grants government agencies broad powers to take decisions that have planning implications with few express guidelines. Agencies' policies thus play a more significant role in decisions than the legal framework. Moreover, the law usually does not provide for public consultation … This approach was probably adopted because the authorities regarded public consultation prior to the taking of planning and development decisions as administratively inefficient.

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[31] Julie Adshead, 'Revisiting the ideologies of planning law: Private property, public interest and public participation in the legal framework of England and Wales' (2014) 6 *International Journal of Law in the Built Environment* 174

[32] Leslie A Stein, 'Comparative urban law and policy: A celebration of the work of Professor Patrick McAuslan' in Thanos Zarataloudis (ed), *Land Law and Urban Policy: Essays on the Contributions of Patrick McAuslan* (Birkbeck law Press, Abingdon 2017).

[33] Jhaveri (n 6), 121-22. Currently in the jurisdiction that spawned modern planning laws, the UK, there is a strong push to simplify procedures for projects of national importance, in order to facilitate economic growth: see https://www.gov.uk/government/news/government-goes-further-and-faster-on-planning-reform-in-bid-for-growth.

[34] Ibid, 122.

Similarly, Jhaveri says of Hong Kong that, 'despite the appearance of a multi-actor and consultative process, there is a real and problematic concentration of power on planning matters within particular sectors of the executive branch of government in Hong Kong – largely without adequate checks by the legislature, the public or courts'.[35]

From the very origins of planning law, the issue of property rights was, naturally, controversial. To take an Asian example, early attempts to introduce planning laws in Penang in the early 20th century met with great hostility from landowners.[36] For some who believed in the untrammelled laissez-faire economy, any state interference in the use of land was either unconstitutional or ought to be very limited in terms of public purposes, addressing only issues of security and the like, but certainly not economic development. In colonial territories in Asia especially, as in Penang, there was landowner resistance, to the notion of regulating the use of land and planners were regarded with acute suspicion. The planners, on the other hand, some of whom had an almost missionary zeal, believed that the public interest should override private property rights, and they gradually won the argument.[37]

Thus, the first two of McAuslan's ideologies came into conflict with each other. The third ideology, based on democratic principle, is that via a democratic process a balance can be reached in decision-making between the public interest and private rights, or in many cases between competing public interests such as development and the environment or heritage. This approach attempts to defuse such conflict via a legitimate administrative and deliberative process carried out under, and regulated by, law, and with reference both to expert views or preferences and to democratic expression of views in the locality. This process may be complex, involving many different agencies,[38] communities, and levels of decision; or relatively simple, being essentially a time-limited public consultation exercise.

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[35] Ibid, 119-20.
[36] For example, landowners and planners in Penang came into conflict in early 20th century: Li Lik Meng, 'Town planning law in Malaysia: Politics, rights and jealousies' (1991) 15 *Habitat International* 105.
[37] Home (n 4) ch.2.
[38] Jhaveri (n 6), 149-51, lists no less than 30 agencies (if one includes the 12 district councils) that are entitled to be heard on planning matters.

If one follows the logic of McAuslan's analysis, democratic decision-making appears to be the best way of arbitrating between the other two 'ideologies', and the present contributors without exception indeed view public participation as of paramount importance, even if the system they are discussing, which they all critique on this ground, does not. We shall see in the contributions that public participation exists generally in a somewhat jejune form in Asia. Hong Kong has the most public participation of the six cities; yet even so, Jhaveri in her piece emphasizes the power of a 'small circle of executive agencies' in controlling the planning system.[39]

Democratic decision-making will clearly vary in its nature and content, according to whether the public participates in general plan-drafting, or in specific issues of development control. An obvious issue, however, is the status that public opinion has in the planning system. Here planning law meets a difficult issue: public or majoritarian views cannot per se be binding on the decision-maker; at the same time, if they can be simply ignored then there may be little point in having public consultation. This dilemma becomes interesting when translated into a slightly different question, whether the policy adopted in a plan drafted with public inputs represents a binding or only an advisory, in-principle statement that can be countermanded in specific instances.[40] Planning policy represents 'soft law' of great significance in planning law regimes due to the lack of any statement in planning statutes of either overarching planning principles or substantive rules. Jhaveri argues that '[t]hrough the increased 'soft law' the legislature is increasingly marginalised in the definition of planning policy goals'.[41] As evidenced in the contributions here, and contrary to Malaysian Federal Court decisions[42] case law shows that although policy may be persuasive, it is not binding (this point is discussed further below). This can be seen as frustrating the whole point of public participation. On the other hand, one wonders if policy might actually develop

[39] Ibid, 120, 125-26.
[40] In 2023 the Malaysian Federal Court, in *Datuk Bandar Kuala Lumpur v Perbadanan Pengurusan Trellises & Ors* [2023] 5 CLJ 167, held that the KL Structure Plan, having been gazetted following public participation, was binding in law under the Federal Territory (Planning) Act 1982, and required 'slavish compliance' by the planning authority; it could only be altered via the same process of public participation by which it had been created. To similar effect is the decision of the same court in *Perbadanan Pengurusan Sunrise Garden Kondominium v Sunway City (Penang) Sdn Bhd* [2023] 2 CLJ 333.
[41] Jhaveri (n 6), 126.
[42] At n37.

by confronting and giving reasons for its non-application in particular cases: individuation is in a sense the life-blood of policy development and courts have in general emphasised the need for flexibility in planning matters.[43]

In practice, a planning law regime will of course to some extent be tugged in all of the three ideological directions. In fact, it is hard to conceive of a system that paid literally no attention at all to any one of the three ideologies. But in Asia, it is the implementation of the public interest that mainly prevails in planning law regimes, as we can see clearly in all the contributions to this book. Planning law is very much about the balancing of interests, but how this is done and with what general outcomes in terms of the interests actually being served, will of course vary between systems according to their ideological orientation. Asian planning law systems are revealed by the case studies as essentially and somewhat relentlessly statist in nature, irrespective of the extent of public participation.[44] In Singapore, for example, the government refused to hold a public hearing that appeared to be mandated by statute.[45] Referring to the Bukit Brown Cemetery issues, the Singapore heritage society opined that

> The 'primary purpose of these [consultation] meetings was for the authorities to explain the need for the road, URA's efforts at conserving old buildings, to manage public opinion, and to tap on SHS's network in order to organise the documentation of the 5000 graves that would be exhumed' … Essentially, the meetings were not for the purpose of seeking the Society's views on the project or exploring whether there were alternatives that could minimize the impact on the cemetery.[46]

Planning law regimes meld the three ideologies together in different ways. For example, public participation may be largely absent, generally required, or confined to adjacent property owners; or it may be evident in the drafting of plans but virtually absent in development control. Public participation is difficult to assess, because even if statute makes little provision requiring it, it may nonetheless occur anyway via the exercise of free speech and public protest

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43 See the case discussed by Jhaveri (n 6).
44 Malaysia, as we see in the cases in n39, seems to be an exception.
45 Lee (n 11), 190.
46 Ibid, 196.

movements, as for example in civil society responses regarding the Bukit Brown Cemetery controversy in Singapore.[47] Private rights may be protected to one extent or another in terms of preserving the relative autonomy of developers or other landowners. In Asia, the primacy of development in the developmental state entails an emphasis on public interest - as defined by the state - rather than on either private property or democratic participation.[48]

Lee, for example, writing of Singapore, explains that

> [i]n the decades immediately following the nation's independence in 1965, the Government gave precedence to promoting economic growth and providing for the housing and transportation needs of the people. This meant, among other things, using the Land Acquisition Act to compulsorily acquire privately owned land at below-market prices so that public finances were not overly stretched. The needs of the wider public were placed above the interests of landowners.[49]

It is notable that in Singapore and Hong Kong the government itself is a major landowner, and yet the planning application process is not binding on the government when it seeks to develop its land.[50] But this emphasis on public interest should not be seen as a brake on the ambitions of private land developers, but rather as licensing of developers whose projects are in line with government policy, and therefore embodying the public interest in economic development. This proposition is revealed to be largely true in all of the cities investigated here. The overall conclusion is that there are large areas of what is in effect unaccountability for planning decisions.

Planning law: The problem of definition

What, then, is the scope of 'planning law'?

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[47] Ibid, 190-91.
[48] Yeh Jiunn-rong, 'Democracy-driven transformation to regulatory state: The case of Taiwan' in Tom Ginsburg and Albert HY Chen (eds), *Administrative Law and Governance in Asia: Comparative Perspectives* (Routledge, Abingdon 2009).
[49] Lee (n 11), 211.
[50] Lee (n 11), 176; Jhaveri (n 6), 118.

For Evidente, a very broad definition is appropriate. It is worth quoting his words on this in order to appreciate the wide net that needs to be cast when we address planning law:

> Planning law … spans a very broad stretch of substantive law, ranging from the Constitution to local government laws, from economic and social development policy spanning industrial, agricultural, mining, tourism laws, from environmental law to climate change and disaster risk management, from indigenous peoples' rights and cultural heritage conservation, to land registrations and transactions. It also covers a practice that involves the procedures of courts and administrative agencies, and of local government councils and boards … we look at the stretch of law as it relates to environmental planning, 'also known as urban and regional planning, city planning, town and country, and/or human settlements planning, [referring] to the multi-disciplinary art and science of analysing, specifying, harmonizing, managing and regulating the use and development of land and water resources, in relation to their environs, for the development of sustainable communities and ecosystems'.

A comprehensive coverage of planning law in a given jurisdiction would potentially have to embrace all of these topics that bear procedurally or substantively on planning decisions; which is to say, there is more to 'planning law' than the law relating to planning. Nonetheless, the focus in these studies is largely on a single statute, or statutory regime involving several interlocking pieces of legislation, namely that which governs first, the drafting of structure or local plans; and second, the system of development control in which such plans are implemented in particular cases, that is, where it deals with planning applications. Thus, at one level planning law implicates just these two areas, but at another level it implicates all of those listed by Evidente. Here our focus is on the core of planning law, rather than what we may call its periphery. Accordingly, the pieces are devoted to two main areas of discussion: first, the structure of decision-making; and second, the extent of inputs from public participation and other sources such as the judiciary.

Planning law typically does not prescribe substantive principles. There are exceptions, to be sure, such as Hong Kong's presumption against development impinging on the Victoria Harbour,[51] but normally planning law merely provides a decision-making process for development planning and development control. This raises important questions about policy. In what ways is planning policy evident, and what form does it take? Planning law could be said to be evanescent without planning policy, being merely a glass into which policy is, so to speak, like a James Bond martini, poured and occasionally shaken, or stirred into it, or merely added. As Idiculla points out,

> While planning law may not directly cause good planning outcomes like sustainability or inclusiveness, it creates the institutions and enables the processes that shape these outcomes. Hence examining the institutional and legal framework for urban planning is important for understanding the contours of urban development.[52]

It is therefore policy rather than law that provides the actual substance of planning. But if policy is, for example, contained and articulated in a development plan that has survived public scrutiny and numerous inputs from statutory agencies, is it not binding and if so in effect part of law, even if only soft law?

Important as this clearly is, courts generally do draw a distinction between law and policy in this area as in other areas. The general assumption (other than in Malaysia) is that policy is not binding and so does not have legal status. Nonetheless, these studies show that policy exercises a strong hold over the planning process, whether it is articulated in documents or generally known or promulgated as official knowledge. But this hold that policy has over the planning process is also evident in the other cases. In the Philippines, two high-level agencies were merged in 2019 to provide greater coordination and policy guidance for local authorities in planning matters.[53] In their contribution, Harding

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[51] Jhaveri (n 6), 134. The law 'recognises the harbour as a special public asset and a natural heritage of Hong Kong people, and for that purpose there shall be a presumption against reclamation in the harbour. Accordingly, … all public officers and public bodies shall have regard to this when exercising any powers vested in them.'
[52] Idiculla (n 2), 53.
[53] Mark Richard D Evidente, 'The Role of the Citizen in Planning Metropolitan Manila' in Harding and Leelapatana (n 16).

and Leelapatana discuss the galvanising role of monarchy in the process of planning for development in Bangkok and Johor.[54]

At the end one wonders whether mature policy rules of great importance that have stood the test of time should not be embedded in law? To do this may not be conclusive; after all, even in the case of Hong Kong's harbour, the presumption against development could, one assumes, in certain cases be rebutted. Yet if the principle is important enough, then giving it statutory status may place the burden of proof where it should lie.

Planning law as reflection of constitutional struggles

Andrew Harding and Rawin Leelapatana's highly original article warrants separate treatment, as it invites a reconsideration of McAuslan's thesis on the rationale and ideologies underpinning planning law. Mainstream scholars—such as McAuslan himself and Swati Jhaveri—typically frame planning regimes as an 'executive-led' process grounded in calculability and public participation. Drawing lessons from Bangkok and Johor, Harding and Leelapatana contest this assumption, demonstrating that the monarchy—a traditional institution whose authority, according to Max Weber, is thought to be eclipsed by legal-rational domination and bureaucratisation in modern society—can play a crucial and influential role in shaping built environments. Their work further challenges the prevailing view that planning law serves to balance public interests with individual rights, showing instead how it may be instrumentalised to support or even glorify the monarchy. The Thai experience, in particular, indicates that modern planning legal instruments may accommodate a monarchical agenda in built environments based on the Mandala-oriented concept of space, which reflects anti-colonial attitudes.

Cities in Asian planning law regimes

Why then have we chosen cities as the focus of attention?

It is true that planning laws tend to be national rather than local. In India they exist at the state level, lying, as is also the case elsewhere, above the level of cities.

[54] See generally Harding and Leelapatana (n 16).

However, most planning law regimes do in fact distinguish urban and rural planning (as in the idea of 'town and country planning'). Cities are growing at stupendous rates across Asia.[55] Rural planning is of course important but raises a different range of issues (mainly regarding agriculture) from urban planning. While law tends obviously to be principally national in scope, increased attention is being given to the particular problems of cities,[56] which are discussed at some length in the contributions here. These problems are familiar ones, principally urban sprawl and the extreme difficulty of regulating development and coordinating policy responses, but also transport, housing density, flooding, public amenity, and heritage preservation. In any event the reality of urban planning is that cities do have their own powers relating to development plans and development control, as well as their own policies, regulations, bureaucracies, and procedures, even if they generally operate under the broad umbrella of national law.[57]

Decentralisation,[58] which has been ubiquitous in the jurisdictions considered here (not so much in Singapore or Hong Kong,[59] of course), offers opportunities to develop urban law and to examine how cities have organised their planning regulations, policies and procedures. Planning law regimes in Asia (except for Singapore) are largely, as we have seen, unrenovated colonial experiments. Cities bear the imprint of history and the legal imprint of colonialism - for better or worse. Planning law regimes are essentially a colonial product developed in and for cities. The question is whether these regimes are adequate for the enormous expansion of cities in the contemporary world.

We need to understand how these regimes deal, or fail to deal adequately, with the vastly increased developmental pressures on cities in the context of environmental issues, survival of communities, creaking infrastructure, and intensified conflict over these very issues. The increasing frequency of conflict

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[55] See above n14.
[56] See, e.g., Michelle Ann Miller and Tim Bunnell, (eds), *Asian Cities in an Era of Decentralisation* (Routledge, Abingdon 2014).
[57] See, further, Harding, above n5, 201-3.
[58] Andrew Harding, 'The constitutional dimensions of decentralisation: Local self-government in Asia' in B Oomen and Adriaan Bedner (eds), *Real Legal Certainty: Essays in Honour of Jan-Michiel Otto* (Leiden University Press, Leiden 2018); Harding, above n5, 24 ff.
[59] In fact, even Singapore and Hong Kong have town/district councils.

over planning issues raises the issue of public participation and each of the articles addresses the extent to which public participation is able to influence outcomes. There is much room for improvement here. As Lee argues, the approach to public participation 'needs rethinking at a time when the ubiquity of the internet and social media have made it easy for like-minded people to contact each other and organize informal campaigns on environmental and heritage issues that they care about'.[60] It is surprising that in the cases discussed here, there is inadequate provision, or even no legal framework at all, for public participation.

One problem of course is that the vesting of powers locally – a more or less inevitable and universal fact – may well be at odds with a national concept of development. The answer to this problem is clearly to recognise the need for coordination of policy. This is clearly not a problem in Singapore or Hong Kong, where what is local and what is central cannot be sensibly distinguished. In some cases, such as a decision where to plant a new settlement or special economic zone or a major highway running through several areas, the decision will have to be taken at the national level. In the Philippines, Evidente notes that two national bodies dealing with housing and national development were merged in 2019 to provide policy development and coordination. A specific objective of this change is to develop standards, and provide guidance, for local authorities, which enjoy devolved powers under Philippines decentralisation.[61] This makes sense in terms of the potentially difficult issue of central-local relations. Local authorities tend to lack expertise and resources. We do not have comparative information on the numbers of professional planners employed by planning authorities across the cities studies here, but it seems likely that the numbers, although increasing, are insufficient. The Philippines system also makes use of incentives for the preparation of local plans, which are drafted within a framework of other national, regional and provincial plans. Case law indicates an unwillingness to compromise on local autonomy for the sake of concentrating power centrally to secure integration. Accordingly, coordination of essentially independent

[60] Lee (n 11), 212-13.
[61] Harding, above n5, ch 6.

authorities (no small task in Manila with its 17 cities) is the best way forward and the way that Philippines is taking.

Conclusions

There are of course many issues relevant to planning law regimes that require further investigation. For example, the contributors to this special issue acknowledged in the seminar where their contributions were discussed that corruption in the planning process is a large issue. Of its very nature this is not an issue they felt able to address in their contributions. Wider than this, the contributors have set out the structure of decision-making but have not scrutinised in any detail the actual process of drafting plans and determining planning applications. We should ideally have knowledge of the extent of discipline-based articulation of these decisions; for example, the extent and nature of attention to environmental concerns, and the extent of professionalisation of the decisions and the influence of planners over the process. The area of planning policy also requires investigation: how is policy formulated and implemented? Public participation, too, needs further investigation. How does the public get to know relevant facts and occasions for participation? What form does participation take, and under what conditions? Judicial review and the appeal process also raise important questions: what are the incidence, success rates, and types of matter raised?

The chapters presented here nonetheless present a fairly consistent normative position. The authors are in favour of more accountability, more legal certainty, and a more democratic approach to deciding planning matters in which urban residents are empowered to control their own destinies. They worry that power is reserved almost exclusively to a relatively small group of people in statutory agencies. This, as has been argued here, is consistent with the Asian developmental state's focus on development. However, now that Asia's cities are developed – highly developed in some cases - it is surely time for the state to consider a wider range of matters with a greater sense of urgency – community, amenity, heritage, and climate change, for example. This may slow down the planning process, and thereby act as a brake on rampant development, but that is a change whose time, we should agree, has arrived. The region has suffered too long from poor planning and too narrow a definition of public interest.

Comparative investigation can only spur the development of ideas for reform. Ideas that might be looked at further include a longer time-frame for the drafting of plans (Singapore looks decades ahead rather than years); greater transparency, accountability and democracy in the planning process; greater clarity in statute law; and more structuring of discretion via soft law and good governance via the judicial review process.

This special issue makes a start in a new area of scholarship, and it is to be hoped that others will take a cue from this research and take matters further.

CHAPTER 2

BANDUNG TOWN PLANNING: FROM A COLONIAL TO A MODERN INDONESIAN CITY

By Tristam Pascal Moeliono[1]

Abstract

The architectural foundation of many modern cities in Indonesia – to be contrasted with urban kampung or informal settlements – were laid down by Dutch town planners. Those plans became possible only after city governments established by the Dutch colonial government were empowered to appropriate land from the indigenous population. By looking at this beginning of colonial cities in Indonesia, specifically Bandung, we can discern state-formal legal instruments made available for urban planning from the changes made after independence. But while spatial and development planning laws were introduced after Indonesia's independence, what was instrumental in city development was eerily similar with the past: the granting of authority to autonomous cities to appropriate land for (urban) development. While the justification for land appropriation might have changed, the result – displacement of the urban poor – is similar. Most urban dwellers living in informal settlements do not enjoy the right to participate in the whole land-use planning process.

I. Introduction

Like many modern post-colonial cities in Indonesia, Bandung city (the capital city of West Java Province), faced over the last decade numerous environmental and

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human rights challenges.[2] Unbridled land use for development, depletion of ground water, growing urban slums, floods, and landslides, have all become increasingly frequent over the years. Yet up to present, the Bandung city government and neighbouring districts disregard those continuing disasters and the risks they pose to sustainable living conditions for urban residents. They continue to allow land-use for urban development, even in areas declared off limits for development.

The question examined in this article is the which legal instrument – past and present – has empowered the Bandung city government to control urban land use and city development, and why these laws and regulations failed to achieve sustainable land use. The article focuses on the historical development of spatial planning law and urban land-use regulations in Indonesia, and how they form the basis for urban land-use planning today. The article examines how the Bandung municipal government responds to the changing spatial-planning regime, from those operated by the Dutch colonial government up to the current framework of laws. This framework comprises the Basic Agrarian Law (No. 5/1960), the Spatial Planning Law (Law 24/1992, as amended by Law 26/2007), and subsequent implementing rules and regulations, including those related to land acquisition for public and commercial-business investment. The exposition of the past urban planning (or land-use) rules and regulations and the current spatial planning law regime will consequently touch upon two related issues. First, the extent of devolution of powers to city governments in managing land use. Secondly, the extent to which urban-spatial planning controls people's access to land.

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[2] As reported, when discussing the issue of sustainability of cities by, amongst other: Bima Bagaskara, Permasalahan Akut Kota Bandung yang Tak Kunjung Rampung, 7 sept 2024, https://www.detik.com/jabar/berita/d-7529058/permasalahan-akut-kota-bandung-yang-tak-kunjung-rampung, access 26 November 2025.
Donny Iqbal, Krisis Lingkungan: Cekungan Bandung Kian Rentan, 25 feb 2020,https://mongabay.co.id/2020/02/25/krisis-lingkungan-cekungan-bandung-kian-rentan/. access 26 November 2025; Budiman, Ariev, Bambang Sulistyantara, and Alinda FM Zain. 'Deteksi perubahan ruang terbuka hijau pada 5 kota besar di Pulau Jawa (Studi kasus: DKI Jakarta, Kota Bandung, Kota Semarang, Kota Jogjakarta, dan Kota Surabaya).' *Jurnal Lanskap Indonesia* 6, no. 1 (2014): 7-15; and Setiawan, Bakti. 'Indikator Keberlanjutan Kota Di Indonesia: Studi Komparasi Empat Kota Di Jawa (Sustainability Indicators of Indonesian Cities: Comparative Studies of Four Cities in Java). *Jurnal Manusia dan Lingkungan* 14, no. 1 (2007): 1-14; Tjiptoherijanto, Priono. 'Urbanisasi dan pengembangan kota di Indonesia.' *Populasi* 10, no. 2 (1999): 57-72.

In reviewing these frameworks, it is argued that state-government laws should not be perceived as the sole normative framework guiding the government, business-people and urban citizens.[3]

Notwithstanding this, it is still necessary to describe the basic legal framework which can provide the common reference point through which government officials, investors seeking access to land, and urban residents – including those who live in slums or on densely populated, informally acquired land – communicate and justify their actions.

However, as suggested by Fred W. Riggs as early as 1960, the public administration responsible for implementing those laws and regulations may apply them in ways that differ (significantly) from their original intent.[4] Especially in an authoritarian regime, such as under President Suharto (1967-1999), or even now,[5] The executive may usurp Parliament's legislative authority, reducing it to a mere rubber-stamp body that endorses whatever policies the government proposes. Law and regulation thus become mere instruments of power - in this case, used to secure government access to land. Viewing from a different angle, a focus on lawyers and courts in land conflicts,[6] demonstrates how prevailing laws and regulations controlling access to land, may open avenues to back-door deals between government officials and land developers. Another issue exacerbating the situation is the inability or unwillingness of the government to fully

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[3] James F. O'Day, Ehrlich's Living Law Revisited--Further Vindication for a Prophet without Honor, 18 W. Res. L. Rev. 210 (1966), Available at: https://scholarlycommons.law.case.edu/caselrev/vol18/iss1/12.

[4] Riggs, F.W., Administration in developing countries; the theory of prismatic society, Boston, Houghton Mifflin 1964. Cf.: Rumki Basu, Revisiting Fred W. Riggs' Model in the context of Prismatic Societies today, Indian Journal of Public Administration, Vol. 67, 2021 (1): 87-95. https://doi.org/10.1177/001955612110056.

[5] Vedi R. Hadiz, and Richard Robison. 'The Political Economy of Oligarchy and the Reorganization of Power In.' Indonesia, no. 96, 2013, pp. 35–57. JSTOR, https://doi.org/10.5728/indonesia.96.0033 accessed 2 Mar. 2023. Cf.: Heryanto, A., & Hadiz, V. R. (2005). Post-authoritarian Indonesia: A comparative Southeast Asian perspective, *Critical Asian Studies*, *37*(2), 251–275. https://doi.org/10.1080/14672710500106341 &. Sharon Poczter & Thomas B. Pepinsky, Authoritarian Legacies in Post–New Order Indonesia: Evidence from a New Dataset, Bulletin of Indonesian Economic Studies, Vol. 52 (1):77-100. https://doi.org/10.1080/00074918.2015.1129051

[6] Kouwagam, S.U., (2020) How lawyers win land conflicts for corporations: Legal Strategy and its influence. on the Rule of Law in Indonesia, unpublished Leiden Dissertation.

consolidate state law and eradicate the existing informal-unwritten laws that allow informal land use and development to flourish.[7]

This discussion of how the Bandung town council develops and uses spatial-urban planning laws and regulation begins in Parts 2 and 3, with an historical overview of policies, government regulations and structure of authority pertaining to land use. It covers the period from the Dutch colonial government's construction of modern cities to the promulgation of new spatial planning laws and regulations since 1992. This discussion reveals how spatial-planning laws and regulations direct and set development targets for various ministries. These documents have a direct bearing on how the government regulates access to land for public as well as private investment interest, but at the same time allows for the development of the informal city. These documents also serve as justification for government decisions to dispossess squatters or slum areas in the name of upholding urban citizens' right to healthy and clean 'urban' environment.

Part 3 tackles the issue of public participation in the making, implementation, and supervision of spatial planning. Part 4 contains a reflection on the legal framework and how it has been worked out, affecting adversely Bandung urban citizens' tenurial security as well as their basic right to a clean-healthy environment.

II. Bandung Historical Development: Formal Colonial city and Informal Kampung Settlements

Bandung city may be briefly described as a densely populated urban area in the most densely populated province of Indonesia. The city was established and developed by the Dutch colonial government in support of large tea-coffee and other hard crop (quinine-rubber) plantations around the highlands surrounding the area. After Indonesia's independence in 1945, and formal recognition in 1949, the city management became fully controlled by the Indonesian bureaucracy.

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[7] Richard Harris, Modes of Informal Urban Development: A Global Phenomenon, August 2018, Journal of Planning Literature 33(3):267-286. DOI: 10.1177/0885412217737340. Available from: https://www.researchgate.net/publication/329236079_Modes_of_Informal_Urban_Development_A_Global_Phenomenon accessed 01 March 2023.

Based on official historical records, we may trace two different cities: the Dutch colonial city and the Indonesian city, adjacent and overlapping within the same area (that is, the Bandung Basin). The colonial city was developed and managed by a city council enjoying autonomy (*stadsgemeente*), with the initial intention to make it the capital city of the Netherlands-Indie (in the period of 1920-1930). The colonial city was built based on Thomas Karsten's architectural design. He was also the urban architectural mastermind behind the development of numerous colonial cities in Java (Semarang and Malang, amongst others).[8]

Bandung – the European Colonial City and its surroundings

The colonial (old) city is connected to Cimahi, a garrison city, housing several officer and commando schools and headquarters of several other armed divisions, by the railway, reminiscent of Breda, a garrison city in the Netherlands. Along the railway, dividing Bandung into north and south sections, there are areas utilized by the armed forces for offices, residential areas, officer quarters, an officer candidate school, and an army command school, interspaced with rural areas (small plots of paddy fields or open fields). Those areas are still under the Indonesian armed forces' control and supervision. Consequently, their use, spatial-planning wise, is also fully under their control. In support of the garrison city, the government decided to build an air force base – Andir (Husein Sastranegara),[9] Margahayu Airport[10] (south of Bandung), and another at Subang (Kalijati) far north of Bandung. The demarcation of military and civil zones, on

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[8] Cote, J. (2014). Thomas Karsten's Indonesia: Modernity and the end of Europe, 1914-1945. *Bijdragen tot de Taal-, Land- en Volkenkunde*, 170(1), 66 - 98. https://doi.org/10.1163/22134379-17001004 jo. James L. Cobban (2007),' Exporting planning: the work of Thomas Karstens in colonial Indonesia, Planning Perspective, Vo. 7, 1992 (3): 329-344; Cobban, J.L. (1994). Exporting Planning: The Work of Thomas Karsten in Colonial Indonesia. In: Dutt, A.K., Costa, F.J., Aggarwal, S., Noble, A.G. (eds) The Asian City: Processes of Development, Characteristics and Planning. The GeoJournal Library, vol 30. Springer, Dordrecht. https://doi.org/10.1007/978-94-011-1002-0_16. Cf. Yulianto Sumalyo. (1995) Arsitektur Kolonial Belanda di Indonesia: mengetengahkan arsitek dan biro arsitek: Maclaine Pont, Thomas Karsten, C.P. Wolf Schoemaker W. Lemei, C. Citroen, Ed. Cuypers & Hulswit Batavia, Algemen Ingenieurs Architekten / Yulianto Sumalyo. Yogyakarta: Gadjah Mada University Press.

[9] Sudiro Sumbodo, Andir, De Fabriek dan Lapangan Terbang LA, 3 agustus 2017, https://aviahistoria.com/2017/08/03/andir-de-fabriek-dan-lapangan-terbang-la/ accessed 3 October 2022 Cf. Sejarah Singkat,di laman resmi TNI AU; https://tni-au.mil.id/sejarah-singkat/ accessed 3 October 2022.

[10] For a short historical overview of the establishment and development of Margahayu air force base see: https://lanud-sulaiman.tni-au.mil.id/sejarah/ [14/10/2022]. Cf. for Kalijati-Subang airforce base: see: https://tni-au.mil.id/lanud-suryadarma-kalijati-subang/ accessed 14 October 2022.

top of the original north (European) and south (indigenous) zones may still be seen today. In addition, to the west of the seat of the district (*karesidenan*), there are residential areas of the Chinese population. Consequently, the business area (controlled and managed mostly by the Chinese population) overlaps with the zone under the control of the regent/district head and indigenous Indonesian communities.

During the colonial period, the Dutch government apparently had no need for a distinct urban or spatial planning law. What can be traced, from perusing Dutch colonial laws, is the granting of autonomy to city councils (*stadsgemeente*) by virtue of decentralization laws inserted into the *Indische Staatsregeling*.[11] The first and most prominent administrative and financial responsibility of the local (city-town) councils concerned the construction and maintenance of public work. The town councils were authorized to issue urban development planning documents *(bouwplan* or *geraamteplan*) comprising technical rules and regulations concerning zoning, land-use and building.[12] Specifically, the construction or development plans provide the justification for the town council to acquire state owned land and utilize the acquired land to construct a modern city.

Colonial legal instruments to acquire land for urban development.

The most important legal tools for this purpose are the *Agrarische Wet*[13] *and Agrarische Besluit* [14] 1870. Both made possible the direct utilization of unencumbered state-owned land or waste land (*woeste gronden*) for the public interest (i.e., construction of a modern-colonial city, serving mostly the European population). Land appropriated by the town council was then encumbered with

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[11] *Decentralisatie-wet* (*Staatblad* 1903 No 329), *Decentralisatie Besluit* (*Staatblad* 1905 No. 137), *Local raden-ordonnatie* (Staatblad 1905 No. 181)

[12] See: Andi Achdian (ed.) op.cit, pp. 59 et seq. Cf. van Roosmalen, P. K. M. (2015). Netherlands Indies Town Planning: An Agent of Modernization (1905–1957). In F. Colombijn & J. Coté (Eds.), Cars, Conduits, and Kampongs: The Modernization of the Indonesian City, 1920-1960 (pp. 87–120). Brill. http://www.jstor.org/stable/10.1163/j.ctt1w76ts6.9

[13] *Wet van 9 April 1870, houdende aanvulling van art. 62 van het reglement op het beleid der regering van Nederlandsch-Indie* (S.1870: 55); amended by Art. 51 *wet op de staatsinrichting van Nederlands-Indie* (S.1925: 447).

[14] *Staatsblad* 1870 No. 118 as incorporated in Art. 51 of the '*Wet op de Staatsinrichting van Nederlands Indie*' (*Staatsblad-state* gazette 1925 No.447). The *Algemene Besluit* (General Decision) contains the*: algemene domeinverklaring* (pasal 1). Also contained in Staatsblad 1875: 119a and expanded to include Sumatera by virtue of Art. 1 *Staatsblad 1*874 No. 94f; keresidenan Manado by virtue of Art. 1 *Staatsblad* 1877 No. 55; and for *'residentie Zuider en Oosterafdeling van Borneo*' by virtue of Art. 1 *Staatsblad* 1888 No.58; 3. *Koninklijk Besluit* (royal decree) 16 April 1872 No. 29 (*Staatsblad* 1872 No. 117).

land rights based on Western agrarian law. In that way, authority over land was taken from the indigenous government, thereby avoiding land ownership claims of the indigenous population. All this occurred despite the existing prohibition on land alienation of the indigenous population, a prohibition that could in practice be easily circumvented by declaring indigenous land rights claims non-existent.[15]

In contrast, given the existing policy of indirect rule – which granted the indigenous government limited self-governing authority (albeit under close supervision)—the development and regulation of land use outside the colonial city's administrative borders fell exclusively under its jurisdiction. In this context, so long as the Dutch government did not seek to acquire the land for large commercial plantations or other purposes, *adat* law (customary-non state law) was the norm. Consequently, the regency official buildings and surrounding land fell outside the authority of the town councils.

Indigenous populations and the informal city

As indicated above, a different kind of city was developed and managed by the indigenous government *(Karisedenan Priangan*). This second city, which up till 1986 was the capital city of the Bandung District,[16] was designed based on the traditional spatial imagination of power dispersal. In this imagination, the regent official seat/office was the seat of political power, surrounded by the grand mosque, an open area to accommodate public meetings, and outer regions (commercial, residential areas, and the scattering of small villages surrounded by paddy fields. Notwithstanding some overlaps, there is a general understanding that the dividing line is the railway track running East to West. North of the railway track (highlands) was decidedly the European side, the colonial city. The South side (lowlands) fell under the indigenous government's authority.

Meanwhile, small agricultural villages that are located in rural areas and scattered also within or at the fringes of the colonial city developed and applied their own laws pertaining to land use-management, ownership, including rules and

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[15] *Grond- vervreemdingsverbod*; S.1875 No 179.
[16] The capital city of the Bandung District was moved initially to Bale Endah and latter to Soreang by GR 2/1986.

regulations on optimal utilisation of available space. Patterns of land use, traces of which may still be seen far away from cities, were compounds, and a small number of traditional bamboo houses, surrounded by rice fields or gardens. In present-day Bandung, this pattern of land use may be traced in the names still in use for certain city areas: coconut garden (*kebun kelapa*), kawung garden (*kebun kawung*), and grass-garden (*kebun jukut*), around the regent's official site.

III. Spatial Planning and Distribution of Authorities

The development and enactment of urban planning regulations

As earlier mentioned, during the rule of the Dutch colonial government (until 1942, when the Dutch East Indies government capitulated to the Japanese army), there was no need for a special or separate urban or spatial planning law. What was required was merely the authorisation granted to the semi-autonomous (i.e., European) city government to develop modern urban areas, along with justifications for accessing land for that purpose.

Urban planning law in independent Indonesia began with the promulgation of the decentralisation law (*decentralisatie wet* 1903/1904), establishing city governments (town council, or *stads-gemeente*) as autonomous government units, and empowering them to make and implement city development plans (*bouwplan-geraamteplan*). Based on these plans, the town council had been contracting out construction of the city to the private sector. These private enterprises then received full support of the city government in acquiring land for city development. The result was the construction of several modern cities serving mostly the minority European population in Malang, Surabaya, Semarang, Batavia-*Buitenzorg,* and Bandung.

In 1939, the colonial government decided to draft a bill on urban planning. Promulgation was postponed as the Dutch lost the Netherland-Indies to the Japanese army (1942-1945). After Japan surrendered to the Allies in August 1945, the Dutch government which had succeeded in re-establishing itself in some parts of the former colony (1945-1949) and had regained full control of the capital city (Batavia) decided to promulgate the bill as the urban-city construction law.

In short, this was part of a broader attempt by the Dutch government to regain control of the lost overseas colony. In 1947-48 they introduced two basic laws and regulations pertaining to urban planning, i.e. the *Stadsvorming Ordonnantie* (SVO, Stb 1948/168), supplemented by *Stadsvorming Verordening* (SVV, Stb. 1949/40). These were implemented in the fifteen *gemeentes* (towns) temporarily under Dutch control.[17] It is questionable whether the Dutch did succeed in this plan, given that the Indonesians fought to expel the Dutch from those areas. Nonetheless, at least in some parts of Batavia (now Jakarta) the instruments appear to have been applied during the few years before the final recognition of Indonesian independence in 1949.

Both colonial urban-planning instruments (the SVO and SVV) were subsequently adopted by the Indonesian government. Legally, this was justified under the transition regulation that contributed all existing laws in force.[18] Specifically, for urban planning, the Ministry of Home Affairs retained both the SVO and SVV as guidance until they were replaced by the Law on Spatial Management 1992. In contrast, the Ministry of Public Works simply disregarded both the SVO and the SVV, and instead relied on the Joint Decree issued by Ministry of Home Affairs and Ministry of Public Works.[19]

These developments indicate two important changes: first, the loss of authority of the town councils in urban planning; and second, the full transfer of authority over this function to a technical ministry. In terms of urban planning and tenurial security for urban citizens, it is important to note that in 1960 the colonial land law was revoked and replaced by the Basic Agrarian Law ('BAL').[20] The rationale behind this change was the rejection of the *domeinverklaring in* which all existing land is perceived to be State property (which was the principle behind the Dutch colonial land law of 1870) in independent Indonesia. Consequently, a better principle was found in the State's right of eminent domain or right to avail (*hak menguasai negara*). On this understanding the Indonesian state should not be perceived as holding all-encompassing private ownership, but only as retaining

[17] Batavia, Tegal, Pekalongan, Semarang, Salatiga, Surabaya, Malang, Padang, Palembang, Banjarmasin, Cilacap, Tangerang, Bekasi, Kebayoran and Pasar Minggu.
[18] Article II of the 1945 Constitution stipulates that all existing laws and regulation in force during the Dutch colonial period will be still in force until expressly amended or declared void.
[19] Nos. 650-1595 and 503/Kpts/1985.
[20] Law 5/1960.

authority to formulate policies (*beleidsdaad)*; to govern (*bestuursdaad*); to regulate (*regelendaad*); to manage (*beheersdaad*); and to control or supervise (*toezichthoudensdaad*) land and other natural resources use.[21] In any case, as an umbrella act, the BAL needed to be translated into a number of implementing regulations pertaining to the management of various natural resources (land, water, forest, minerals, oil and gas). The primary focus of the BAL, however, was agrarian land reform or, more precisely, the redistribution of land ownership to peasants, who had been dispossessed during the colonial period.

Unfortunately, Suharto disregarded the distributive objectives of the BAL and effectively replaced it with sectoral laws (forestry, mining, oil, and gas) designed to enable foreign investors to explore and exploit Indonesia's abundant natural resources. Urban planning was not part of the 'development agenda'. Revenues from work contracts (mining), production-sharing contracts (oil and gas,) and forest concessions was used to finance, bolster, and maintain the New Order regime's grip on Indonesian society.[22] As a result of this policy direction, the government ignored the need –especially given the large rise in urbanisation since the 1970s –to convert land-ownership rights granted under Dutch colonial law or to address the pattern of land occupation based on *adat* (customary law). People from rural areas in Java and the Outer Regions flocked to centres of economic development, mostly to Jakarta and other previously colonial cities, including Bandung. This population pressure was met with a deliberate policy of looking the other way, allowing massive land-use conversion in and at the fringes of the urban areas.[23] Green open areas in and around cities, including river basins, were occupied by squatters and converted into informal residential areas (or, in government parlance, 'slum areas'). In those areas transfer of ownership remained outside the control of the National Land Office. Building regulations or other limitations on land use had no legal force in this area. In short, in these residential areas, informal law (non-state law) remained and continue to remain the prevailing norm. In Bandung, the spread of informal residential areas can be

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[21] The Constitutional Court re-interpreted this principle in three consecutive decisions, Nos. 001-021-022/PUU-I/2003. Full text is available at https://www.mkri.id/public/content/persidangan/putusan/Putusan001PUUI2003.pdf, accessed 19 October 2022.

[22] Richard Robison, *Indonesia: The Rise of Capital* (Allen and Unwin, 1986)

[23] Bandung, Indonesia Metro Area Population 1950-2023, https://www.macrotrends.net/cities/21447/bandung/population, accessed 24 July 2023.

observed in and around the city centre (Tamansari, the Cikapundung river basin) and at the fringes of the city (Cidadas, known to be a specially densely populated area of Bandung).[24]

IV. The Formal-Legal and Top-Down Approach to Urban Development Planning

Post-1967, urban spatial planning has been carried out based on the existing national law (BAL and its implementing regulations); the adopted SVO/SVV, serving as guidance for the Ministry of Home Affairs; and technical regulations developed by the Ministry of Public Works. The Bandung city government also prepared a Bandung City Structural Plan (master plan) in 1970. In 1971 it was further developed in the Bandung Municipality Master Plan 1971-1991.[25] In 1985, the city government issued a 1985-2005 city master plan, supplemented by sectional and detailed land-use plans. These documents refer to the Bandung Urban Development Strategies (1974) and became the basis for the Bandung Urban Development and Sanitation Study (1977-78).[26]

Meanwhile, the city government, acting under the Basic Law on Regional Government of 1965[27] and under the New Order regime, possessed limited powers for independently managing land-use or spatial planning issues. A top-down centralised government system was established from 1974, uniformly regulating cities and districts (second-tier governments). Spatial planning of provinces, district and urban areas were thus directly controlled by the central government (the Ministry of Home Affairs and the Ministry of Public Works) operating through the first-tier government (provinces).

Top down spatial-development planning was thus put in place, replacing bottom-up urban planning by city governments. This was exemplified by the West Java

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[24] Based on official data, Cicadas (east side, outskirt of Bandung), has a population density of more than 13,000 people per square kilometre. See also: https://bandungkota.bps.go.id/indicator/12/285/2/administrasi-penduduk-kecamatan-cibeunying-kidul-menurut-jenis-kelamin.html accessed 19 October 2022.
[25] DPRD Decree 8938/1971.
[26] Haryo Winarso, 'Three Generations of Slum Upgrading Programs: Lessons from Bandung, Indonesia', Working Paper PPIK No. 010619, Bandung: ITB.
[27] Law 18/1965, as amended by Law 5/1974: Basic Law on Regional Government (which recentralised power to the central government). It was again amended by Law 22/1999, returning autonomy to district/city government.

Provincial/1st tier government Regulation 13/1984 on the Basic Patterns for West Java Development [*Pola Dasar Pembangunan Jawa Barat*]. The formerly autonomous town council of Bandung was, in the above regulation, perceived merely as part of the Bandung Raya Region, comprising of the city of Bandung, and districts around Bandung (Bandung, Cianjur, Garut, and Sumedang). This approach, combined with the use of top-down development planning, may have contributed to the promulgation of the first Spatial Planning Law (24/1992), which formally revoked the SVO/SVV of 1947/49. Urban planning became only a small part of centralised spatial planning.

The Broad Guidelines of State Policy, issued by the People's Consultative Assembly, were at the top of the hierarchy. Until 1999, this was the highest state organ, the seat of the people's sovereignty, expressing the will of the people. The Guidelines formed the foundation for hierarchical sectoral development plans, with spatial planning being merely part of an instrument to achieve development goals.

Another factor shaping this hierarchical and centralised spatial planning system was the government system established by Law 5/1974, premised on the need for unification and uniformity of governance down to the village level. Unfortunately, as general development planning formulated in the Broad Guidelines of State Policy was implemented along the lines of ministerial power distributions (a sectoral approach), spatial planning powers became dispersed among three different government bodies: The National Planning Development Board (*Badan Perencanaan Nasional/Bappenas*), the Ministry of Public Works, and the Ministry of Home Affairs.

Top down spatial-development planning: massive dispossession in the name of development

The central government issued regulations on national spatial planning with general directives addressed to lower-level governments. This system was maintained up to present, even after Suharto's downfall and decentralisation. This top-down, centralized, and sectoral or fragmented approach, became the main feature of spatial planning and has been reflected in land-acquisition practices for public or private interest.

Land acquisition for public interest (including those of a public-private character) may be carried out only if existing spatial plans (general or detailed) justify the purpose.[28] Spatial plans are supposed to indicate future land use, and those who acquire land and possess land title may only utilise land in accordance with the land-use designation found in spatial-planning documents. But In the absence of spatial plans, development plans or other land use plans may be used as substitutes.

The same principles apply to land acquisition in the interest of private investment. Investors may only acquire land that is designated for cultivation *(kawasan budidaya*) or in accordance with zoning regulations. Even the infamous Law 11/2020 on job creation reiterates this principle in Article 14, stipulating that private sector investors may acquire plots of land and utilise them only if their activities are derived from a detailed spatial plan (*Rencana Detail Tata Ruang*). This presupposes government's control over the land market and power to direct investors' behaviour in terms of acquiring and utilising land. In practice, however, the opposite occurs. Investors acquire and develop land based on economic calculations, and often they choose to serve upper- or middle-class interests. Gated communities, shopping malls, private urban-satellite cities and even luxurious plots of cemeteries are allowed to flourish and to reshape the urban landscape, justifying the dispossession of the lower middle class urban and rural dwellers.[29] In effect, the land market drives spatial planning and not vice versa.

V. Top-Down Spatial Planning and Regional Autonomy

Following the state's radical transformation in 1997/1998, Law 24/1992 was revoked by Law 26/2007, even though the procedural for setting up of spatial plans remains largely the same. The breakthrough in terms of planning authority concerns redistribution of powers between the central government and the provincial and district-city governments, with the latter being granted some autonomy. The legal framework is found in GR 25/2000, as amended by GR 38/2007, concerning the distribution of governmental powers as between the

[28] T Moeliono, Tristam, 'The Spread of Gated Communities: A Threat to Regional Autonomy', in J Vel (ed), *Land, Law and Local Autonomy in Indonesia: Selected Conclusions of the INDIRA Research Program* (Van Vollenhoven Institute, Faculty of Law, Leiden University 2008).

provinces and autonomous cities/districts. Based on that regulation alone, one might argue that the city/district governments possess autonomy, although constrained by numerous statutory limitations and exceptions.

The central and provincial governments, on the other hand, retained significant control over planning authority by requiring city/district governments to make their spatial plans in accordance with national long-middle term plans, which replaced the Broad Guidelines of State Policy.[30] In addition, the authority to draw up spatial plans was for some time strictly monitored and controlled by the Ministry of Home Affairs.[31] This suggests the central government's reluctance to relinquish power entirely, or alternatively, its distrust of regional governments' capability for autonomous governance.

The move to government recentralisation: Access to land and ease of doing business

Other recent changes were motivated by political-economy concerns such as facilitating investment and creating jobs.[32] They sought deregulation or de-bureaucratisation through restructuring the permit-licence-recommendation system concerning land acquisition and use for investment. These measures strengthened the central and provincial government's position vis a vis the districts and cities in regulating access to land and natural resources.

As a short conclusion, apart from the existence of a tight supervisory mechanism for the making and implementation of development plans, the central government also reclaimed the earlier devolved power in spatial planning, which covers land use and planning of natural resources utilisation. It was undertaken as a response to the weakening authority of the central government over the

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[30] Law 17/2007 re. Long Term National Development Plan of 2005-2025. The president as executive power translated the Law into Presidential Regulation 18/2020 re. Medium Term National Development Plan of 2020-2024. At the provincial level (of West Java) it become Provincial Regional Regulation re. West Java Province Medium Development Plan of 2018-2023 [9/2008, amended by no. 7/2019]. At the next level, the Bandung city government issued Regulation 8/2008 re. Long Term Regional Development Plan 2005-2025.

[31] GR 8/2008 re. Stages, Procedure of the Drawing, Control and Evaluation of Implementation of Drafts of the Regional Long- and Medium-Term Development Plan & Ministry of Home Affair Regulation 86/2017 re. Procedure on the Planning, Control and Evaluation of Regional Development, Procedure to Evaluate Long – medium term Development Planning, and Procedure for the amendment to Long -medium term development plans and regional government work plan.

[32] Law 11/2022; and through GR 21/2021 on the Implementation of Spatial Planning.

management of land and other natural resources during the period after 2004. This weakness was aggravated by the loss of the Ministry of Home Affairs' power to revoke, through its executive review authority, regional government regulations considered not to be in line with central government policy. In fact, during this period (2004-2014) the city/district governments enjoyed full self-governance, but many regional heads abused this power for self-enrichment or to enhance their political standing. Permits, licences, and recommendations controlling access to land or natural resource were treated as commodities to be traded to the most lucrative investors, thus disregarding the region's environmental carrying capacity.

Another important feature of the resulting spatial-planning scheme is the coexistence of hierarchical planning documents and overlapping or conflicting authorities. We shall now turn to a discussion of the present condition of spatial-development planning laws and regulations.

The limited and symbolic authority of regional government in spatial-development planning

Referring to the existing Spatial Planning Law (26/2007) and the Regional Autonomy Law,[33] district and city governments are granted the authority to make, implement and supervise the implementation of spatial plans. Included in the bundle of authority is the power to stipulate more detailed rules and regulations regarding land use. They are required to produce general spatial plans (*Rencana Umum Tata Ruang Wilayah, RTRW*), detailed regional spatial plans (*Rencana Detail Tata Ruang, RDTR*), and building (technical) and environmental plans (*Rencana Tata Bangunan dan Lingkungan/RTBL or Bloc Plans*).

This bundle of powers, however, is not absolute given the recentralisation policy initiated by the central government, as discussed above. The implementation of those powers is subject to several conditions. These conditions are the requirement that city/district plans should be made in line with the provincial and national spatial plan. In other words, the national-provincial spatial plan (containing indications of future land use) is a mandatory reference in the

[33] 23/2014, as amended by 9/2015.

formulation of city or district spatial plans. At the same time, the spatial plans are to be aligned with development plans made at the local-regional and the central government. The hierarchical system of spatial planning and development planning is of course at odds with the idea of giving districts and cities full autonomy.

In addition, another form of mandatory alignment is the obligation imposed on the cities/districts to reserve and acknowledge the existence of areas that are off limits to them. The central and provincial governments may designate strategic areas (*kawasan strategis*) within the cities or districts, which then fall outside city or district regulatory authority. One example is the designation of North Bandung as a protected area and consequently, the planning, utilisation, and supervision of land use is off-limits to the city/district government sharing the same area, with only the provincial government authorised to decide. [34]

One important limitation to consider is that the boundaries of the city/district or provincial government spatial planning authority do not reach forest areas placed under the sole authority of the Ministry of Forestry. Consequently, boundaries (forest and non-forest) must be established, or spatial plans must be aligned (harmonized) with forest planning (*padu serasi*).

VI. From Planning to Technical Rules: The Case of West Java Province and Bandung City

West Java Province is declared as buffer zone, meaning that the whole area is perceived as being in support of central government. So, it is in the interest of the central government to control land use in the province. Moreover, rapid urbanisation and extensive land-use changes in areas surrounding Jakarta, especially in the highland, Puncak area, have caused flash floods and massive floods in Jakarta. The President accordingly decreed Bandung and its surrounding a metropolitan area and designated it as a national strategic area.[35] Consequently, the authority to manage and control land use should be removed from the cities/districts sharing the area (the city of Bandung, Cimahi, and the West

[34] Nicole Niessen, Municipal government in Indonesia: policy, law, and practice of decentralization and urban spatial planning, unpublished diss, Leiden University, 1999.
[35] Presidential Regulation 45/2018 re Spatial Plan for the Bandung Basin Urban Area.

Bandung and Sumedang districts of Bandung, and transferred to a special inter-governmental coordinating body, namely the Managing Board for Bandung Basin (*Badan Pengelola Kawasan Cekungan Bandung*)[36] which began operating in September 2021.

Another factor in the making of spatial plans, mentioned earlier, is the requirement to align the plan with existing development plans and, importantly, campaign promises made by the incumbent district head or mayor. At the provincial level, the lawmakers drawing up the spatial plan should take into consideration the new regulations passed in 2019.[37] Those regulations change from time to time, but the principle remains: long-term development plans made by provincial governments should be translated into similar plans (long-medium- or short-term) elaborated by districts and cities. These governments indicate targets, such as a sustained level of economic growth or investment, and the provincial plans are then transformed into plans designating certain areas as necessary to achieve that target. Thus, spatial plans (general as well as detailed) may be read as a list of areas designated for national or regional development purposes.

Regardless of these statutory limitations and external factors, the city/district government is under an obligation to prepare not only a general spatial plan, but also a detailed plan (RDTR and RTBL/Bloc Plan, based on the general plan. This requirement is essentially the same as under the previous system established before the regional autonomy laws of 2004. Based on those plans they are to make town plans (*ketetapan rencana kota/KRK*). In addition, they must issue zoning regulations controlling land use for various purposes (residential, business, industry, etc.). The most important legal obligation of the district government is then to ensure that utilisation of available land is carried out in accordance with the spatial plan formalised in regional regulations. How the infringement of the

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[36] Established by Governor Regulation 86/2020.

[37] West Java Province Regulation 9/2000 re Long Term Development Plan 2005-2025 (as amended by Provincial Regulation 7/2019). And at the district and city level, the provincial development plan is elaborated into: Bandung City Regulation 3/2019 [RPJMD 2018-2023], Bandung District Regulation [RPJMD 2021-2026], West Bandung District Regulation 3/2019 [RPJMD 2018-2023.

plans is to be dealt with is a separate issue, leading to the discussion of whether the plans entail legally binding obligations,

To return to statutory limitations in planning, city/district governments are under the obligation to meet a target of reserving at least 30% of the area under their administration as open green space (such as public parks or cemeteries). In practice, the government may enter into a written arrangement with private business entities (such as housing developers) wishing to acquire land to build gated community or business/commercial centres, requiring them to reserve a certain percentage of the land acquired as open green space. If it is not practically feasible for the developer to make that reservation within the area acquired (it being too small to allow for green-open space or economically not feasible to reserve a certain percentage to that use), the option offered is for the company to provide the required percentage of green-open space elsewhere. It is telling that the Bandung city government failed to meet this target, and we may assume that numerous private developers (residential areas, business or shopping centres) still have an outstanding obligation to make the reservation.[38]

Other statutory limitations must also be considered. These take the form of technical regulations concerning the construction of buildings and actual land use. There are provisions concerning the allocation of authority to process permits in relation to the amount of land to be utilised, for example, if it concerns land more than 5000 m^2, such application may only be submitted to the governor rather than to the district head or mayor. Other technical rules to be enforced by the cities/districts are provisions on the construction and management of road-side lanes; building lanes; numbers of floors allowed to be constructed; building coefficient (land area allowed to be used for construction); and specific rules limiting the freedom to construct building on or utilise riversides, or lakesides. These technical rules, along with many other detailed rules issued and amended from time to time by the Ministry of Public Works,[39] may be regarded as technical guidance imposed on the city/district bureaucracy when considering

[38] As recorded in the Bandung official website: https://www.rth.bandung.go.id/.
[39] Ministry of Public Work and Housing Regulation No 05/PRT/M/2016 re Building Permit, as amended by Regulation No 06/PRT/M/2017 re amendment to the regulation No 05/PRT/M/2016 re Building Permit and the Ministry of Public Work and Housing Regulation No 20/2020.

land use or building construction permit applications. Those technical rules apply based on the District or City Spatial Plan Regulation, or in the absence of such document, based on the KRK (*ketetapan rencana kota*/city master plan) or Building Technical Architectural Guidelines. In short, building technical rules or guidance may be imposed in the absence of formal spatial-planning documents.

What then emerges is the possibility of cities/districts having no spatial planning document and even no incentive to make one. In this situation, they may allow utilisation of available land for construction or development by referring to national technical guidance rules alone. Perhaps this is because the central government is fully aware of the region's lack of technical and financial capacity to make, maintain, and implement spatial planning documents, but tolerated it. Also, not all districts feel the necessity to regulate land utilisation through spatial plans, cities with limited space are more eager. Arguably another possibility is that cities/ districts are quite content with the lack of spatial plans and the absence of this document does not impair their ability to issue land or other natural resource utilisation licences or land development permits.

Implementation and governance issues

To move on to implementation and governance, the most important legal instruments to ensure compliance with spatial plans or technical building regulations are a bundle of recommendations and permits enabling access to land for citizens, commercial enterprises, or even government agencies. To be included in this bundle of permits are the location permit, a permit to acquire land on a large scale (specifically for investment or business), land-use permit (*izin penggunaan-pemanfaatan tanah*) and building-construction permit (*izin mendirikan bangunan*), [40] supported by space utilisation suitability approval (*Persetujuan Kesesuaian Kegiatan Pemanfatan Ruang*/PKKPR) and environmental-risk-assessment approvals. Which level of government possesses the authority to issue such permits depends on the scale of the land to be acquired. In any case, the authority to award permits or approvals may enable the government to act administratively or legally in case of violation of permit or approval conditions.

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[40] Renamed into Persetujuan Bangunan Gedung (approval to construct buildings), byby virtue of Government Regulation (GR) No 16/2021 re Implementing Regulation of Law No 28/2002 re Building Construction.

The point here is that a well-functioning licence-approval system regulating access to land is necessary to protect the interests of the city/district residents. Unfortunately, while governments are more than willing to award those permits (which indicates that they meet investment targets and the obtaining of revenues), they seem to be reluctant to provide adequate resources for monitoring and law enforcement. This impinges on the citizen's right to file complaints or obtain redress or compensation where land use by others damages or infringes their basic right to a clean and healthy environment.

Lastly, we can mention the land-building tax system.[41] City/district governments currently possess the authority to determine the amount of land/building tax is to be imposed on landowners. This has become an important source of revenue especially for city governments that are unable to tax natural resources. As may be observed by comparing the amount of land tax in different areas, these governments have succeeded in forcing a change of residential areas into commercial-business or mixed-use zones. Also, the granting of permits to change the use of one area into a restaurant, office, or commercial area, serves as a pretext to increase taxes. In the final analysis, land/building tax becomes an effective instrument to put pressure on urban residents to move out or adapt by changing the use of their land accordingly.

VII. Bandung City Spatial Planning

The Bandung City Government, divided into 30 sub-districts and 151 urban precincts, possesses the authority to plan, manage and supervise the utilisation of land within its administrative borders covering 167.31 km2. The official status of Bandung as the capital city of West Java Province must be taken into consideration. The provincial government possesses overriding authority to plan, manage, and supervise urban land. In addition, spatial planning law accords to the province the exclusive authority to determine which areas should be taken outside the purviews of the cities and districts. These include bonded zones and national-provincial protected or strategic zones, including public roads

[41]Law 12/1985, Law 12/1994 re. Land-Building Tax and KMK-523/KMK.04/1998 re. valuation of Land-Building Tax. The valuation is based on the market value (Nilai Jual Objek Pajak/NJOP). See https://www.pajak.go.id/id/peraturan/pajak-bumi-dan-bangunan..

categorised as provincial or even national toll roads that interconnect and run through cities or districts.

In conclusion, spatial-planning powers in principle are granted to cities/districts as autonomous regions, the scope of which follows their administrative borders. This power is not absolute, but rather fragmented, being subjected to competing, conflicting, and sometimes higher administrative powers. Notwithstanding the fragmentary nature of spatial-planning powers described above, the city government of Bandung, with the approval of the regional parliament, issued the Bandung City Spatial Plan 2011-2031 (*Perda* Kota Bandung 18/2011), which is translated into the Detailed Spatial Plan and Zoning Regulation 2015-2035 *(Perda* 10/2015). It reiterated the importance of spatial planning (in this case RDTR or zoning regulation) to determine land use.

Any existing general and detailed spatial plan of Bandung must be read in conjunction with development plans—whether long- medium- term or short term, including incidental plans made by various government agencies from time to time. Referring to various city government regulations (*peraturan daerah*) re. development plans are obligatory in the preparation of spatial plans, these plans contain economic targets as well as indications of future land use in support of foreign and domestic investment. In short, these plans proceed from the understanding that the citizen's right to use land use and to set up an economic enterprise must be guaranteed and supported by spatial and/or development planning policies.

The complex system of land use permits, considered a legal hurdle hindering ease of doing business, has been simplified. Under the Job Creation Law, private investors seeking to procure land must submit an approval request *(persetujuan*) indicating the suitability of the land and specify the intended use. This request forms part of the business investment licensing system managed by the Investment Coordinating Board at the regional level. The change of nomenclature – from licence to approval[42] – was apparently made with the

[42] Bandung Regional Regulation No 5/ 2022 re Bandung Spatial Planning of 2022-2042. Cf. Bandung Mayor Regulation 87/2022 re Structure of Spatial Planning Forum. Art. 1, par 12, defines the approval of land use (Persetujuan Kesesuaian Kegiatan Pemanfaatan Ruang; PKKPR) as a document stating that the land-use plan is in accordance with both spatial plans and detailed spatial plansg. (*pemanfaatan ruang dengan* RTR *selain* RDTR).

purpose of decreasing the risk of delays caused by citizens (individuals, or through class actions) challenging the legality of permits (a final individual decree issued by a public body) before the Administrative Court.[43]

The authority over spatial planning rests with the Bandung city government, which is obliged to transform the general spatial plan into a more detailed architectural and building plan. Procurement of land for private business purpose, and its subsequent use, may only be is permissible only if it conforms to those documents. At the same time, the above scheme also indicates that the sub-districts and neighbourhoods do not share that authority. Only the city government is granted the power to plan and control implementation of those plans. The Regional Parliament is the only body capable of overseeing this power.[44] However, neighbourhoods and individual landowners or residents – the majority of whom live in urban-villages (or slum areas) – appears to have no meaningful voice in the plan making, processing and approval of land-use permits, or in the supervision of land utilisation. On the other hand, the city government's power to make plans should be controlled, or at least curbed by the general population's right to participate in determining their own future. The right to participate should be understood as a necessary corollary of the government power to make and implement spatial planning documents. It is to this right to participate, the right to give meaningful voice, in the realisation of the right to healthy and clean environment, we shall now turn.

VIII. Public Participation in Bandung and the Right to Clean and Healthy Environment

The basic right to clean-healthy environment and housing.

The 1945 Constitution recognises two basic rights: the right to a clean and healthy environment, and the right to a decent home and means of living.[45] It follows

[43] See: A Bedner, Administrative *Courts in Indonesia: A Socio-Legal Study* (London-Leiden Series on Law, Administration, and Development, Brill – Nijhoff, 2001), 6.
[44] Bandung Regional Regulation No 5/ 2022 re Bandung Spatial Planning of 2022-2042, Art. 20, par (1) & (2), stipulates that the authority to monitor spatial planning policies shall be regulated by law. This task falls under the purview of the Bandung regional parliament. See: Task and Authorities of the Bandung DPRD, https://dprd.bandung.go.id/profil/kedudukan-tugas-pokok-serta-hak-dan-kewajiban, accessed 25 July 2023.
[45] Art. 28 H par. (1) UUD 1945 stipulates that everyone have the right to (attain and enjoy) physical and spiritual prosperity, a decent place to live, and to a good and healthy living

that urban dwellers should have a voice in determining how the limited urban land is to be managed, including who may have access to it and under what conditions. Viewed in this way, spatial planning should ideally be formulated and enforced with this goal in mind. In the same context, spatial planning should consider the right of residents to use the land they occupy (i.e., own under legal or informal land title) in peace and tenurial security. The major threat to the enjoyment of those rights comes from land-grabbing by individual third parties (misusing the informality of land ownership claims, which is typical in urban villages in Bandung), and from government-sponsored land acquisition in the public or private interest. Also, not to be discounted is the fact that the implementation of spatial plans rests upon a complex licensing system.

The vulnerability of urban residents – especially those living in areas denoted as *kampong kota* or urban slum areas – to land-grabbing or eviction arises from the fact that most of them do not hold valid, modern land titles. Instead, they rely either on outdated western land-ownership claims, or simply on uninterrupted peaceful occupation. [46] Without proper land-ownership documents, notwithstanding the fact that they are granted identity cards by the same government, and their homes enjoy state electricity, they may easily be categorised as squatters, illegally in possession of land and living in improper houses (that is, without the required building permit). Should their land being procured by private parties or in the public interest, they may have no right to claim any legal remedy or adequate compensation.

In addition, it is necessary to pay attention to the state's power, exercised through spatial plans, to limit the bundle of rights held by land occupants or homeowners. This power is expressed in Article 6 of the BAL. The social function of land may be understood in terms of the government stipulating limitations on land use, i.e., in the determination of zoning and certain plots as protected areas, and in the

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environment. The same basis rights are reiterated in Art. 40 Law 39/1999 (human rights) and Article 5 par. (1) 32/2009 (environmental management law).

[46] Rerrink, Gustaaf (2011), Tenure Security for Indonesia's Urban Poor: a socio-legal study on land, decentralisation, and the rule of law in Bandung, diss. Leiden University. Cf. Djaka Soehendera, (2012), Sertifikat tanah dan orang miskin: pelaksanaan proyek ajudikasi di Kampung Rawa, Jakarta, KITLV-Leiden. Both argues that tenurial security for the urban poor (Bandung-Jakarta) are (and still is) tenuous. Cf: Frans Ari Prasetyo, Eviction and urban resistance in Bandung, 10 Nov 2020, https://www.newmandala.org/eviction-and-urban-resistance-in-bandung/ accessed 11 October 2022.

determination of which plot of land should be reserved and procured for development projects. From the perspective of urban citizens, spatial and development planning are a real threat to their tenurial security. In practice, spatial plans are mostly utilised to justify land grabbing.[47]

Public participation in planning

The fulfilment of basic rights is, nevertheless, guaranteed by recognition of the citizen's right to participate in the whole process of making, implementation, and supervision of plans, and the right to submit objections or, if necessary, the right to file a civil lawsuit or report a violation of spatial plans to the police.[48] Nonetheless, as will be argued below, the top-down and sectoral approach actually hinders the realisation of these rights.

In the planning stage, the question is, which urban citizens possess the right to participate, or should be consulted, by the regional law-making institution (the regional house of representatives) or by special government bodies authorised to draft and make spatial planning documents? Can it be completely entrusted to the members of the regional parliament? What mechanism or procedures exist that genuinely empower individuals or communities to make plans that serve their interests?

The scheme described in the above sections suggests that, while existing rules and regulations on public participation are plentiful, the current regional government structure does not really open the possibility of a bottom-up process. It is well documented that most Bandung citizens reside in slums areas. Their daily routine contact with the government occurs mostly at the level of urban precincts *(kelurahan)* or sub-districts (*kecamatan*). Neither of them has any authority over spatial planning. Even neighbourhood-level disputes involving violation of spatial planning or building regulations are left for the communities

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[47] Baca: Tri Joko Her Riadi (ed.), Bandung, dari Penggusuran ke Penggusuran, 16 April 2022, https://bandungbergerak.id/foto/detail/91/bandung-dari-penggusuran-ke-penggusuran; Cf. Reja Hidayat, 'Kampung Kumuh Kerap Dicap Ilegal, Apa Masih Bisa Ditata?'8 October 2021, https://tirto.id/gkdZ

[48] Art.60-75, Spatial Planning Law (No 26/2007). The public right to participate is regulated in GR 68/2010 re Form and Procedure of Public Participation in Spatial Planning (implementing regulation of Art. 65, Law 26/2007); GR 45/2017 re Public Participation in the Governance of Regional Governments; and Ministry of Home Affairs Regulation 4/2019 re Form and Procedure for Public Participation in Regional Spatial Planning.

themselves to resolve. Sub-district or urban precinct heads primarily serve as intermediaries, conveying information about future land use, justified by top-down spatial planning. What this reveal is that even this process often consists only of general notifications delivered to whoever happens to be able to attend the meeting. Real discussion, in which citizens may voice their opinions and objections, rarely occurs. This also indicates that the spatial planning documents (RTRW-RDTRK-RTBL and building regulations) do not reflect or represent the concerns and interest of most of Bandung residents.

Another factor is the diversity and hierarchical structure of spatial planning. Both government levels, the West Java provincial government, or even the national government may declare certain areas taken outside of the Bandung city government's authority. Land utilised by the provincial government or military bases and its surrounding area and those declared to be provincial strategic areas (North Bandung Area, for instance), are declared practically off-limits to the city government and its citizens. The same applies to watersheds or river basins, whose spatial management authority falls to two different government bodies: Public Works and Ministry of Environment and Forestry. Thus, the present sectoral and fragmentary approach to spatial-development planning practicality leaves little room for meaningful community participation.

Informal-slum areas as a failure in spatial-development planning

Consequently, actual land uses in slum areas disregard existing spatial plans or fall entirely outside the control of city government. From the city government perspective, urban villages are treated as a technical problem and a scourge to the city's self-image, and thus designated for a total restructuring, revitalisation, or simply to be eradicated.[49] Existing urban villages, designated as slums, are viewed as a problem to be fixed, as they do not fit the ideal of a modern urban city.[50] In other words, from the perspective of urban village residents, the Bandung city spatial plans – whether general or detailed – often translate in practice into

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[49] J-M Otto, 'Indonesian Opposition in the Colonial Municipality: A Minahasser in Bandung' 2:1 *Asian Journal of Law and Society* 169-193 (2015) Cf. P Jones, 'Housing Resilience and the Informal City', 28:2 *Journal of Regional and City Planning*, 129-139 (2017).
[50] See: Visi-Misi Kota Bandung, in https://www.bandung.go.id/sub-etalase/3/visi-misi.

dispossession, demolition of homes, and eviction. Their voices do not count and may easily be ignored. They become the victims of urban development.

Another factor negatively impacting urban dwellers' right to participate in the whole process of spatial planning is the way the whole system of permits is set up, as mentioned earlier. The catch is that the existing system is geared towards stimulating investment-led economic growth. The voices the bureaucracy heeds are those of investors applying for the necessary permits, not those of urban dwellers. In general, these communities would not have the time or money to navigate the bureaucracy managing such information. This is not the case for private land developers or investors.

To put it differently, the entire permit system, allowing access to land for private business enterprises or even the government, is far from transparent to the public. Urban dwellers, who have a great stake in knowing to whom and for what reason their homes are being traded away by the city government, are not privy to the process. As a result, when urban citizens feel the need to defend their right to clean and healthy environment, threatened by what is deemed a violation of existing spatial plans, they must face not only investors but the government. Both possess legal and spatial-planning information that is not readily accessible to the public.

To put it bluntly, spatial planning becomes the tool by which government maintains strict control over investment and access to land. The same instrument, despite numerous regulations on public participation[51] that formally recognizes the importance of land occupants' voices, in practice precludes such participation. This may be too harsh a statement. But looking at the incidence of massive displacement performed in the name of spatial planning, the same plans seem to justify violation of the right to a clean and healthy environment and residence, especially for those living in urban villages in and around Bandung. It should, however, be added that the city government may not always be successful in precluding public participation. The spread and resilience of the informal city,

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[51] Law No.26/2007 (spatial planning) as amended by Law 11/2020 (Job Creation); Government Regulation (GR) No. 21/2021: re. implementation of spatial planning; GR 68/2010 re. procedure for public participation in spatial planning; Ministry of Home Affair No. 4/2019 re. procedure for public participation in local spatial planning.

as well as l conflicts resulting from public and private land appropriation, are sufficient proof of this.

IX. Conclusion

This brief historical description shows an important similarity between town planning during the Dutch era and spatial planning in modern independent Indonesia. Both are important legal tools used by autonomous city government to secure access to land for building a modern city. Both the domain statement of the *Agrarische Wet* and the right to avail of the BAL provide the legal basis legitimising government's power to control access to land and manage its utilisation. During the Dutch colonial period it may well have been the purpose to construct a modern colonial city for the European population, a not-so-isolated island surrounded and interspersed with villages, the residential areas of the indigenous population. Similarly, the Bandung city government utilises spatial planning, with the help of private investors, to create a modern city. The Bandung city government too must deal with urban villages, often incorrectly perceived as centres of poverty, or slums that blemished the ideal image of the city.

However, the role and function of city planning seem to be less relevant in Indonesia today. Where spatial plans of any kind are absent – because the cities/ districts have been unable or unwilling to make one – other plans initiated from time to time by the government or even by private investors may serve the same function. The government structure is also important. During the Suharto era (1967-1997/98), city government possessed little or no actual powers of self-government, including those related to city planning. It was also the time for rapid growth and the spread of the informal city in Bandung. But even after the implementation of the decentralisation laws in 2004, by which city/district governments are granted more power in terms of spatial planning, the central or provincial government retained considerable power to control access to land, and thus how cities were to be constructed. This legal tug-of-war between the central government and autonomous regional governments over planning authority has undoubtedly had negative effects on the rights of the general population, particularly landowners, or occupants, in the districts, and most importantly city dwellers.

While the legal landscape related to spatial planning is prone to many changes, the government ultimately maintains its adherence to the principle that land acquisition is in the public interest, and, more importantly, land utilisation either performed by the government or in the private interest, may only be carried out based on conformity with the spatial plans.

CHAPTER 3

THE TRAVAILS OF URBAN PLANNING IN INDIA: AN EXAMINATION OF THE PLANNING LAW REGIME OF BANGALORE*

By Mathew Idiculla**

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Abstract

Though the legal framework of urban planning plays a significant role in determining the nature of urban development, there is limited scholarship on the planning law regimes of different jurisdictions, especially in Asia and the global South. For countries like India, where the rule of law is seen to be weak and implemented arbitrarily, much of academic scholarship has focused on informality in urban planning, and the formal planning process has been relatively ignored. This article attempts to elucidate the planning law regime that operates in India through a close examination of the legal and institutional framework of urban planning in the city of Bangalore. It traces the colonial roots of India's urban planning system, examines the institutions and processes of planning that

operate in Bangalore, highlights the debates around the contents of the master plan, and examines the difficulty of enforcing the plan. This article argues that the fundamental concern with India's urban planning regime is the disjuncture between the authority to plan and local democratic accountability. Even after the passing of the 74th Constitutional Amendment in 1992, which sought to empower municipalities by vesting them with multiple powers including that of urban planning, the master plan for Bangalore is still not prepared by the elected municipal government but by an unelected parastatal agency controlled by the state government. The article also discusses the concerns regarding the top-down planning process which does not provide adequate avenues for public participation, the static land-use based master plans that do not integrate key sectors of urban development, and the government's approach of addressing non-enforcement of plans by legalizing violations of planning norms.

Introduction

The role of urban planning in making cities more economically dynamic, environmentally sustainable, and socially inclusive is now widely acknowledged. Urban planning, which includes physical and land-use planning as well as socio-economic planning, can direct the city towards specific political and economic objectives. However, the relevance of urban planning law in shaping the future of cities is less recognized. The legal framework of urban planning has a fundamental role to play in determining how a city develops as it lays out the boundaries within which urban planning systems and processes operate. While planning law may not directly cause good planning outcomes like sustainability or inclusiveness, it creates the institutions and enables the processes that shape these outcomes. Hence, examining the institutional and legal framework for urban planning is important for understanding the contours of urban development.

While issues concerning planning have received quite a bit of attention from scholars in various social science disciplines, it has been inadequately studied by legal scholars. The most celebrated work on urban planning law continues to be Patrick McAuslan's 1980 treatise *The Ideologies of Planning Law*.[1] In this classic book,

[1] Patrick McAuslan, *The Ideologies of Planning Law* (Pergamon Press 1980).

McAuslan argues that there are three dominant ideologies of planning law: private property, public interest, and public participation. The ideology of private property prioritizes the protection of property rights of individuals; the ideology of public interest argues that law should be used to advance overall public interest; and the ideology of public participation emphasizes the right of the public in decision making for balancing competing interests. McAuslan maintains that planning law regimes may lean towards any of these three ideologies or a combination of the same, at different degrees. While the ideologies of private property and the public interest have been core tenets in planning law since its inception, the ideology of public participation has also become important in the post-war period.

Notwithstanding the pioneering work by McAuslan, there have been very few contemporary analyses of how planning law regimes operate in different jurisdictions. In a reassessment of how the ideologies of planning law operate in contemporary times, Julie Adshead asserts that despite changes in planning law and policy, the balance between the three competing ideologies in the planning regime in England and Wales remain similar to what McAuslan identified over 30 years ago.[2] However, there are very few works that systematically analyse the planning law regimes of other countries, especially those in Asia and the global South. While planning law in African jurisdictions have lately received some scholarly attention,[3] planning law systems of Asian cities have been mostly ignored. In India, while there is an abundance of literature that offers political economy critiques of planning, there is hardly any research and writing that examines the legal framework of urban planning.

Much of the literature on urban planning in India is either trained towards a positivist side that explains how planning can be employed productively,[4] or it is

[2] Julie Adshead, 'Revisiting the Ideologies of Planning Law: Private Property, Public Interest and Public Participation in the Legal Framework of England and Wales' (2014) 6 Intl JL in the Built Environment 174.
[3] Vanessa Watson, 'Changing Planning Law in Africa: An Introduction to the Issue' (2011) 22 Urban Forum 203208; Stephen Berrisford, *The Challenge of Urban Planning Law Reform in African Cities* (University of Cape Town Press 2014); Stephen Berrisford, and Patrick McAuslan, *Reforming Urban Laws in Africa: A Practical Guide* (African Centre for Cities, Cities Alliance, United Nations Human Settlements Programme (UN-Habitat) and Urban LandMark 2017).
[4] See IJ Ahluwalia and others (eds), *Urbanisation in India: Challenges, Opportunities and the Way Forward* (Sage Publications India 2014); Bhargav Adhvaryu, 'Enhancing Urban Planning using Simplified Models: SIMPLAN for Ahmedabad, India' (2010) 73 Progress in Planning 113.

a critique of the very process of planning.[5] In fact, the dominant academic literature on planning is centred around how Indian cities are fundamentally illsuited for undertaking modernist planning mechanisms. In her famous essay, 'Why India Cannot Plan its Cities', Ananya Roy argues that urban planning in India takes place informally rather than through a process bounded by law.[6] The process of urban planning is said to be characterized by informality since the law itself is left open-ended for multiple interpretations and interests. Roy argues that planning operates through the contestation between published plans and territorial claims made on them.

For countries of the 'global South' where the rule of law is seen to be weak and implemented arbitrarily, academic scholarship has unsurprisingly focused on planning regimes from the point of view of informality.[7] Indian cities are seen to be dominated by informal settlements, unplanned areas, and unauthorized developments where squatters and slum-dwellers live on the margins of legality. Partha Chatterjee conceptualized this space as a 'political society' in which the daily life of the poor is marked by routine violations of regulations, unlike a conventional 'civil society'.[8] In much of the postcolonial world, it is argued that popular politics operate outside of the traditional arena of 'civil society' and formal legal institutions of the State, but through processes where the State engages with underprivileged population groups not as citizens but as convenient instruments for administration. Because of the focus on such informal processes in urban planning and administration, the formal legal processes have been largely ignored in mainstream literature on urban planning in India. While it is important to recognize the existence of informal processes and strategic circumventions of plans, the formal legal process of urban planning still deserves scholarly attention.

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[5] See Ananya Roy, 'Why India Cannot Plan its Cities: Informality, Insurgence and the Idiom of Urbanization' (2009) 8 Planning Theory 76; Gautam Bhan, 'Planned Illegalities: Housing and the 'Failure' of Planning in Delhi: 19472010' (2013) 15 Economic & Political Weekly 58.

[6] Roy (n 5).

[7] See Nezar AlSayyad and Ananya Roy (eds), *Urban Informality: Transnational Perspectives from the Middle East, Latin America, and South Asia* (Lexington Books 2003); AbdouMaliq Simone, City Life from Jakarta to Dakar: Movements at the Crossroads (Routledge 2010); Vanessa Watson, 'Planning and the 'Stubborn Realities' of Global South-east Cities: Some Emerging Ideas' (2013) 12 Planning Theory 81.

[8] Partha Chatterjee, *The Politics of the Governed: Reflections on Popular Politics in Most of the World* (Columbia University Press 2004).

This article attempts to elucidate the planning law regime that operates in India through a close examination of the legal and institutional framework of urban planning in the city of Bangalore. While the planning-law systems of Indian cities vary because in India's federal system each state has its own planning legislation, there are substantive similarities in the institutions and processes governing urban planning. This is especially true because of the common colonial legacy of India's mega-cities and the common legislative source of the planning laws of different states. This article seeks to highlight the planning law regime that operates in Indian cities by analysing the institutions and processes of urban planning in Bangalore. It critically analyses concerns regarding who has the authority to plan, whether the planning process is participatory, and the issues related to the enforceability of the plan.

This article argues that the fundamental normative concern with India's urban planning regime is the disjuncture between the authority to plan and local democratic accountability. Even after the passage of the 74th Constitutional Amendment in 1992, which sought to empower municipalities by vesting them with multiple powers, including that of urban planning, the master plans for most of its megacities, including Bangalore, is still not prepared by the elected municipal government. Instead, parastatal agencies in the form of development authorities that have no local level accountability are vested with powers of urban planning. Along with such institutional anomalies, this article also raises concerns regarding the top-down planning process, which does not provide adequate avenues for public participation. It also critically analyses the concerns with static land-use based master plans that do not integrate key sectors of urban development and examines the government's approach of addressing nonenforcement of plans by legalizing violations of planning norms.

The rest of the article is divided into six sections. It starts by tracing the colonial roots of India's urban planning system, highlighting how the City Improvement Trusts were established and planning laws evolved. The third section takes a detailed look at the institutions and processes of planning that operate in Bangalore, analysing the key provisions of the planning law in Karnataka. The fourth section raises questions about who has the authority to plan and analyses the disjuncture between the constitutional vision and state legislative framework of urban planning. The fifth section discusses the debates around the contents of the plan, specifically regarding how civil society groups have legally contested zonal categorizations in Bangalore's master plan. The sixth section examines the difficulty of enforcing the plan and how planning violations are sought to be addressed by the legalisation of illegal constructions. The conclusion sums up the main highlights and arguments of the article and identifies the key changes required in India's planning law regime.

The evolution of urban planning systems in India

The origins of India's present urban planning system can be traced to the institutional response of the British colonial government to a plague that struck Bombay in 1896. During much of colonial rule, Indian cities largely operated as dual towns, with clear separation between the areas where the British and the Indians lived. Cities like Madras, Bombay, and Calcutta (now respectively called Chennai, Mumbai and Kolkata), built by the British, had a core fort area that was occupied by the British.[9] Along the fort, the British developed 'civil lines' that housed the residences, shops, and administrative offices and a 'cantonment' that housed the armed forces. The areas around the fort where Indians lived were referred to as the 'native' or 'black town'. When the British extended their presence beyond the presidencies of Madras, Bombay, and Calcutta to preexisting Indian cities, they attempted to reproduce this form of spatial segregation in these cities as well.[10]

While the civil lines and cantonments were characterized by wide roads, large housing plots, open spaces, and low densities, the native town was mostly overcrowded and often lacked basic civic amenities. Until the end of 19th century, the British were chiefly concerned with the administration and improvement of their part of town around the cantonment and civil lines. However, things changed decisively in 1896 when the bubonic plague struck Mumbai. More than 5 million residents of Bombay fled the city. Between 1897 and 1899, the plague is estimated to have been responsible for the death of 44,984

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[9] Robert Home, *Of Planting and Planning: The Making of British Colonial Cities* (Routledge 2013).
[10] Howard Spodek, 'City Planning in India under British Rule' (2013) 47 Economic & Political Weekly 53.

people— almost 6 per cent of the city's population, as per the 1901 census.[11] Between 1896 and 1900, the mortality rates in Bombay rose to 65.4 per 1,000—more than twice the rate in previous decades. Ports in Europe closed its trade with Bombay in 1896.[12] The city's thriving commercial life was virtually paralysed.

The bubonic plague had originated in the native areas of the city. As Bombay grew as an important commercial centre of the British empire with a thriving cotton mill industry, its population rose rapidly. However, the British had largely neglected how the people in the native areas of the city lived.[13] With the outbreak of the plague threatening residents of the civil lines and cantonment areas as well, the colonial government realized that it needed to take a more proactive role in addressing the concerns of the city as a whole. In response to the problems caused by the plague, the Bombay presidency, under the British colonial regime, created the Bombay Improvement Trust in 1898—a forerunner for similar bodies in cities across India under colonial rule.

The Bombay City Improvement Trust was created under the City of Bombay Improvement Act, 1898 (Bombay IV of 1898), passed by the British Parliament. It was responsible for physical planning that included 'creating new streets, decongesting crowded localities, reclaiming land for urban expansion, and constructing housing for low income residents'.[14] One of the prime reasons for creating the Bombay Improvement Trust was to address the poor sanitation conditions that earned the city the infamy of a 'cholera nest'. As Prashant Kidambi argues, the establishment of the trust was 'the outcome of a firmly entrenched belief that plague was, in the first instance, the direct result of overcrowding in poorly ventilated and filth-ridden dwellings.'[15] The British government believed that if the overcrowded and insanitary living conditions were improved, the threat of the outbreak of such diseases could be prevented. The trust was endowed with the 'eminent domain' powers that enabled it to

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[11] Caroline E Arnold, 'The Bombay Improvement Trust, Bombay Millowners and the Debate Over Housing Bombay's Millworkers, 18961918' [2012] Essays in Economic & Business History 30.
[12] Spodek (n 10).
[13] Prashant Kidambi, *The Making of an Indian Metropolis: Colonial Governance and Public Culture in Bombay, 1890-1920* (Ashgate 2007) 68.
[14] Spodek (n 10).
[15] Ibid.

destroy and improve the slums that had propped up in the native areas of Bombay.

Following Bombay, city improvement trusts were established in Mysore, Calcutta, Lucknow, Kanpur, and Allahabad.[16] What is interesting about the creation of these trusts is that it existed parallel to municipal corporations that the British colonial government had already established. As Partho Datta notes in the context of Calcutta, the 'autonomous nature of the Trust indicated that the colonial government distrusted Indians in the elected municipality'.[17] While in the initial years of colonial rule, municipalities were populated by members nominated by the British, in later years, they were also open to Indians. Viceroy Lord Ripon's Resolution of 1882 brought the idea of local self-government and made them elected bodies, though with limited franchise. The creation of improvement trusts ensured that appointed officials could proceed 'unencumbered by accountability to representatives of local self-governing institutions.'[18] The city improvement trusts leave an enduring post-colonial legacy whereby planning and development of cities is kept out of the realm of the elected municipal government. It is these trusts that later became development authorities in independent India, reproducing the disjuncture between urban planning and local democracy.

The first major town planning legislation in Britain was the Housing and Town Planning Act of 1909. This Act emerged from the widely perceived need that housing developments should be planned and regulated. It drew its inspiration from Ebenezer Howard's Garden City movement and was a reaction against the repercussions of industrialization, including congestion and pollution.[19] The Act restricted the construction of 'back-to-back' housing, which was found to have a negative impact on public health. The Garden City movement and the National Housing Reform Council in Great Britain also influenced urban planning and

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16 Along the lines of the City of Bombay Improvement Act, 1898, the British government introduced the City of Mysore Improvement Act, 1903, The Calcutta Improvement Act, 1911 and the United Provinces Town Improvement Act, 1919, which established Improvement Trusts for Lucknow, Kanpur and Allahabad. The City Improvement Trust Board for Bangalore was established in 1945, just a couple of years before India's independence.

17 Partho Datta, *Planning and the City: Urbanisation and Reform in Calcutta c. 1800 - c. 1940* (Tulika Books 2012) 177.

18 Kidambi (n 13) 68.

19 Peter Hall, *Cities of Tomorrow: An Intellectual History of Urban Planning and Design since 1880* (John Wiley & Sons 2014).

development in British India. However, India's municipalities did not have people with expertise in town planning, and their staff were largely dominated by civil engineers.[20]

Inspired by the Housing and Town Planning Act of 1909, the Bombay Town Planning Act of 1915 became the first town planning legislation in India. It gave the Bombay Municipal Corporation powers to prepare Town Planning Schemes for urban development or redevelopment. A town planning scheme is a land readjustment mechanism that allows for micro-level planning, whereby owners of land themselves could develop a neighbourhood in collaboration with local authorities. Following Bombay, the United Provinces Town Planning Act 1919 and Madras Town Planning Act 1920 were enacted. The first set of town planning acts enacted in India sought to address the poor housing conditions by providing for redevelopment of areas, similar to efforts made to improve the housing conditions of industrial labour in British towns.[21]

In Britain, the Housing and Town Planning Act of 1909 was replaced by the Town and Country Planning Act of 1947. While town planning schemes, which focused on neighbourhoods, were the primary instrument of planning in the 1909 legislation, under the 1947 legislation, these were replaced by development plans, which provided for comprehensive planning of the entire city. Though India became independent in 1947, the British Town and Country Planning Act of 1947 became the inspiration behind similar legislations in Indian states.[22] Bombay was again the first state to adopt the new development plan-centred legislation with the passing of the Bombay Town Planning Act in 1954. However, the new legislation did not completely do away with town planning schemes, as it retained them as a tool for the implementation of the development plan.

As India embraced the path of modernity and industrialization postindependence, the need for planned urban development was recognized nationally.[23] The Institute for Town Planners, India was established in Delhi in

[20] Spodek (n 10).
[21] Ibid.
[22] Jamal H Ansari, 'Evolution of Town Planning Practice and System of Urban Government in India' (1977) 20 Urban & Rural Planning Thought 9.
[23] Annapurna Shaw, 'Town Planning in Postcolonial India, 19471965: Chandigarh ReExamined' (2009) 30 Urban Geography 857.

1951 by a group of urban planners. The government of India set up the Town and Country Planning Organization, which brought a Model Town and Country Planning Law in 1960. It envisaged the creation of a Town and Country Planning Board for each state for coordinating various local planning authorities, which are responsible for the preparation of comprehensive development plans or master plans. This Model Law, which was inspired by the British Town and Country Planning Act of 1947, became the basis for the enactment of various town and country planning acts across various states in India.

The planning law framework in Bangalore

Bangalore operated as a dual city during the colonial period—with the Bangalore cantonment and civil lines occupied and governed by the British and the old Indian town of Bengaluru pete (Kannada term for city) where the natives lived.[24] By the early 20th century, the two municipalities—Bangalore City Municipality and the Bangalore Civil and Military Station Municipality—developed as independent entities, with separate central markets, railway stations, hospitals, and commercial areas.[25] In 1945, the City Improvement Trust Board for Bangalore was constituted, developing new extensions to the city to meet the demands for housing. With independence, the idea of a having a divided city was given up and the City of Bangalore Municipal Corporation was constituted in December 1949 by the amalgamation of the two municipalities.[26] The Greater Bangalore Municipal Corporation, or the Bruhat Bengaluru Mahanagara Palike (BBMP), was created in 2007 by amalgamating eight nearby Municipal Councils and 110 villages with the Bangalore Municipal Corporation.[27]

The Bangalore Municipal Corporation consists of a set of elected councillors who elects a mayor from amongst them who presides over the corporation. The

[24] Janaki Nair, *The Promise of the Metropolis: Bangalore's Twentieth Century* (OUP 2005).
[25] While the old Indian town of Benglaluru was founded by Kempegowda in the year AD 1537, the Bangalore cantonment was established by the British in 1809.
[26] The Bangalore City Corporation was formed under the City of Bangalore Municipal Corporation Act, 1949, which divided the city into 70 territorial units called wards. In 1976, the Karnataka Municipal Corporations Act replaced the Bangalore Municipal Corporation Act, 1949 as the legislation governing all Municipal Corporations in Karnataka. Bangalore City Corporation was later officially renamed the Bangalore Mahanagara Palike (BMP) which essentially means the same in Kannada.
[27] Mathew Idiculla, 'The Transformation of Governance in 'India's Silicon Valley" (2017) 694 Seminar 17.

Corporation Council, the Standing Committee, and the municipal commissioner are designated as 'municipal authorities' vested with the powers to implement the Act.[28] The mandatory functions that the municipal corporation is required to carry out include the construction and maintenance of public streets, provision of public parks and gardens, collection and disposal of waste, construction and maintenance of drains, preventing the spread of dangerous diseases, and so on.[29] While the 1976 Karnataka Municipal Corporation Act vests the municipal corporation with various civic responsibilities, it does not contain specific provisions on urban planning or mention urban planning as a mandatory or discretionary function. Though the BBMP has a town planning department, its responsibility is mostly restricted to the enforcement of land-use regulations like approving building plans and not in drawing up a development or master plan.[30]

The legislation principally governing urban planning in Bangalore is the Karnataka and Country Planning Act, 1961 (KTCP Act). This law was enacted by the State of Karnataka (then called Mysore) following the Model Town and Country Planning Law of 1960. The preamble of this Act states that it was created for 'the regulation of planned growth of land use and development and for the making and execution of town planning schemes'.[31] The KTCP Act provides for the appointment of a director of town planning and a State Town Planning Board by the State government for 'determining principles and policies for achieving the balanced development of the State as a whole.'[32] The crux of the act is the provisions laying out the processes required for the preparation of the master plan for the entire city as well as the preparation of town planning schemes for the implementation of the master plans.

[28] Karnataka Municipal Corporations Act (1976) s 6.
[29] Ibid s 58.
[30] Town Planning Section, Bruhat Bengaluru Mahanagara Palike (BBMP) https://site.bbmp.gov. in/PDF/townplanning/1.%20Introduction%20and%20objectives.pdf accessed 1 February 2023.
[31] The stated aims of the act include stopping 'uncontrolled development of land due to land speculation' and directing future growth in way that ensures 'desirable standards of environmental health and hygiene'. The Preamble further states that 'to ensure that town planning schemes are made in a proper manner and their execution is made effective, it is necessary to provide that a local authority shall prepare a development plan for the entire area within its jurisdiction'.
[32] Karnataka Town and Country Planning Act (1961) s 4 (KTCP Act).

Under a town planning scheme, land is assembled by the state from the landowners and reconstituted after providing for public infrastructure like roads, parks, open spaces, affordable housing, and other social and public amenities, as per the master plan. The remaining land is returned back to the landowners as serviced land parcels after an elaborate tabulation of infrastructure costs, compensations, and betterment levies.[33] However, unlike the case of Bombay and its succeeding states—Maharashtra and Gujarat—the town planning scheme has not been invoked much in Karnataka. The focus of the KTCP Act has hence been the preparation and the enforcement of the comprehensive development plan or the master plan. [34] The process of master planning begins with identification of an area for which a plan is to be made and notifying such area as a local planning area.[35] After the declaration of the local planning area, the state government shall constitute a planning authority, which shall be a body corporate with powers to acquire, hold, and dispose of property, consisting of both officers nominated by the state government and those nominated by the local authorities of the area.

The planning processes is to be based on a land survey. Every planning authority shall carry out a survey of the area within its jurisdiction and prepare and publish a master plan for such area and submit it to the state government for approval.[36] Before carrying out the survey for preparing a master plan, the planning authority shall make a declaration of its intention to prepare such plan and publish the declaration in the Official Gazette and in local newspapers calling for suggestions from the public.[37] The planning authority may consider the suggestions made by the public within two months of the publication of declaration and incorporate the same into the plan before sending it to the state government.[38] The Act also requires a copy of the plan showing the boundaries

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[33] Shishir Mathur, 'Use of Land Pooling and Reconstitution for Urban Development: Experiences from Gujarat, India' (2013) 38 Habitat Intl 199.
[34] An earlier version of the Act had called the first plan made under this law the Comprehensive Development Plan (CDP). Subsequent amendments have replaced the CDP nomenclature with master plans and revised master plans.
[35] KTCP Act (n 32) s 4A.
[36] Ibid s 9(1).
[37] Ibid s (1).
[38] Ibid s (2).

of the area included in the master plan to be open to public at the office of the planning authority or local government.[39]

However, the provisions regarding public participation or consultation in the planning law are quite limited. Section 13(1) of the KTCP Act provides that, on receipt of the master plan, the State government may make 'modifications as it deems fit' and return it to the planning authority, which shall publish the plan inviting public comments within 60 days. The planning authority shall consider the comments from the public and resubmit the plan with recommendations for such modifications 'as it considers necessary in the light of the public comments made' to the state government.[40] The state government shall then 'give its final approval to the plan and the reports with such modifications as the Director may advise'.[41] The planning authority shall then publish the master plan, which shall also be permanently displayed in the offices of the director and the concerned planning authority for inspection of the public.[42] Hence, in this framework, there is little scope for active public participation in the planning process as much of these procedures allow the state discretion to decide whether to take into account the public comments.

While the KTCP Act prescribes how the planning authorities across the state of Karnataka are to be constituted, Bangalore has specific provisions in the Act regarding its planning authority. Section 81B of the KTCP Act provides that 'the Bangalore Development Authority shall be the Local Planning Authority for the local planning area comprising the City of Bangalore'. The Bangalore Development Authority (BDA) was established in 1976 under the Bangalore Development Authority Act, 1976 as a successor to the erstwhile City Improvement Trust Board, established in 1945. It combined the functions of the planning authority for Bangalore under the KTCP Act with the developmental functions of the erstwhile City Improvement Trust Board.[43] The KTCP Act states

[39] Ibid s (3).
[40] Ibid s (2).
[41] Ibid s (3).
[42] Ibid s (4).
[43] The statement of objects and reasons of the Bangalore Development Authority (BDA) Act justifies the formation of BDA on the ground that the existence of multiple authorities with overlapping functions over planning and development created confusion and hence a single authority is necessary for Bangalore. While the jurisdiction of Bangalore's Municipal Corporation, the BBMP, is 712 square kilometres, the BDA has a larger territorial jurisdiction covering 1,306 square kilometres. It is for this area, excluding the parts coming under

that 'the Bangalore Development Authority shall exercise the powers, perform the functions and discharge the duties under this Act as if it were a Local Planning Authority constituted for the Bangalore City'.[44] Hence, while the composition of the planning authority for Bangalore is distinct from those of other cities in Karnataka, all of the provisions regarding the process of making a master plan remain the same.

The urban planning law framework of Bangalore is defined by the master plan, a document that primarily lays down the land-use and development control regulations. The instrument of town planning schemes, which enables a participatory mechanism for urban development with the collaboration of the landowners, has not been used for implementing the master plan, though provisions for it exist in the KTCP Act. While the BDA is responsible for drawing the master plan for 1,219 square kilometres, another agency called the Bangalore Metropolitan Region Development Authority, covering a much larger jurisdiction of 8,004 square kilometres, is required to prepare the 'structure plan' for the region but does not have a direct link with the master planning process for Bangalore.[45] The process prescribed for making the master plan offers only limited avenues for public participation. While the KTCP Act requires the publication of the planning area and the draft master plan, giving people time to respond with any objections, there is no active role or mandate for participation or consultation with stakeholders prescribed in the law.

Constitutional questions on the authority to plan

The most important question regarding the planning law framework for Bangalore is who has the authority to plan the city. Under the KTCP Act, duly amended by the BDA Act, the powers of preparing the master plan are given to

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Bangalore-Mysore Infrastructure Corridor Planning Authority, a mega-infrastructural project, that the BDA prepares the master plan.

44 KTCP Act (n 32) s 81B.

45 The Bangalore Metropolitan Region Development Authority (BMRDA) was created under Bangalore Metropolitan Region Development Authority Act 1985 with the task of 'planning, coordinating and supervising the proper and orderly development of the areas within the Bangalore Metropolitan Region'. Section 9(ii) of the BMRDA Act vests the BMRDA with the responsibility 'to prepare a structure plan for the development of the Bangalore Metropolitan Region' BDA and other local planning authorities coming under the jurisdiction of the BMR have to submit their plans to the BMRDA for approval. However, beyond such approvals, the planning processes of the BDA and BMRDA are not essentially connected or collaborative and do not enable the creation of nested multi-scale plans.

the BDA. Planning powers are vested with neither the elected municipal corporation of Bangalore nor a local planning authority, like other cities in the state, in which case elected representatives of the Bangalore Municipal Corporation would have been duly represented in the planning authority. The question regarding the BDA's authority to plan has been fraught in public debates and legal battles. This question becomes all the more relevant in light of a landmark constitutional reform on local government in India that was passed almost three decades ago.

In December 1992, India's Parliament passed the 73rd and 74th Constitutional Amendments, which mandated the creation of rural and urban local governments across India. The 74th Amendment added Part IX A, entitled 'The Municipalities', to the Constitution and gave urban local governments constitutional recognition as legitimate units of government. The 74th Amendment mandates that democratically elected municipalities, in the form of municipal corporations, municipal councils, or nagar panchayats, are to be created and empowered to work as effective 'institutions of self-government'.[46] In the original Constitution enacted in 1950, local governments were not vested with any specific powers and were merely listed as a state subject in the division of powers between the governments at the union and state level.[47] Though even after the constitutional amendments, laws for the administrating local governments still fall under the state list, they have to abide by the constitutional provisions, and, hence, state governments have amended their local government laws. The 1976 Karnataka Municipal Corporation Act and the 1976 Karnataka Municipalities Act were amended in 1994 to bring them into conformity with the constitution provisions under the 74th Amendment.

The 74th amendment provides that the '[s]tate may, by law, endow the Municipalities with such powers and authority as may be necessary to enable them to function as institutions of self-government', providing for devolution of powers to municipalities with respect to 'preparation of plans for economic development and social justice' and 'implementation of schemes for economic

[46] Constitution of India art 243-W.
[47] 'Local Government' is a state subject as per Entry 5 of List II of the Seventh Schedule of the Constitution.

development and social justice as may be entrusted to them including those in relation to the matters listed in the Twelfth Schedule'.[48] The very first item on the list of 18 functions in the 12th Schedule is 'urban planning including town planning'. The next two items on the list are 'regulation of land-use and construction of buildings' and 'planning for economic and social development'. Hence, under India's Constitutional scheme, the core functions envisaged for municipalities are in the domain of urban planning: town planning, regulations of land-use, and social and economic planning. In the case of Bangalore, the elected urban local body that is supposed to carry out the urban planning functions listed in the 12th Schedule is the city's municipal corporation, the BBMP.[49]

In the context of urban planning, the 74th Amendment also mandates the constitution of a Metropolitan Planning Committee (MPC) for metropolitan cities with a population of more than 1 million and that are spread across more than one municipality. At least two-thirds of the members of the MPC are to be elected by, and from amongst, the elected members of the urban and rural local bodies within the metropolitan area.[50] The MPC is required 'to prepare a draft development plan for the Metropolitan area as a whole'. In preparing the draft development plan, the MPC shall have regard to the plans prepared by the local governments in the metropolitan area: '[M]atters of common interest' between local government including 'co-ordinated spatial planning', sharing water, and other resources; 'integrated development of infrastructure and environmental conservation'; overall objectives of the governments at the Centre and state; and the extent of investment likely to made by the governments. This draft development plan must be prepared once every five years and is required to be submitted to the state government.[51]

An analysis of the provisions related to urban planning under the 74th Amendment would indicate that the constitution seeks to vest planning powers on the elected municipality (as per a reading of Article 243-W, read with the 12th Schedule) as well as the partly elected MPC (as per Article 243-ZE). While a

[48] Constitution of India art 243-W.
[49] Mathew Idiculla, 'Unpacking Local Self-Government: The Uncertain Power of Cities in the Indian Constitution' (2020) 53(1) Verfassung und Recht in U¨bersee 30.
[50] Constitution of India, art 243-ZE.
[51] Ibid.

municipal corporation like the BBMP is expected to make a city-level, landusebased master plan, the MPC has to provide for the metropolitan-level development plan, which integrates all plans prepared by the local elected bodies in the metropolitan area. However, despite meeting the population criteria, Bangalore did not have a MPC for 20 years, and it was constituted in 2014 only due to the intervention of the Karnataka High Court. The Bangalore Metropolitan Planning Committee Rules were notified by the government based on an order passed by the High Court on 3 January 2014.[52] However, even after its constitution, it has hardly started functioning in a serious manner.[53]

The question of who has the legal authority to make the master plan for Bangalore is an issue that is pending before the courts. Two Bangalore-based citizens groups—Namma Bengaluru Foundation and Citizens Action Forum—filed writ petitions in the High Court of Karnataka challenging the constitutional authority of the BDA to prepare the master plan. These petitions, originally filed in 2014, challenge the constitutionality of section 9 of the KTCP Act, among other provisions, as it provides for the preparation of the master plan without any reference to the MPC. The petitioners have argued that, since the MPC was constituted as per the constitution for preparing the development plan, this task cannot be undertaken by the BDA after the enactment of the 74th Amendment. The state government, however, has argued that the draft development plan, which is to be prepared by the MPC, is different from the master plan prepared by the BDA. In October 2017, a division bench of the High Court passed an interim order restraining the government of Karnataka from approving the master plan without the permission of the Court.[54]

The existence of an authority like the BDA was legally challenged even earlier. In 2004, several landowners moved the High Court of Karnataka seeking to quash the acquisition of land for the 'Arkavathy Layout' by the BDA, stating that BDA does not have the constitutional authority to undertake such a project. In

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52 *CN Kumar v Bangalore Development Authority*, WP no 21436/2005.
53 Akshia Machina, 'Bangalore Metropolitan Plan Panel Meets Only for Chai, not Charcha' Economic Times (3 October 2017).
54 'Karnataka Government Restrained from Approving 2031 Master Plan' The Hindu (17 October 2017) https://www.thehindu.com/news/cities/bangalore/karnataka-government-restrainedfrom-approving-2031-master-plan/article19873421.ece, accessed 1 February 2023.

Sharadamma and Others v State of Karnataka,[55] a single judge of the Karnataka High Court ruled in favour of the land owners of Arkavathy Layout and found that the project suffered from various discrepancies. It held that since the 74th Amendment vested the powers of planning in a municipal corporation and a metropolitan planning committee, the BDA itself had no locus standi to undertake such a project. However, on appeal, the division bench of the Karnataka High Court held that the BDA was not a municipality and the provisions of the BDA Act, which is a special legislation, were not inconsistent with Parts IX and IX(A) of the Constitution of India.[56] It held that the BDA Act is a special self-contained code enacted by the state government under power traceable to Entry 5 of List II of the Seventh Schedule.[57]

In the appeal to this decision, the Supreme Court, in *Bondu Ramaswamy v Bangalore Development Authority*,[58] upheld the decision of the division bench by distinguishing between the functions envisaged for the BDA and those of the Municipal Corporation. The Court held that municipal functions like urban town planning and regulation of land use are distinct from the task of 'development' as contemplated in the BDA Act.[59] It held that, as object and functions of a municipal Corporations are completely different from those of a development authority, the mere existence of the municipal corporation will render the BDA redundant. The Supreme Court also dismissed the argument of the petitioners that since the constitution mandates the creation of a MPC for preparing the

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55 *Sharadamma and Others v State of Karnataka,* WP no 6530/2008, (2005) 4 KarLJ 481.
56 WA no 3783/2008.
57 Entry 5 of List II (State List) states the following: 'Local government, that is to say, the constitution and powers of municipal corporations, improvement trusts, district boards, mining settlement authorities and other local authorities for the purpose of local self-government or village administration.'
58 *Bondu Ramaswamy v Bangalore Development Authority*, CA no 4097 OF 2010, (2010) 7 SCC 129 (arising out of SLP (C) no 4318 of 2006).
59 The Supreme Court held that: 'Municipalities are not concerned with nor entrusted with functions similar to those entrusted to BDA under the BDA Act, that is building, engineering or other operations by forming layout of plots with all amenities, construction of houses and apartments, as a part of any scheme to develop a city Municipalities are concerned with the overall economic development providing social justice (urban poverty alleviation and slum improvement) regulating land use and constructions, providing amenities. ...Neither urban town planning nor regulation of land use and construction, is similar to the 'development' as contemplated in BDA Act, that is carrying out building, engineering operations in or over or under land. It would thus be seen that the object and functions of a Municipal Corporations are completely different from the object and purpose of a development authority like BDA. BDA is not a municipality. Therefore, it cannot be said that mere existence of Municipal Corporations Act, duly amended to bring it in conformity with Part IX-A of the Constitution, will nullify or render redundant, the BDA Act.'

draft development plan for a metropolitan area, the BDA cannot draw any development scheme.

The Court held that, while the 'development scheme' to be drawn by the BDA deals with acquisition of land, laying out of plots, formation of roads, construction of buildings, and so on, a development plan made by the MPC is for the overall development of various functions enumerated in the 12th Schedule.[60] While this case has affirmed the BDA's right to draw development schemes and acquire property to form the layout, the question before the Court was not whether BDA has the right to make a master plan. Thus, it has not conclusively answered the question of who has the authority to make the master plan for Bangalore. The present case pending before the Court, challenging the authority of the BDA to plan and instead demanding that the MPC plan for the city is likely to determine this question more conclusively.[61]

Contestations over the contents of the plan

It is not just the questions related to who has the authority to plan and what process it should follow that are being politically and legally contested. The contents of the plans and the nomenclatures used therein have also come under contestation in Bangalore. Under the KTCP Act, land use and development within the local planning area of Bangalore should conform to the provisions of the master plan. Section 12 of the KTCP Act provides that the master plan 'shall consist of a series of maps and documents indicating the manner in which the

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[60] The Court further held that '[d]evelopment scheme to be drawn up by the BDA for development of Bangalore Metropolitan Area is specific ie acquisition of land, laying out or re-laying plots, formation of roads, construction of buildings, providing drainage, water supply and electricity and allot them to members of the public. On the other hand, the development plan for the metropolitan area as a whole, to be prepared by Metropolitan Planning Committee constituted under the KMC Act involves making a plan for overall development with reference to the various functions enumerated in the twelfth Schedule...It would thus be seen that the 'development scheme' formulated for Bangalore Metropolitan Area by BDA has nothing to do with a 'development plan' that has to be drawn by a municipality or by Metropolitan Planning Committee. The development plan to be drawn for a metropolitan area, by a Metropolitan Planning Committee should not be confused with a development scheme to be drawn by a development authority like BDA for a metropolitan area...In these circumstances, the contentions that the BDA Act, is no longer in force and that BDA has no jurisdiction or authority to draw up a development scheme to form layouts and acquire land to form lay outs in pursuance of any development scheme for Bangalore Metropolitan Area, is wholly untenable'.

[61] 'Draft RMP-2031: High Court Notice to BDA, State' The Hindu (Bengaluru, 13 February 2018).

development and improvement of the entire planning area within the jurisdiction of the Planning Authority are to be carried out and regulated'. It further states that the master plan shall include zoning of land use for various purposes along with zoning regulations, street and traffic circulation pattern, areas reserved for parks, playgrounds, public spaces, and so on, areas earmarked for future development, reservation of land for government bodies, and designation of lands being subject to acquisition, declaring certain areas as areas of special control and development and stages by which the plan is to be carried out.[62] Hence, under the KTCP Act, the master plan is largely a land-use and zoning regulation plan.

The master plan is narrow in scope as the KTCP Act does not provide for it to cover the design of transport and the water and energy networks of the city. Hence, despite being called a 'master' plan or a 'comprehensive development' plan, its ambit is quite limited. Even if a master plan tries to be more comprehensive by providing for other key infrastructural sectors to be integrated with the plan, these elements of the plan are not statutorily binding on the service delivery agency. Much of Bangalore's civic services, like water, electricity, and transportation, are carried out by different parastatal agencies (in the form of the Bangalore Water Supply and Sewerage Board, the Bangalore Electricity Company, and the Bangalore Metropolitan Transport Corporation), who are answerable not to either the BBMP or the BDA but only to the state government.[63]

Given this situation, to make these agencies implement parts of the plan relating their sectors is difficult as most of them operate independently as public corporations.

Despite the strict zoning basis of the KTCP Act, planning exercises have tried to go beyond static one-size-fits-all plans. While the Comprehensive Development Plan 1995 provided for rigid zoning regulations, the Revised Master Plan 2015, made in 2007, introduced the idea of having mixed land-use zones. This was in recognition of the reality of the multiple purposes for which urban spaces in

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[62] KTCP Act (n 32) s 12.
[63] Idiculla (n 27).

Indian cities like Bangalore are used. While, in global narratives, Bangalore is known as an information technology hub and the 'Silicon Valley of India', in reality, the city has a very heterogenous urban character. Only a few areas of the city have a neat distinction between various urban purposes, and much of Bangalore, like most other Indian cities, is characterized by a mix of multiple activities carried out in the same neighbourhood.[64]

However, the land-use categorization and zonal regulations of the 2015 Revised Master Plan (RMP 2015), especially the category of 'mixed residential' use, have become a bone of contention. While some of the older localities like Cubbon Pete, which engaged in traditional textile weaving, welcomed the idea of mixed-use zones, residents of newly planned residential layouts such as Koramangala and Indiranagar fiercely protested this categorization.[65] The KTCP Act does not provide a category for 'mixed residential' in the provision related to the contents of the master plan. Section 13(a) of the KTCP Act provides that master plans include 'zoning of land use for residential, commercial, industrial, agricultural, recreational, educational and other purposes together with Zoning Regulations'. Hence, RMP 2015's land use categorization that partially allowed mixed use became a subject of a legal challenge. In 2008, the Citizens Action Forum and other civil society groups filed a public interest litigation challenging RMP 2015 for allowing commercial use of residential areas through the landuse category of 'mixed residential'.[66]

In response to this public interest litigation, the government constituted an Expert Committee under the chairpersonship of former bureaucrat A Ravindra to review the master plan. After examining the A Ravindra Committee report, which highlighted problems related to the commercialization of residential areas, in January 2012, the High Court of Karnataka issued an interim order stating that, in specific areas where purely residential use is permitted, no further permission shall be granted for redevelopment for any other purpose.[67] The High Court

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[64] Solomon Benjamin, 'Governance, Economic Settings and Poverty in Bangalore' (2000) 12 Environment & Urbanization 35.
[65] Sudhir Krishnaswamy, Champaka Rajagopal and Mathew Idiculla, 'Planning for the Future of Bengaluru by Learning from the Past' *The Hindu* (4 March 2017).
[66] *Citizens Action Forum v State of Karnataka*, WP 3676/2008.
[67] The High Court held that '[a]s a first step, as partial acceptance of the report, we direct that in the following areas of the city ie Malleshwaram, Richmond Town, Vasanthanagar, Jayanagar, Vijayanagar, Visveshwarpura, Rajajinagar, R.T.Nagar etc., classified in the Zoning Regulations,

disposed the writ petition in February 2014 after the BDA agreed to amend certain provisions of the master plan to ensure that commercial units do not operate in residential areas.[68] The BDA, through an affidavit submitted to the High Court, declared that it would modify the RMP to restrict commercial activities based on the width of the approach road and the area it is located in.[69] The RMP 2015 was amended and notified by the state government on 20 March 2015 in the stated terms, ensuring that no commercial activities were allowed in residential mixed zones if the road width is at least 40 feet, and only certain ancillary uses are permitted even in such areas.

This case challenging the zonal categorization of RMP 2015 shows how influential residents' groups, concerned by the rise of commercial establishments in their neighbourhoods, have been able to use judicial intervention to alter the very content of the master plan. Elite residential groups, using the Court's public interest litigation jurisprudence to recast Indian cities into spaces of order is, in fact, a wider phenomenon in urban India and has been well documented in the case of Delhi.[70] Even after getting a favourable verdict from the High Court, residents' groups in localities like Indiranagar have continued to fight against commercial establishments like pubs and restaurants that have been operating in

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which corresponds to areas wherein purely residential user is permitted, no further permission shall be granted for re-development and re-construction except for residential user'. Subsequently, the High Court in another interim order issued in this case in December 2012 reiterated its earlier order and further stated that irrespective of the nomenclature of 'residential mixed' used in the 2015 Revised Master Plan (RMP), all areas marked as residential under CDP 1995 shall be restricted from redeveloping it for any other purpose. It held that: 'In addition thereto, the residential areas mentioned and shown in CDP 1995, regardless of whether they are subsequently depicted as residential main or residential mixed are also included. This order shall also apply to other residential areas regardless of the nomenclature used in the Revised Master Plan of 2015'.

[68] In disposing the case, the division bench headed by the chief justice issued a direction to the state government to amend the land use regulations of the RMP as agreed to be undertaken by the BDA: 'Citizens Win PIL on Reckless Commercialisation in Bengaluru' Citizen Matters (20 February 2014) http://bengaluru.citizenmatters.in/state-to-amend-land-use-rules-mixed-residential-bda-rmp-2015-caf-pil-6162, accessed 1 February 2023.

[69] The BDA affidavit stated that, in main and mixed residential areas in Ring 1 (core city areas) and Ring 2 (inner suburbs), no commercial activities will be allowed for roads of width 40 feet and less; for roads above 40 feet, up to 20 per cent of built up area or 50 square metres of ancillary use allowed; in main and mixed residential areas in Ring 3 (outer suburbs) along with previous conditions, ancillary use may be permitted as main use if plot size is more than 1,000 square metres, having frontage of 10 metres or more and if the road width is more than 60 feet.

[70] See Anuj Bhuwania, *Courting the People: Public Interest Litigation in Post Emergency India* (CUP 2017); Gautam Bhan, *In the Public's Interest: Evictions, Citizenship and Inequality in Contemporary Delhi* (Orient Blackswan 2016); Asher Ghertner, *Rule by Aesthetics: World-class City Making in Delhi* (OUP 2015).

its area, allegedly in violation of the revised planning norms.[71] While legal contestation over zoning is quite common globally, this example shows how the Indian judiciary can go beyond adjudicating on the zoning process and virtually direct the planning authority to amend its plan.

Circumventing the enforcement of plans

Even if plans are well made, they will not be able to meet their stated goals in the absence of an effective enforcement framework. The master plan process invariably does not account for how its provisions will be implemented. Even the proposed Revised Master Plan of 2031 of Bangalore does not provide a clear institutional framework for the BBMP and other service-providing agencies for implementing the plan.[72] Indian cities are known to have difficulty in enforcing plans, especially because they continue to be dominated by informality. While urban areas are ostensibly governed by an elaborate set of planning, zoning, and building regulations, the reality of the built environment of Indian cities tell a different story. Much of urban India is seen to operate outside the planned vision of the city and can be classified as unauthorized due to violations of planning and building laws.[73]

Planning is contested politically and through daily actions of residents after the plan is made, and not just during the formal plan making process. The master plan of the city is challenged by surreptitiously constructing buildings ignoring the planning norms.[74] As Ananya Roy argues, planning in Indian cities can itself be characterized as an informalized entity in which the circumvention of laws and plans is symptomatic of the state working through the idiom of informality through active 'deregulation' and 'unmapping'.[75] Instead of viewing them as deviations, planning violations in Bangalore can be seen as the outcome of a

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[71] 'Illegal Commercialisation: Indiranagar Residents Approach Lokayukta' *The Hindu* (1 September 2018).

[72] Sudhir Krishnaswamy, Champaka Rajagopalan and Mathew Idiculla, 'Draft RMP-2031 for Bengaluru: Institutional Gaps and Flawed Outcomes' The Hindu (10 January 2018) https://www.thehindu.com/news/cities/bangalore/draft-rmp-2031-for-bengaluru-institutional-gaps-and-flawed-outcomes/article22412684.ece, accessed on 1 February 2023.

[73] Ghertner, (n 70); Solomon Benjamin, 'Occupancy Urbanism: Radicalizing Politics and Economy beyond Policy and Programs' (2008) 32 Intl J Urban & Regional Research 719.

[74] Richard Harris, 'Modes of Informal Urban Development: A Global Phenomenon' (2018) 33(3) J Planning Literature 267.

[75] Roy (n 5).

particular planning and governance practice shaped by various networks furthering both public and private interests.[76] Planning violations are not necessarily produced in opposition to what is formal and legal but can be seen as a product of planning itself in which both official and unofficial actors jointly participate.

The master plan in Bangalore has been characterized by the violation, in different degrees, of building by-laws and zoning regulations. Interestingly, the response of the government to massive levels of violation of planning and building regulations has been to regularize such violations.[77] The Akrama Sakrama scheme is the most important measure introduced by Karnataka on this regard. The Akrama Sakrama scheme is the unofficial name given to a set of regulations that seeks to regularize unauthorized constructions and developments in Karnataka. It literally means 'making the illegal, legal' in Kannada, the local official language of the state.[78] The Akrama Sakrama scheme was initiated by the Karnataka Town and Country Planning Act and Certain Other Laws (Amendment) Act 2004. This Act amended the Karnataka Town and Country Planning Act 1961, the Karnataka Municipal Corporations Act 1976, and the Karnataka Municipalities Act 1964.

The Akrama Sakrama scheme provides for one-time regularization of multiple regulations ranging from building deviations to illegal constructions to change in land use in urban areas. To implement the scheme, the Karnataka Town and Country Planning (Regularisation of unauthorized Development or Constructions) Rules 2014 was subsequently notified. The Akrama Sakrama scheme enables violations of set-back norms, floor area ratio, and land-use conversion to be legalized by paying a regularization fee. It provides for the regularization of setback violations to the extent of 50 per cent in the case of residential buildings and 25 per cent in the case of non-residential buildings.[79] It also provides that violations of floor area ratio to the extent of 50 per cent in the case of residential building and 25 per cent in the case of non-residential building

[76] Jayaraj Sundaresan, 'Urban Planning in Vernacular Governance: Land Use Planning and Violations in Bangalore, India' (2019) 127 Progress in Planning 1-23.
[77] Amita Bhide, 'The Regularising State' (2014) 49(22) Economic & Political Weekly 92.
[78] Mathew Idiculla, 'Logic of Legalising the Illegal' Deccan Herald (5 January 2017).
[79] KTCP Act (n 32) s 76FF(7).

may be regularized.[80] The amendment also enables regularization of land use violations 'as far as may be' in accordance with other provisions of the KTCP Act.[81]

The government justified the enactment of such a law to legalize illegalities by citing the high percentage of non-compliance with its planning and zoning laws. Based on a random sample survey conducted by the BBMP, in four of the 198 wards of the BBMP, it was estimated that of the 16.75 lakh sites in Bangalore, the BBMP had been able to collect tax for 13.82 lakh (1.3 million) sites and the remaining 2.93 lakh sites (17.49 per cent) were considered to be unauthorized. The government's survey data found that of the residential properties with violations, 47.5 per cent have violations above 50 per cent. In case of non-residential buildings with violations, the survey found that 81.75 per cent of buildings have more than 25 per cent violations—that is, only 18.25 per cent buildings have violations below the limit provided by the Akrama Sakrama scheme.[82]

The constitutionality of the Akrama Sakrama amendments and rules was challenged by various civil society groups like Citizens Forum for Mangalore Development, Citizens Action Forum, and the Namma Bengaluru Foundation. The petitioners argued that the amendments and rules relating to the Akrama Sakrama scheme are unconstitutional as they violated Article 14 (Right to Equality) and Article 21 (Right to Life) of the Constitution. It was argued that the scheme violated Article 14 as it was arbitrary and created two classes of people: those who violate the law and those who do not violate the law. While the violators of law are rewarded by having their illegalities legalized, the nonviolators of law are discriminated against. The petitioners also contended that the scheme violated Article 21 since the courts have held that the right to life also includes the right to a clean and healthy environment and that large-scale regularizations would cause environmental damage.

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[80] Ibid s 76FF(9).

[81] Ibid s 76FF(10).

[82] *Citizens Forum for Mangalore Development v Government of Karnataka*, WP no 8895/2015, Statement of Objections, Government of Karnataka.

However, on 13 December 2016, the division bench of the Karnataka High Court led by the chief justice upheld the validity of the Karnataka Town and Country Planning Act and Certain Other Laws (Amendment) Act 2004 and other legislation and rules of the Akrama Sakrama scheme. The Court held that the amendments beforehand 'are the policy matters of the Government of Karnataka. The Government can bring such proposed amendments, and the Court cannot interfere into the policy matters of the Government'.[83] The court did not directly address the concerns regarding the violation of Articles 14 and 21 but rejected the contention that the regularization fee and cut-off period fixed by the state was arbitrary. Since the State conducted a survey regarding the extent of unauthorized constructions, the Court held that there was a scientific basis and proper application of mind by the legislature in passing the amendment.

The Court justified the regulation by stating that it is a one-time regularization scheme and that there are also reasonable restrictions that ensure that health and safety measures are not compromised. Since only buildings that comply with these conditions can be regularized, the court held that the power granted to the government cannot be said to be excessive. The Court held that the amendment has taken measures to ensure that storm water drains, tank bed areas, open spaces, health and safety, and fire security are not compromised.[84] The Court also justified its decision by stating that, if the scheme was not regularized, large number of buildings will have to be demolished. This, according to the Court, was not feasible. The Court held that, if the buildings were demolished, this would amount to 'national waste' and this would also result in homelessness. Since the government must provide them with alternate sites, it was not feasible to demolish buildings with planning violations.[85]

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[83] Ibid.

[84] The High Court held that 'we are of the opinion that, all care and precautions are taken to see that there is no compromise with respect to storm water drains, tank bed areas, river courses, canals, area below high tension electric lines, parks, play grounds, open space for providing civic amenities, coastal regulation zones etc. ...The State also has not compromised with regard to the health and safety measures and the fire security measures, while implementing the regularisation of unauthorised buildings'.

[85] The Court further held that '[i]f all such buildings are ordered to be demolished, firstly, there is national waste and secondly, the persons who lost their buildings in such operation would become homeless and actually, they will be on streets. The Government is also not in a position to provide the alternate sites to them in view of scarcity of the area. Therefore, the persons by investing their hard earned money when got constructed such buildings may be in violation of the building bye-laws, but only on that ground, it is not proper or feasible to demolish such buildings'.

After the Karnataka High Court upheld the legality of the Akrama Sakrama regulations, the State government announced that it would notify the scheme and invite applications from property owners for regularization of illegal constructions. The decision of the Karnataka High Court was, however, challenged before the Supreme Court of India. Admitting a special leave petition filed by the Namma Bengaluru Foundation, in January 2017, the Supreme Court granted interim protection that no applications under the scheme should be processed and granted a stay over the scheme.[86] Hence, the Akrama Sakrama regularization scheme is still not operational. Thousands of properties that have violated planning and building laws are still under a cloud.

Akrama Sakrama is an interesting example of how the Indian state deals with the issue of rampant violation of planning and zoning regulations. Rather than taking legal action against those who violate the planning laws, it condones the violations citing practical difficulties. While such legislation regularizes only past and not future violations, the possibility of such regularization schemes again coming up in the future cannot be ruled out. So, in some ways, the Akrama Sakrama scheme renders the existing urban planning processes redundant. The level of compliance of planning and zoning laws is low since they are seen as flexible guidelines for people to negotiate rather than as edicts of the state that have to be strictly adhered to. The State is a key participant in constituting this urban reality, either by active connivance or benign neglect. The State's de facto disregard of planning laws is taken a step further when it de jure declares what was illegal to be legal.

Conclusion

Bangalore's urban planning regime is defined by a disjuncture between who has the authority to plan and who has local democratic accountability. The roots of this disjuncture lie in the British colonial institutional framework, which established city improvement trusts in parallel to the elected municipal governments. The City Improvement Trust Board for Bangalore constituted by the British morphed itself as the BDA in post-independent India. Even after the

[86] 'Akrama-Sakrama on Hold, SC Stays Scheme' *Bangalore Mirror* (14 January 2017) https://bangaloremirror.indiatimes.com/bangalore/others/akrama-sakrama-on-hold-sc-stays-scheme/article show/56529595.cms, accessed 1 February 2023.

passing of the 74th Amendment, which sought to empower municipalities to enable them to function as 'institutions of self-government' by vesting them with multiple powers, including that of urban planning, the master planning exercise in Bangalore is carried out by a parastatal agency, the BDA.

The BDA, whose primary responsibility is the provision of infrastructure, housing, and land sites, is not the appropriate planning authority for Bangalore under the constitutional scheme. The 74th Amendment envisages the urban planning function to be carried out by the municipal corporation. The MPC is envisaged as the integrator of various plans carried out by local governments at the level of the larger metropolitan area. However, under the Karnataka Town and Country Planning Act, the Local Planning Authority responsible for preparing the master plan of Bangalore continues to be the BDA and not the municipal corporation or the MPC. Hence, the fundamental issue with the present institutional framework for planning is that the BDA Act and the KTCP Act have not been suitably amended to reflect the purpose envisaged in the 74th Amendment.

The union government, in 1996, issued a Model Regional and Town Planning and Development Law under the Urban Development Plans Formulation and Implementation Guidelines, which requires municipal corporations to prepare local plans and the MPC to prepare the regional plans.[87] However, most states, including Karnataka, have failed to incorporate these provisions in their planning legislations. Instead, most planning laws are still based on the British Town and Country Planning Act of 1947, even though Britain itself has moved away from this planning model. In fact, some states, like Andhra Pradesh, where urban planning is governed by the Andhra Pradesh Town Planning Act 1920, are still following the provisions of its predecessor, the Housing and Town Planning Act of 1909. So most Indian states have not updated their planning laws and continue

87 Urban Development Plans Formulation and Implementation Guidelines were updated to form the Urban and Regional Development Plans Formulation and Implementation Guidelines in 2014. Urban Development Plans Formulation and Implementation Guidelines, Ministry of Urban Affairs and Employment, Government of India (August 1996)

https://mohua.gov.in/upload/upload files/files/URDPFI%20Guidelines%20Vol%20I(2).pdf, accessed 1 February 2023.

to follow practices of the British colonial government, reproducing the anomaly of the local government having limited powers over urban planning.

Under the present legislative scheme, planning in Bangalore is largely a top-down process that does not provide for adequate avenues for public participation. The KTCP Act does not mandate plans to be prepared on the basis of public participation and merely asks for public comments for a short period of time. Similar provisions govern other cities in India. A democratic planning process would require the planning authorities to undertake large-scale awareness building campaigns regarding the planning exercise and conduct workshops at much lower levels. Despite not being a statutory requirement, in the preparation of RMP 2031, the BDA carried out consultations in all of the eight administrative zones of the BBMP.[88] However, beyond the active participation of some of Residents' Welfare Associations, which mostly represent residents who are economically better-off, the involvement of the larger population of the city in the planning process seems limited.

The nature of urban plans itself needs further consideration, especially for countries like India, which is dominated by informal urbanism. The question is whether a master planning exercise defined by land-use plans is an appropriate instrument in Indian cities. The practice of preparing purely static, land usebased master plans is now considered outmoded in many cities across the world.[89] However, under India's town and country planning laws based on 1947 British legislation, master plans are principally restricted to zoning, which segregates areas into various land-use categories like residential, commercial, industrial, and so on. The master plan is narrow in its scope as it is principally just a land-use plan and does not integrate key sectors of urban development like water, electricity, and transport—functions carried out by parastatal agencies not connected with the municipal corporation or the development authority. Hence, both the legislative design of the KTCP act and the institutional setting of having

[88] 'Bengaluru Citizens Reject BDA's Master Plan 2031, Call It 'Unconstitutional'' The News Minute (29 January 2017) https://www.thenewsminute.com/article/bengaluru-citizens-reject-bda-smaster-plan-2031-call-it-unconstitutional-56454, accessed 1 February 2023.
[89] Peter Hall and Mark Tewdwr-Jones, Urban and Regional Planning (Routledge 2019).

multiple parastatal agencies prevent the master plan from becoming a truly comprehensive plan for the city.

The widespread violation of planning and zoning rules has led the government to enact laws like the Akrama Sakrama scheme that provide for legalizing these violations and arguably provide residents with perverse incentives to violate planning regulations. While such laws may be seen as an instance of India's urban planning regime working through informality, the nature of urban informalities are varied, and the justifications offered to them also vary. As Partha Chatterjee argues, while the encroachments by the poor are justified by a moral argument, a similar moral justification for regularizing illegal constructions cannot be easily employed by the middle class,[90] who are the predominant beneficiaries of schemes like Akrama Sakrama. The State used a survey regarding the extent of violations to justify it carried out after the regulations were issued to justify the need for such a scheme. The High Court also cited this 'scientific survey' along with the negative consequences of implementing the planning regulations that will result in demolishing many buildings, while upholding challenges to the amendments that introduced the Akrama Sakrama scheme. This approach is vastly different from the jurisprudence that the courts have employed while ordering the demolition of various slums and informal settlements.[91]

The planning law regime in Bangalore, like in other big cities in India, faces serious institutional infirmities. It faces fundamental questions regarding who has the authority to plan, what should be the process of planning, and what is the nature of the contents of the plan. To address these challenges, it is important to first fix the question of the authority to plan by vesting the constitutionally recognized municipalities and MPC with appropriate planning responsibilities. Going by the provisions of the 74th Amendment, the elected municipality should make the city-level master plan, while the MPC has make the metropolitan-level development plan, which integrates plans prepared by the local bodies in the metropolitan area. The minimal public participation component provided in the

[90] Partha Chatterjee, *The Politics of the Governed: Reflections on Popular Politics in Most of the World* (Columbia University Press 2004).

[91] Mathew Idiculla, 'A Right to the Indian City? Legal and Political Claims over Housing and Urban Space in India' (2020) 16 Socio-Legal Rev 1; Anuj Bhuwania, *Courting the People: Public Interest Litigation in Post Emergency India* (CUP 2017).

planning legislation also needs to be revisited. For planning to be responsive to the varied needs of each locality, decentralized and participatory planning processes need to be adopted. Ward committees can be made part of the planning process whereby they prepare local plans in a participatory manner and share the same with the municipality.[92]

The narrow understanding of planning as the process of making static land-use based master plans needs to be reconsidered. Rather, plans should accept the holistic nature of urban development, which would require the plans to be have components for physical and social infrastructure of the city. Since municipal functions are carried out by multiple agencies in the city, processes for intersectoral coordination in the formulation and implementation of the plan would also be necessary. Hence, it is time for Indian cities to rethink their present institutional framework of urban planning and consider alternatives and changes that ensure that the plan is a dynamic and living document that integrates all key sectors of urban development and is made by authorities with local democratic accountability through an inclusive and participatory process.

92 Sudhir Krishnaswamy, Champaka Rajagopal and Mathew Idiculla 'Towards Demand-led Planning for Bengaluru' The Hindu (26 March 2017) http://www.thehindu.com/todays-paper/tp-national/ tp-karnataka/towards-demand-led-planning-for-bengaluru/article17665908.ece, accessed 1 February 2023.

CHAPTER 4

CROWN AND DEVELOPMENT:

THE INFLUENCE OF MONARCHY ON BUILT ENVIRONMENT IN BANGKOK AND JOHOR*

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Abstract

This article challenges the Weberian view that modernization stems from the rational legal system, wherein legal-rational authority displaces traditional and charismatic authority as the transformative agent. We contend instead that, in key instances at the forefront of Asian development, monarchy has orchestrated economic and built-environment modernisation. In Thailand and Malaysia, royal interventions have operated outside or behind formal laws governing planning and development, producing significant outcomes for cities and economies. Two case studies illustrate this claim. In Bangkok, the King has played a leading role in shaping urban development. In Johor, the Sultan – later Malaysia's Yang di-Pertuan Agong – has similarly directed the Iskandar Malaysia development region. These interventions exceed the expectations of constitutional monarchy, relying not on legal-rational authority but on traditional notions of royal power. Thus, monarchy emerges as a decisive agent of modernisation, complicating conventional theories of rationalisation and authority in Southeast Asia.

Introduction

Monarchy has proved a remarkably persistent institution in the modern world, and especially in Asia. Despite attempts to confine the power of monarchy within European-style constitutional constraints, the description 'constitutional monarchy' fails to capture accurately the role and status of monarchs in contemporary Asia. Interest in these monarchies is growing, and it is generally found that Asian monarchies have largely not just maintained their power, but in some cases have increased it. This is in contrast to European monarchies, which a recent study shows to 'have witnessed a growing gap between the formal political power conferred on them by the constitution, and the actual power they wield in reality'.[1]

In this article we explore the role of monarchy in the context of modernization as evidenced by two narratives of built environment, namely urban development in Bangkok, Thailand, and the development region Iskandar Malaysia in Johor,

[1] Hazell, R. and Morris, B. (2020). *The role of monarchy in modern democracy: European monarchies compared*. Oxford: Hart Publishing, 269.

Malaysia. Our finding is that the King of Thailand and the Sultan of Johor both play significant roles in development. This finding contradicts Weber's notion that modernization arises via the adoption of legal-rational authority, as the authority of the monarchy is classified as traditional in Weber's formulation.[2] The succeeding sections set out the narrative of, first, Bangkok, and secondly, Johor. We then draw our conclusions.

Thai Monarchy and Urban Development

As one of the largest urban centers in Asia, effective management of urban spaces is vital for the modernization of Bangkok, Thailand's capital city. Since 1936, various comprehensive town planning legislations and building control laws have been adopted to support these objectives. Despite entrusting the executive branch with a leading role in shaping the dynamics of city growth, these legal instruments have not only preserved the traditional concept of city space ('TCCS'), centered as it has always been in Bangkok on the sanctity of the monarchy, but their functioning is, in fact, dominated by this very idea. This approach effectively facilitates the Weberian 'traditional authority'—the King, as a constitutional monarch whose powers and position are circumscribed by constitutional limits, and his networks—to influence the city's modernization.[3] Such influence reinforces the entrenchment of royal political dominance, making the monarchy 'an almost unchallenged source of legitimacy and object of legitimation' within the Thai polity.[4]

Below, we first provide details of the TCCS, then examine how it fundamentally differs from and is challenged by the Western-oriented concept of space ('WCS'). In the last section, we assess how urban spaces has become a battleground for political dominance between the monarchy and reformists, and how building control and planning laws bolster the monarchy's efforts to both restore and sustain its political hegemony.

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[2] Weber, M. (1978). *Economy and society: An outline of interpretive Sociology. Volume I*. Roth, G. and Wittich, C. (eds). Berkeley: University of California Press, 226-37.
[3] Ibid.
[4] Dressel, B. (2010). 'When notions of legitimacy conflict: The case of Thailand', *Politics & Policy*, 38(3), pp. 445-469.

Bangkok as a microcosm of the universe

The social structure of pre-modern Siamese (Thai) society was intrinsically shaped by the Hindu-Buddhist cosmography known as *the Traiphum*.[5] According to the *Traiphum*, the universe is divided into three realms—heaven, human, and hell.[6] The realm to which one belongs is determined by their past and present actions (*karma*), which, in turn, affect the extent of their accumulated merits (*bun*).[7] Styled as *Rama* (the incarnation of Vishnu), the King was deemed to be the semi-divine supreme ruler of this cosmological universe (*Devaraja*), believed to possess the highest degree of *bun* in the kingdom (*Dhammaraja*).[8] This idea of stratified, religious-oriented social order profoundly influenced the original planning of Bangkok and thereby the TCCS.

Founded as the capital of the Chakri dynasty in 1782, Bangkok was originally conceived as a 'microcosm of the universe'.[9] As the supreme and most virtuous ruler of this microcosm, the King's abode—the Grand Palace—deemed to be *Khet Phra Racha Than* (the royal precinct) symbolizes Mount Meru, the central axis of the *Traiphum*, with the heavenly realm *Dawadoeng* at its pinnacle.[10] One of its main throne halls represents this divine paradise.[11] Regarded as 'the center of divine power', the Grand Palace determined the physical layout of pre-modern Bangkok .[12] Surrounding roads were subsequently built not only to showcase 'its grandeur' but also to 'segregate the Grand Palace from the commoners' residential area,' which were considered as the earthy domain.[13] These insights

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[5] Chua, L. (2021). *Bangkok utopia: Modern architecture and buddhist felicities, 1910–1973*. Honolulu: University of Hawaii Press, 19-20.
[6] Ibid.
[7] Zeamer, E. (2016). 'Examining all the realms of nature: Evidence, insight, and the quest for knowledge in modern Thailand', in Hoover, S. M. (ed.) *The media and religious authority*. University Park: The Pennsylvania State University Press, pp. 125-149.
[8] Leelapatana, R. (2021). 'The Thai-style democracy in post-1932 Thailand and its challenges: A quest for Nirvana of Constitutional Samsara', in Harding, A. and Pongsapan, M. (eds.) *Thai legal history: From traditional to modern law*. Cambridge: Cambridge University Press, 218. Mérieau, E. (2022). *Constitutional bricolage: Thailand's sacred monarchy vs. the rule of law*. Oxford: Hart Publishing, 86.
[9] Holt, J. C. (2017). *Theravada traditions: Buddhist ritual cultures in contemporary Southeast Asia and Sri Lanka*. Honolulu: University of Hawaii Press 2017, 32.
[10] Sumčhindā, P (2014). *ถอดรหัสพระจอมเกล้า [Decoding King Mongkut]*. Bangkok: Matichon, 45.
[11] Prasertsiri, P. (2012). *เลาะรอบขอบวัง [Walking around the palace]*. Bangkok: Bangkok Book, 37-8.
[12] Teeraviriyakul, U. (2016). 'Bangkok: From an antique to a modern city', in Wongsurawat, W. (ed.) *Sites of modernity: Asian cities in the transitory moments of trade, colonialism, and nationalism*. Berlin: Springer, 127.
[13] Leelapatana, R. (2023). 'The Monarchy-led Urban Development: Lessons from Bangkok's Planning Regime', *The Chinese Journal of Comparative Law*, 11(3), 7-8-; Youmangmee, N. (2016).

into the layout of pre-modern Bangkok enable us to derive the rationale behind the TCCS.

Fundamentally, the TCCS is grounded in the idea of 'sacred topography,' a realm that is intrinsically 'religious' and 'imaginative,' and therefore 'does not … correspond to the earth's surface [in reality]'.[14] Additionally, the TCCS integrates city planning primarily with the pre-eminence of the monarchy rather than the public good and legality. More specifically speaking, central to this concept is the idea of a heaven-earth division, wherein the royal precinct is envisioned as the celestial domain around which all other structures, considered earthly, must revolve. These earthly structures cannot intrude upon the royal domain but remain subordinate to its influence.

The traditional concept of city space in modern Thailand

The adoption of the WCS during the reign of King Chulalongkorn (1868-1910), in response to European imperialism, posed significant challenges to the TCCS.[15] While the TCCS hinges upon the sanctity of the monarchy, its Western-oriented counterpart is based on the belief that the process of rationalization entails demystification—in other words, individuals' ability to 'master all things by calculation'.[16] This emphasis on calculability and rationalism highlights the notion of 'defined and governed territories' as a rationale for modernization at both national and local (Bangkok) levels.[17]

At the national level, the introduction of the WCS marked the emergence of the Thai nation-state—a sovereign entity with centralized authority in Bangkok capable of exercising control within its clearly defined boundaries under an absolute monarchy.[18] However, our primary focus is on the context of Bangkok, where this introduction catalyzed the development of urban spaces. Since the late

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'Management of 'public spaces': Case-study of roads in Bangkok in the Reign of King Rama V', in Wongsurawat, W. (ed.) *Sites of modernity: Asian cities in the transitory moments of trade, colonialism, and nationalism*. Berlin: Springer, 49.

14 Winichakul, T. (1994). *Siam mapped: A history of the geo-body of a nation*. Honolulu: The University of Hawaii Press, 24,33.

15 Ibid, 47-61.

16 Weber, M. (2009). 'Science as a vocation', in Weber, M. (ed.) *From Max Weber: Essays in Sociology*. Translated by Gerth, H. H. and Mills, C. W. Oxford: Routledge, 139.

17 Winichakul (n.14), 47-56.

18 Heng, M. S. H. (2019). 'King Chulalongkorn as builder of incipient Siamese Nation-State', *East Asia*, 36, 68-76.

19th century, Western-influenced urban designs have become emblematic of modernization, with their construction carried out through more rational practices, notably systematic urban planning and land acquisition.[19] Two issues arise in this context, which will be briefly outlined here and examined in more detail in the following section.

First, Bangkok's expanding urban spaces have become a battleground for political dominance between the monarchy and reformists.[20] Having acquired a significant portion of land, the King and the royal family emerged as '[pivotal] agents of urban development' at the start of the modernization process, with structures such as the French-style Ratchadamnoen Avenue and the Italian-style Anantasamakom Throne Hall of the Dusit Palace constructed between 1899 and 1908.[21] The areas surrounding the avenue replaced the Grand Palace as Bangkok's city center.[22] In terms of their political significance, these edifices represented 'the modernized image of the [monarchy]',[23] allowing the King to project his political pre-eminence beyond the sacred sites, such as the Grand Palace (Chua, 2021, p. 24).[24] However, despite providing a more rationalized view of urban spaces in Bangkok, their presence did not result in the rationale behind the TCCS—the *Traiphum*—being wiped out. Rather, as Ratchadamnoen Avenue, literally translated as 'royal progress', connects the city's modernized space with the Grand Palace and the Dusit Palace, it retained 'the enchantment of the [pre-modern] era', while envisioning the modernization process as the product of the traditional idea that city landscape revolved around the King.[25] Following the Revolution of 1932, which brought the end to royal absolutism, a parliamentary democracy with the King as its head was inaugurated. Control over the process of modernization—particularly through defining urban landscapes and architecture—was crucial for the revolutionary group composed of mid-ranking

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[19] Navapan, N. (2014). 'Absolute monarchy and the development of Bangkok's urban spaces', *Planning Perspectives*, 29(1), 6-10.
[20] Leelapatana, (n.13), 7-12.
[21] Navapan (n.19), 2-6.
[22] Dovey, K. (2001). 'Memory, democracy and urban space: Bangkok's 'path to democracy'', *Journal of Urban Design*, 6(3), pp. 265-282.
[23] Mega, V. (2013). *Quintessential cities, accountable to the future sustainability, innovation and citizenship*. Brussels: Springer.235; Navapan (n.19), 14
[24] Chua, L. (2021). *Bangkok utopia: Modern architecture and buddhist felicities, 1910–1973*. Honolulu: University of Hawaii Press. 24.
[25] Ibid, 23-4; Peleggi, M. (2017). *Monastery, monument, museum: Sites and artifacts of Thai cultural memory*. Honolulu: University of Hawaii Press.141.

civilian and military officials, known as the People's Party ('PP'), in integrating this Western concept into local life and culture in 1932.[26] Importantly, we will demonstrate below that Thailand's transformation to a nominally constitutional monarchy in 1932 was incomplete as the process of democratization did not fully override the Buddhist-royalist culture. Instead, the PP had to rely on the technique of sacralization previously adopted by the monarchy to promote their political ideology, thus unintentionally allowing the TCCS to remain a part of the Thai constitutional landscape. The aforesaid control was also vital for the monarchy in restoring its political prominence under the *Traiphum* cosmology, a goal that achieved full success by the 1970s.

Second, where the King's orders (*Phrabrom Rachaongkarn*) were the main source of authority for implementing urban development during the absolute era,[27] political liberalization, along with the expansion of urban areas in Bangkok and other cities— especially from 1932 onward—prompted the government to increasingly recognize the importance of building control and legal-rational town planning. Simply put, although the revolution of 1932 did not completely replace the traditional mode of legitimacy, this incident remains crucial in the study of urban development as it marks the formal transition from traditional to more legal-rational authority. Legal-rational tools, especially town planning legislation, have since played an important role, including in the restoration of the TCCS, which was key to reinstating the political preeminence of the monarchy in post-absolutist Thailand.

The first law on construction control was passed in 1936 and was later replaced by the current Building Control Act of 1977 ('the BCA 1977'). Meanwhile, Thailand's first comprehensive planning legislation, the Town and Rural Planning Act, was introduced in 1952 ('the TRPA 1952') during the premiership of Field Marshal Phibunsongkhram ('Phibun'). The act was influenced by the English Town and Country Planning Act of 1947.[28] The current Town Planning Act 2019

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[26] Fuwongcharoen, P. (2018). "'Long Live Ratthathammanun!': Constitution worship in revolutionary Siam', *Modern Asian Studies*, 52(2), pp. 609-644.

[27] *Royal Gazette no 6, 339*, 1889. p.339.

[28] Tapananon, N. (2018). *สิ่งที่ได้ 'ละไว้ฐานที่เข้าใจ' ในพระราชบัญญัติการผังเมือง พ.ศ.2518 [What are 'omitted due to common knowledge' in the Town Planning Act 1975]*. Available at: https://www.tuda.or.th/index.php/2018/08/02/articles-0000001/ accessed 12 September 2024.

('the TPA 2019') builds on its 1975 predecessor ('the TPA 1975'), which was itself based on two American planning statutes: the Standard State Zoning Enabling Act 1926 and the Standard City Planning Enabling Act 1928.[29] These laws outwardly accommodate what Swati Jhaveri describes as 'an idealized planning regime' ('IPR').[30] Generally, the IPR seeks to reconcile the classic tension between the need for organized town planning in the public interest and its potential adverse effects on individual rights and interests, such as the right to private property.[31] It is assumed that if the town planning process is carried out in accordance with pre-established legal rules, allows for public participation, and is subject to review, it is more likely to be deemed effective, democratic, and accountable, thereby minimizing the aforementioned tension.[32] Therefore, in contrast to the TCCS rooted in karma and royal privilege, the IPR links urban spaces and modernization with the public good and individual rights. It simultaneously signifies a belief in human capacity to 'appropriate a spatial object'.[33] especially through 'technocratic' methods and 'engineering tools' to steer cities towards order and prosperity.[34]

The monarchy's success in restoring royal political dominance in post-absolutist Thailand prompts us to inquire how its sacred status under the *Traiphum* is projected through urban architecture, despite the presence of building control laws, the IPR, and the democratization process introduced by the PP. In other words, as modernization renders the 'legal-rational' form of legitimacy—where authority is derived from a formal, impersonal law —undeniable, we aim to explore how the royalist-conservative faction co-opts the WCS to advance their development visions, which are centered around the TCCS.[35]

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[29] Ibid.
[30] Jhaveri, S. (2022). 'The executive-led planning regime of the Hong Kong Special Administrative Region', *The Chinese Journal of Comparative Law*, 10(1), pp. 1-27.1.
[31] McAuslan, P. (1980). *The ideologies of planning law*. Oxford: Pergamon Press, 11-75.
[32] Leelapatana, (n.13), 4-5; McEldowney, J. (2017). 'Policy and development: Perspectives from public law and political thoughts – a twenty-first century odyssey', in Zartaloudis, T. (ed.) *Land law and urban policy in context: Essays on the contributions of Patrick McAuslan*. Oxford: Birkbeck Law Press, pp. 189-219, 191.
[33] Winichakul (n.14), 54-55.
[34] Padawangi, R. (2022). *Urban development in Southeast Asia*. Cambridge: Cambridge University Press.3-4.
[35] Weber (n.2), 217-20.

Bangkok's urban spaces as a battleground for political dominance

The story of modernization in Bangkok illustrates how urban architecture makes a political ideology – an abstract set of beliefs to which a polity must commit – publicly visible and concrete.[36] This visibility helps these ideas become ingrained in the public consciousness.[37] Ostensibly. the ability to define the meaning of Bangkok's modernization and its course of development in the late 19th century facilitated the Thai monarchy's consolidation of political hegemony. In this section, our focus is on the efforts of the PP to seize control of this definition in order to replace royal hegemony with Western concepts such as constitutionalism and democracy, as well as the monarchy's subsequent success in regaining this control in the democratic era.

As discussed, the monarchy envisaged Ratchadamnoen Avenue as the anchor of Bangkok's modern urban landscape. In their effort to embed the concepts of constitutionalism and democracy into the public discourse, the PP sought to visualize these principles by redefining the symbolism of the avenue. This endeavor culminated in the inauguration of the Democracy Monument at its center in 1939.[38] Due to the absence of a long-cultivated constitutional culture, many Thais at the time nonetheless misunderstood *Ratthathammanun* (constitution) to be a child of Phraya Phahonphonphayuhasena, one of the military leaders of the PP.[39] The lack of an embedded understanding of constitutionalism made the design of the Democracy Monument particularly challenging at the time.

The architecture of the Democracy Monument clearly represents the transition of power from the absolute monarchy to a constitutional regime on 24 June 1932.[40] To enhance its mystique, the replica of the constitution, positioned at its zenith, is auspiciously displayed as 'a thick accordion-style codex called *Samutthai*

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36 Morrice, D. (1996). *Philosophy, science and ideology in political thought*. London: Macmillan Press, 75.
37 Evers, H. and Korff, R. (2003). *Southeast Asian urbanism: The meaning and power of social space*. Munster: Lit Verlag, 17.
38 Leelapatana (n.13), 10.
39 Banomyong, P. (2000). *Pridi by Pridi: Selected writings on life, politics, and economy*. Translated by Baker, C. and Phongpaichit, P. Chaing Mai: Silkworm. 170.
40 Peleggi, M. (2017). *Monastery, monument, museum: Sites and artifacts of Thai cultural memory*. Honolulu: University of Hawaii Press.134.

[which is] placed on a two-tiered golden pedestal tray'.[41] Regarding its location, the monument not only became the new 'focal point' of the avenue, but also manifested the interruption of 'the monarchy's urbanistic vision of modernity'.[42] Additionally, the then Prime Minister and member of the PP, Phibun, who was educated in France, intended the Democracy Monument to symbolize 'national unison' and to serve as 'the milestone of national progress'.[43] Instead of using prerogative power as in the pre-absolutist era, Phibun opted for a legal-rational approach to town planning. The Land Appropriation Act was passed in October 1939 to organize building control and urban planning and development around the *Ratchadamnoen* precinct, resulting in many European-style edifices and facilities being constructed along the avenue.[44]

The internal power struggle within the PP itself, coupled with post-Second World War corruption scandals involving the civilian government supported by its civilian wing, created an opportunity for the monarchy to gradually recover from its nadir, beginning with a coup in 1947. With the assistance of two military generals—Field Marshal Sarit Thanarat and General Prem Tinsulanada, the monarchy succeeded in fully reinstating its lost prestige by the 1970s.[45] Interestingly, instead of restoring the absolute monarchy, the royalist-military alliance—described by McCargo as 'the network monarchy'—opts to maintain its political dominance through the system of tutelage democracy, formally known as 'the Democratic Regime with King as Head of State' ('the DRKH').[46] Central to this regime is 'the concept of neo-royalism', under which royal sacredness is merged with democratic legitimacy, with the 'down-to-earth' and 'citizen-centric' *Dhammaraja* seen as the embodiment of democracy.[47] Moreover, the DRKH restores the 'sacred and inviolable' status of the King, with every Thai constitution since 1949 unwaveringly enshrining the 'inviolability clause,' which immunizes him from any legal liability (Section 6, the Constitution of the Kingdom of Thailand, 2017). This prerogative effectively reinforces the concept

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[41] Fuwongcharoen (n.26), 624.
[42] Peleggi (n.40), 137-40.
[43] *Royal Gazette*, 1940, pp. 876-881.
[44] Peleggi (n.40), 140.
[45] Winichakul, T. (2008). 'Toppling democracy', *Journal of Contemporary Asia*, 38(1), pp. 15-30.
[46] McCargo, D. (2005). 'Network monarchy and legitimacy crises in Thailand', *The Pacific Review*, 18(4), pp. 499-519.
[47] Chachavalpongpun, P. (2015). 'Neo-royalism and the future of the Thai Monarchy: From Bhumibol to Vajiralongkorn', *Asian Survey*, 55(6), 1194.

of *Devaraja*. Meanwhile, every post-1947 constitution further preserves his prerogative to appoint the key figures of the network monarchy—the members of the Privy Council (Sections 10-11, the Constitution the Kingdom of Thailand, 2017). With the royal status re-sacralized, electoral politics is permitted only to the extent that it does not undermine the powers and privileges of the network monarchy. Royally sanctioned coups serve as a primary means of vetoing demands for fully participatory politics.[48]

To embed the sacredness and inviolability of the monarchy, along with the ideology of neo-royalism, in public consciousness, it is essential to re-sacralize royal symbolism, with the re-emphasis of the TCCS being one of the means to fulfil this intention.[49] Nonetheless, employing *Phrabrom Rachaongkarn* for this purpose would contradict the plan to integrate the monarchy with democratic legitimacy. Therefore, achieving such a goal must rely on the legal-rational structure, as demonstrated below.[50]

To begin with, as discussed earlier, the PP pursued urban planning through modern positive law in order to supplant 'the monarchy's urbanistic vision of modernity', with the TRPA 1952 adopted to mainstream the IPR as the primary mode of urban development.[51] However, following the restoration of the restoration of royal hegemony, the rationalized TPA itself has been turned into a vehicle that accommodates room for the TCCS. In 2006, a ministerial regulation was passed under the TPA 1975 during the government of Thaksin Shinawatra, who was at the time alleged to have shown 'disloyalty to the throne'—perhaps in an attempt to 'regain trust from the monarchy'—exempting *Khet Phra Racha Than* from Bangkok's comprehensive town plan.[52] The exemption clause was carried over into the new regulations promulgated in 2013 under the premiership of Thaksin's sister, Yingluck Shinawatra, and it is expected to continue in the

48 Winichakul, T. (2014). 'The Monarchy and anti-monarchy: Two elephants in the room of Thai politics and the state of Denial', in Chachavalpongpun, P. (ed.) *'Good coup' gone bad: Thailand's political developments since Thaksin's downfall*. Singapore: ISEAS-Yusof Ishak Institute, 84.
49 Peleggi (n.40), 141-142.
50 Leelapatana (n.13), 12.
51 Ibid, 137.
52 Crispin, S. W. (2012). 'Thailand's classless conflict', in Montesano, M. J., Chachavalpongpun, P., and Chongvilaivan, A. (eds.) *Bangkok May 2010: Perspectives on divided Thailand*. Singapore: ISEAS-Yusof Ishak Institute, pp. 108-119, 111; Leelapatana (n.13), 16; Ministerial Regulation enforcing Bangkok Comprehensive Plan, 2006).

upcoming regulations enacted under the TPA 2019 (Ministerial Regulation enforcing Bangkok Comprehensive Plan 2013). As a result of this, a zone traditionally separate from the commoners' areas has now been legally recognized as the exception to the IPR, as stipulated by modern planning legislation itself. Ostensibly, this embodies the rationale behind the *Triaphum*, which holds that the royal realm is sacred and impenetrable, akin to a divine heaven. Its presence, coupled with the revised legislation on royal assets, facilitate the current monarch, King Vajiralongkorn (2016-present), in actively influencing Bangkok's urban development and modernization in a way that simultaneously bolsters royalist dominance.[53]

Amid rising anti-establishment movements, the military junta that seized power in May 2014 sought to reinforce royal prestige by replacing the crown property law enacted in 1936 with the Royal Assets Structuring Act 2017 ('the 2017 RASA'), which was later repealed by the His Majesty's Assets Structuring Act 2018 ('the 2018 HMASA') (The Nation, 2017; Vienne, 2022). Passed following the revolution of 1932, the Crown Property Act of 1936 ('the CPA 1936') distinguished crown property, which is held by the King as the head of state, from his private properties (Section 4, the CPA, 1936). Amended in 1948, the CPA 1936 established the Crown Property Bureau ('CPB'), and tasked it with the responsibility of managing crown property (Section 4 bis and ter, the CPA 1936). Both the 2017 RASA and the 2018 HMASA however grant the King the exclusive prerogative over all royal properties (Section 6, the RASA 2017; Section 6, the HMASA 2018). Following the promulgation of the RASA 2017, King Vajiralongkorn instructed the CPB to transform the venue classified as royal property, previously the site of a racecourse, into King Bhumibol Memorial Park to commemorate his father's life work and to enhance green urban space in Bangkok (Thai PBS, 2022). Its surrounding area is also designated as *Khet Phra Racha Than*, referred to as 'the 901 Land', and is therefore exempt from Bangkok's comprehensive town plan.[54]

[53] Leelapatana (n.13), 19-22, 25.
[54] Thansettakij (2023). *ย้อนตำนาน 'ราชตฤณมัยสมาคมฯ' ก่อนผุด 'Entertainment Complex' 2 แสนล้านบาท [Revisiting the history of 'the royal turf club' before the emergence of a 200-Billion-Baht 'entertainment complex']*. Available at https://www.thansettakij.com/business/economy/605112 accessed 26 September 2024.

By excluding throne halls and palaces from its application, the BCA 1977 too embraces the *Triaphum* rationale (Section 6, the BCA 1977). Given the growing tendency for royal prerogative over royal property to be exercised in support of urban development, this legislation therefore provides another potential legal vehicle for the monarch in pursuing this goal.[55]

The *Triaphum* rationale not only underlies their exemption but also provides the fundamental basis for enforcing building control and town planning in Bangkok. The urban layout surrounding the Grand Palace serves as a pertinent example. Enacted in 1985 under the BCA 1977, Bangkok Regulation on the Prohibition of Construction, Modification, Use, or Alteration of Certain Types of Buildings in the Inner Ratanakosin Grand Palace Sub-District, Phra Nakhon District, Bangkok establishes rules for the construction and modification of certain types of structures in the vicinity of the palace. Put more theoretically, while the Grand Palace, classified as *Khet Phra Racha Than*, remains exempt from both the building control and town planning laws, it has nonetheless emerged as the epicenter that determines the trajectory of urban development and modernization in its surrounding areas. Much like the late 18th century, this celestial realm functions as a fulcrum around which structures built by ordinary people must revolve. This approach to legally entrenching urban organization ultimately symbolizes the socio-political predominance of the monarchy.

Outside the royal precinct, building control and town planning in the vicinity of royal development projects ('RDP') are also informed by the rationale underlying the TCCS. King Bhumibol (1946-2016) was particularly recognized for his influence on the construction of key public facilities in Bangkok, including the Silver Jubilee Road in 1971 and the Rama IX Park in the late 1980s. Interestingly, despite his formal status as a constitutional monarch, no specific legislation has ever prevented the King from initiating the RDP. In fact, royal influence on urban development began nearly two decades before Bangkok's first comprehensive town plan was implemented, following the enactment of a ministerial regulation no.127 under the TPA 1975 in 1992.[56] Due to his significant

55 Leelapatana(n.13), 19-22.
56 Robinson, I. M. (1995). 'Emerging spatial patterns in ASEAN mega-urban regions: Alternative strategies', in McGee, T. G. and Robinson, I. M. (eds.) *Mega urban regions of Southeast Asia*. Vancouver: UBC Press, pp. 78-108.

impact on Thailand's development, King Bhumibol continues to be celebrated, even posthumously, as 'the development king'.[57] Additionally, as their names suggest, these RDP clearly project the sacred and altruistic image of the monarchy.[58]

In terms of the authority for their implementation, the late King seized opportunities such as his birthday or the anniversary of his coronation to articulate his vision for urban development, with the government and the network monarchy—particularly the military and royalist elites (especially members of the Privy Council)—tasked with carrying out his will.[59] In the presence of the inviolability clause in the constitution, the royal wishes 'were typically treated as if they were the binding *Phrabrom Rachaongkarn* of the absolutist era'.[60] However, rather than using the King's orders to sanction the construction of these RDP, modern positive laws—such as land expropriation decrees (as seen in the case of the Silver Jubilee Road) and the regulations on foundations enshrined in the Civil and Commercial Code (as exemplified by Rama IX Park)—were applied for this purpose.[61] Similar to the Grand Palace, these structures—sacralised by their status as 'the royal gifts'—have emerged as a fulcrum for shaping the direction of urbanisation and modernisation in their vicinity. Since the 1980s, a number of Bangkok regulations were passed under the BCA 1977 to impose rules on construction and modification of buildings and other structures surrounding the Silver Jubilee Road and the Rama IX Park.[62]

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[57] Seo, B. K. (2020). *Eliciting care: Health and power in Northern Thailand*. Madison: University of Wisconsin Press, 44.
[58] Leelapatana (n.13), 17-9; Winichakul (n.45), 21.
[59] Horayangkura, V., Pimonsathean, Y., Weesakul, U., Lertpocasombut, K., Romratanapun, W., Wongsawatgul, E., and Klinmalai, S. (2007). 'In search of His Majesty the King's underlying concepts in royally initiated urban, community and architecture development', *Journal of Architectural/Planning Research and Studies*, 5(3), pp. 7-8, 12.
[60] Leelapatana (n.13), 13.
[61] Leelapatana(n.13), 17-9.
[62] See a series of Bangkok Regulations Determining Restricted Areas Prohibiting the Construction, Modification, Use, or Change of the Use of Some Types or Sorts of Buildings on the two sides of Rachadaphisek Road between 1985 and 1987; Bangkok Regulations Determining Restricted Areas Prohibiting the Construction, Modification, Use, or Change of the Use of Some Types or Sorts of Buildings Surrounding Suanluang Rama IX in Bangbon and Prawet Sub-districts, Phra Khanong District Bangkok on 23 November 1989 and on 29 January 2004; Metro Society (2016). *ของขวัญจากพ่อ: ถนนในกรุงเทพ ฯ (และปริมณฑล) [Gifts from the father: Road in the Bangkok metropolitan region]*. Available at: https://www.metrosociety.com/index.php/th/editorial/kings-roads, accessed 27 September 2024.

Royal authority, planning law, and Bangkok's city center

Against the IPR, the above section demonstrates how Thailand's modern building control and town planning laws help integrate the TCCS into Bangkok's modernization and urbanization trajectory, thereby projecting royal hegemony to the public. However, since the monarchical influence over urban spaces predates the promulgation of Bangkok's comprehensive plan in 1992, the Thai experience also reflects how the royal court itself shapes the design of city planning. The case of Siam Paragon, one of Bangkok's largest shopping malls located in the Ratchaprasong area, is a notable example.

The estate on which Siam Paragon stands is a royal property adjacent to the residence of Princess Sirindhorn, the younger sister of King Vajiralongkorn.[63] It is operated by the Siam Piwat group, a business conglomerate, with Princess Sirindhorn and the CPB, now under the exclusive supervision of the King by virtue of Sections 6-8 of the RASA 2017 and Sections 6-8, the HMASA 2018, as the main shareholders.[64] This estate has long been leased to foreign companies and Thai business tycoons, making it Bangkok's business heart even before 1992.[65] As a result, the current Bangkok planning regulation, in effect since 2013, designates this area as the Red Zone, a commercial business district, where the construction of industrial factories, transportation stations, and waste disposal sites, as well as the use of land for agricultural purposes, are prohibited.[66] The theoretical conclusion here is that the monarchy appears to 'lend its [legitimacy]' to the development of the city centre of Bangkok and the design of town planning regulations.[67] Again, this reflects the *Triaphum* rationale, under which the monarchy serves as the epicentre of urban development.

Malay Monarchy and the Iskandar Malaysia Project

The Malay monarchies (there are nine of these) share some features with the Siamese/ Thai monarchy, but are in several essential respects very different, due

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[63] Ünaldi, S. (2016) *Working towards the monarchy: The politics of space in downtown Bangkok*. Honolulu: University of Hawaii Press, 149, 155-156.
[64] *Minutes of the Annual General Meeting of Shareholders of the MBK*, 28 October 2008.
[65] Ünaldi (n.63), 144-190.
[66] Map of Bangkok (2013): https://webportal.bangkok.go.th/public/user_files_editor/354/NewFolder/14-2556.pdf
[67] Ünaldi (n.63), 160.

to their different history and constitutional as well as symbolic status. Thus the Malaysian case study presented in this section, takes a different form. Like the case study on Thailand, it concerns the process of modernization via physical or spatial development, illustrating strongly the role of monarchy (in the shape of Sultan Ibrahim Ismail of Johor) in modernization. But we move here from the urban development in Bangkok's TCCS to very non-traditional spaces and red-earth development in rural Johor.

First, we need to understand the different evolution of the Malay monarchies compared to that of Thailand.

The Malay Monarchies in History

The states that emerged from the fragmentation of the Malacca empire in the 16th century each had their own Ruler who was connected to the Malaccan dynasty. This dynasty traced its origins to the Arab world and even to Alexander the Great. 'Iskandar' itself, the name of the region discussed in our case study, is the name of the present Sultan of Johor's father and is derived etymologically from 'Alexander' (Al-Iskandar).

Nonetheless, the Rulers enjoyed the highest social status in Malay society. The state was inconceivable without a *Raja*; government itself is *kerajaan* in the Malay language.[68] This concept involves the notion of *daulat* (sovereignty), which the Ruler 'ruled by the grace of Allah, who had given him blessings and legitimized his reign.[69]

Ideas of monarchy in the Malay world have complex origins, and can be seen as syncretic, having Hindu and Buddhist, as well as Muslim, influences.[70] For example,

The actual structure of government prior to British rule owed much to Hindu ideas, for example in the astrological obsession with multiples of four. Perak had

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[68] Milner, A. (1982). *Kerajaan: Malay political culture on the eve of colonial rule*. Tucson: University of Arizona Press.
[69] Suwannathat-Pian, K. (2011). *Palace, political party and power: A story of the socio-political development of Malay kingship*. Singapore: NUS Press, 12.
[70] Harding, A. and Kumarasingham, H. (2023). 'The Malay monarchies in constitutional and social conception', *Asian Journal of Law and Society*, 9(3), pp. 399-417.

four great, eight major, and 16 minor chiefs, and 32 territorial chiefs. Even the throne was 16-sided, while the palace had 32 pillars for each section of the building, and salutes were given in number eight, 16, or 32.[71]

Even traditional magic had a role to play. Winstedt recorded in 1874 that 'Perak folk saw nothing strange in their Sultan 'Abdullah, sitting at a séance on the shaman's mat and becoming possessed by the genies of the State, who prophesied the death of the British Resident destined soon to be murdered.'[72]

Anthony Milner expresses in the following terms the relationship between ruler and subject in *kerajaan* ideology royal subjects understand what we might call their identity and purpose in terms of rajaship … we must be cautious even of using language which assumes the subject's distinct and separate identity. The notion of lives 'contained within custom' and the image of *namas* embedded in royal ceremonial structure suggest that, according to Kerajaan ideology, individual Malays were seen almost as portions rather than subjects of kingship. In these circumstances the expression of anxiety about being '*raja*-less', the fear of the 'utter confusion' which reigns in the absence of kingship, is understandable. It is equally important to examine the terms in which Malay texts make strong injunctions against treason (*derhaka*).[73]

Yet unlike the Kings of Siam, the Malay Rulers were not in general absolute monarchs, but were held in check by their officials and the state's territorial chiefs. Rulers were obliged to consult their senior officials in matters of government, and prominent ministers felt it was their prerogative to offer words of advice or admonishment when they felt tradition or protocol had been disregarded—sometimes high-ranking ministers exercised more influence than the ruler … without their support the sultan was virtually powerless.[74]

The *kerajaan* ideology was of course deeply disrupted by colonialism. Unlike the Thai monarchy, the Malay monarchies were subjected to colonial influence in a

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71 Andaya, B. (2018). *The Perak Sultanate: Transitioning into the 21st century*. Singapore: ISEAS—Yusof Ishak Institute. Harding, A. and Kumarasingham, H. (2023). 'The Malay monarchies in constitutional and social conception', *Asian Journal of Law and Society*, 9(3), 402.
72 Winstedt, R. (1958). *The Malays: A cultural history*. Oxford: Routledge, 64.
73 Milner (n.68), 114; Milner, A. (1994). *The invention of politics in colonial Malaya: Contesting nationalism and the expansion of public space*. Cambridge: Cambridge University Press, 24.
74 Andaya (n.69), 5-6.

system of indirect rule. Following the Pangkor Engagement in 1874, a treaty between Britain and the state of Kedah, a residential system was developed in which the traditional Ruler or Sultan was obliged to act on British advice except in matters involving Islam and Malay custom. Under the residential system, government represented a careful balance between British advice and the observance of traditional norms, protocols, and symbolism.[75] This means that (paradoxically, one might think) the residential system asserted the absolute power of the ruler over the territorial chiefs in order to increase the power of the coloniser as against those whose power had previously constrained the Rulers'. This supported the system of indirect rule.[76] The symbolism of monarchy was thus required to be maintained in order to disguise the reality – namely, the essentially invasive nature of British rule. The British had already established Crown colonies in Penang, Malacca and Singapore, and these were unified as the Straits Settlements in 1826. The residential system extended British rule ultimately, over the half century following Pangkor, to all of the Malay states, while Johor itself was the first state to enact its own constitution in 1895, and the last to adopt indirect rule (in 1914).[77] It did not join the Federated Malay States as a number of other Malay states did under the British idea of centralising administration.[78] Its independence was recognised even in the British courts when the then Sultan Abu Bakar was sued and claimed sovereign immunity, supported in his claim by the British government.[79] These are not merely historical facts. Even the present Sultan insists on Johor's exceptionalism; the 1895 Constitution of Johor as foundational; and the people of Johor (of all races) as his people, the '*bangsa Johor*' or Johor nation.[80] As we will see, the modernisation of the state is a prime objective of the Sultan's reign.

As with the Thai monarchs under Thai constitutions since 1932, the Malaysian Federal Constitution imposes formal restraints on the Malay rulers. These restraints, which include the requirement to act on government advice and assent to bills passed by the legislature, are in line with the Westminster-type

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75 Suwannathat-Pian, (n.69), chapter 2.
76 Suwannathat-Pian, (n.69), 23.
77 Milner (n. 68), 197ff.
78 Milner (n. 68), 227.
79 Mighell v. Sultan of *Johor* [1894] 1 QB 149.
80 Hutchinson, F. E. and Nair, V. P. (2016). 'The Johor Sultanate: Rise or re-emergence?', in Hutchinson, F. E. and Rahman, S. (eds.) *Johor: Abode of Development?* Singapore: ISEAS, p.3.

constitutional conventions (Constitution of the Federation of Malaya, 1957, Article 40, 66). To examine the positions from a purely constitutional perspective, the Malay monarchies are framed both by their State Constitutions and by the Federal Constitution, Article 181(1) of which preserves the 'sovereignty, prerogatives, powers and jurisdiction of the Rulers … within their respective territories as hitherto had and enjoyed'. This of course begs the question, what exactly are the matters that are preserved in Article 181(1): the scope of the prerogative power as a matter of law remains uncertain,[81] but in practice the definition has been noted to have clearly expanded considerably over the last twenty years or so.[82] In addition, Article 71(1) guarantees the right of a Ruler 'to succeed and to hold, enjoy and exercise the constitutional rights and privileges of Ruler of that State in accordance with the Constitution of that State'. Article 38 prohibits any legislation that directly impacts the 'privileges, position, [honors] or dignities of the Rulers' without the approval of the Conference of Rulers—a constitutionally significant body made up of Malaysia's nine traditional monarchs. In 1971, the constitutional provision (Article 159), which deals with constitutional amendments, was itself amended to require the consent of the Conference of Rulers to the passing of any constitutional amendments or ordinary laws that related to the 'sensitive issues' that form what is referred to as Malaysia's 'social contract'. This contract embraces citizenship; the special privileges of Malays and natives of Sabah and Sarawak; the national language; the position of the Rulers themselves; and laws governing the questioning of policy on all of these issues. This means nothing less than the entrusting to the Rulers themselves the guardianship of the constitutional privileges of the Malays under Article 153; what the same Article refers to as the 'legitimate interests' of non-Malays; and the entire social contract. Thus the collective monarchy performs a specific policy-political function that goes beyond the notion of constitutional monarchy.[83]

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[81] Hickling, R. H. (1975). 'The prerogative in Malaysia', *Malaya Law Review*, 17(2), pp. 207-232. cf. Harding, A. (1986). 'Monarchy and the prerogative in Malaysia', *Malaya Law Review*, 28(2), pp. 345-365.
[82] Harding, A. (2022a). *The Constitution of Malaysia: A contextual analysis*. Oxford: Hart Publishing, chs. 2,5. Suwannathan-Pian (n.69), 378ff.
[83] Harding (n.82), ch. 3.

However, the Federal Constitution as noted above also codifies the Westminster-type conventions requiring the King to assent to bills passed by the legislature, and act on government advice. The matters designated in the Constitution for the exercise of discretion by the King are limited, but include the appointment of the prime minister on the basis of the confidence of a majority of the members of Parliament, the refusal of a request for a dissolution of Parliament, and summoning a meeting of the Conference of Rulers.[84] Schedule 8 of the Federal Constitution requires the state constitutions to be in conformity with these Westminster conventions so that the Rulers acting at the state level are also formally required to observe them (Federal Constitution of Malaysia, 1957, Schedule 8, para. 1). Essentially under the residential system this had been the position since the late nineteenth century, excepting matters relating to religion and Malay custom.

The Federal Constitution also created the new office of *Yang di-Pertuan Agong* (Supreme Head of the Federation, or simply King). The King is elected by the Conference of Rulers once every five years from amongst its own number so that the office rotates between the various states (Federal Constitution of Malaysia, 1957, Article 38). Traditional epithets and social status still largely apply to the Ruler at the state level; for example, he acquires *daulat* on his accession to the throne, and *derhaka* or treason against the Ruler is still regarded, by some at least, as a social if not a legal matter, of some seriousness.[85] The office of King at the federal level, although a neologism only a few decades old, is nonetheless endowed socially and conceptually with the attributes of the traditional monarchy at the state level.[86] The King is powerful as the Ruler of his state but also as the de facto leader of the Rulers collectively. And their collective influence is also noted to have been increasing.[87] This has occurred despite efforts by the former

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[84] Harding (n.82), 34ff.
[85] Malaysia Now (2021). *'Derhaka' has no place in constitution or modern state, politicians told', Malaysia Now*, 5 July. Available at: https://www.malaysianow.com/news/2021/07/05/derhaka-has-no-place-in-constitution-or-modern-state-politicians-told, accessed 27 September 2024; Milner, 68.
[86] Harding, A. (2020). 'Acting (or not acting) on lawful (or unlawful) advice in Malaysia: From Windsor to Kuantan and back again', *ICONNect Blog*, 20 November. Available at: https://www.iconnectblog.com/acting-or-not-acting-on-lawful-or-unlawful-advice-in-malaysia-from-windsor-to-kuantan-and-back-again/, accessed 27 September 2024.
[87] Harding (n.86); Harding, A. (2022b). 'The Malaysian general election of 19 November 2022 and the problem of the hung parliament', *IConnect Blog*, 14 December. Available at: https://www.iconnectblog.com/the-malaysian-general-election-of-19-november-2022-and-the-problem-of-the-hung-parliament/, accessed 27 September 2024.

Prime Minister Tun Mahathir Mohamad in the 1980s and 1990s to curb royal powers by abolishing royal immunity and the royal power to refuse assent to bills.[88] It is important to note here that the *revival* of royal power finds a parallel in Thailand, as discussed above, although in the Malaysian case it occurred rather later.

In spite of what seem to be clear constitutional prescriptions, the view is now prevalent that the powers of the Rulers are not in fact entirely contained within the constitutional text. As Sultan Nazrin of Perak has put it

The King is not a monumental ornament—without life—without soul … everything that happens is in the vision and hearing of the King … it is a mistake to think that the role of a constitutional monarch is just like a President, limited to what is written in the constitution. The role of the constitutional monarch is beyond what is contained in the constitution.[89]

This notion is especially true in Johor, where

[The] Sultan … has also weighed in on policy matters and issues affecting public life, from religion and culture to inter-ethnic relations, and from land management to education. He and the Crown Prince have frequently commented on the historical and cultural specificity of the state, encapsulated in the term *Bangsa Johor*, which implies an identity based on territory and local culture — as opposed to ethnicity. The Crown Prince has provocatively stated that Johor could imagine seceding from the Malaysian Federation, under certain conditions.[90]

Some of the Sultan's remarks seem to hark back to what he calls 'the order', or an ideal state of affairs that existed prior to the Federal Constitution in which the Ruler exercised far greater powers than he does today.[91] In this, again, we find parallels in Thailand.

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[88] Harding, A. (2022a). *The Constitution of Malaysia: A contextual analysis*. Oxford: Hart Publishing, 113ff.
[89] The Sun Daily (2017). 'Sultan Nazrin: Malay rulers protect people against usurpation', *The Sun Daily*, 24 February. Available at: https://www.thesundaily.my/archive/sultan-nazrin-malay-rulers-protect-people-against-usurpation-XTARCH467890, accessed 27 September 2024.
[90] Hutchinson and Nair (n.80), 3.
[91] Hutchinson and Nair (n.80), 30-1.

On 1 February 2024, Sultan Ibrahim of Johor commenced a five-year term as King at the federal level. In this situation the Crown Prince (known as the Tunku Makhota Johor or TMJ) became Regent of his state. Sultan Ibrahim is by any standard a remarkable figure. He is one of the richest three or four people in Malaysia, with assets reportedly exceeding $5.7 billion.[92] The Sultan is a 'notable private investor … and runs a vast personal business spanning property, shipping, oil and gas and power'.[93] He is ostentatious in his lifestyle, being for example the owner of 300 antique cars and a Boeing 737. He is the only Ruler allowed to maintain his own armed forces.[94] Before taking office as King, he stated in an interview that he was 'not interested in being a puppet King', and that the Malaysian Anti-Corruption Commission and the national oil company Petronas should report directly to the King rather than to parliament or the prime minister. He continued: 'I'm going to hunt all the corrupt people. I will make sure I bring results. People contribute hundreds of millions before elections. How do you pay them back? Giving them mega projects. That's not going to be the case the moment I'm there'.[95] The TMJ stated that his father would be 'hands-on' as King and would give the Prime Minister a 'hard time'.[96] The King also stated he would scrutinize all military equipment procurements.[97] At the state level the Sultan has been able to secure his own choice of Chief Minister, and check state government decisions. [98]

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[92] Tan, A. L. (2024). 'Five things about Malaysia's new King Sultan Ibrahim Sultan Iskandar', *Business Times,* 31 January. Available at: https://www.businesstimes.com.sg/international/asean/five-things-about-malaysias-new-king-sultan-ibrahim-sultan-iskandar, accessed 27 September 2024.

[93] Nadalutti, N. (2019). 'To what extent does governance change because of sub-regional cooperation? The analysis of Iskandar-Malaysia', *International Relations of the Asia-Pacific*, 19(1), pp. 1-31, 24.

[94] Hutchinson and Nair (n.80), 2.

[95] The Star (2023). *I'm going to hunt all the corrupt people.* Available at: https://www.thestar.com.my/news/nation/2023/12/11/im-going-to-hunt-all-the-corrupt-people, accessed 27 September 2024.

[96] Basyir, M. (2023). 'TMJ: Anwar may face challenging reign under Johor Sultan as next King', *New Straits Times*, 29 October. Available at: https://www.nst.com.my/news/nation/2023/10/972767/tmj-anwar-may-face-challenging-reign-under-johor-sultan-next-king, accessed 27 September 2024.

[97] FMT Reporters (2024). 'I will vet military equipment procurements, says Agong', *Free Malaysia Today*, 17 August. Available at: https://www.freemalaysiatoday.com/category/nation/2024/08/17/i-will-vet-military-equipment-procurements-says-agong/, accessed 27 September 2024.

[98] Straits Times (2022). *'Johor ruler appoints surprise new menteri besar Onn Hafiz, after incumbent steps back', Straits Times*, 15 March. Available at: https://www.straitstimes.com/asia/se-asia/johor-ruler-appoints-surprise-menteri-besar-onn-hafiz-after-incumbent-steps-back, accessed 27 September 2024.

If such statements seem at variance with constitutional texts that appear to require adherence to 'Westminster' norms, the monarchy as now conceived adopts a notion of prerogative that appears to precede the adoption of those texts.[99]

The Sultan of Johor and the Iskandar Development Region

The Malaysian government has experimented developmentally with the element of spatial geography to spark economic activity. Examples are the creation of the Multimedia Super-Corridor and Cyberjaya as Asia's answer to Silicon Valley, and the moving of the federal government itself to a new capital at Putrajaya in the same area, to the South of Kuala Lumpur, providing a link to another major project, Kuala Lumpur International Airport.[100] It has also experimented with growth corridors, growth triangles, special economic zones, special development authorities, and development regions. This approach was first taken by China in the 1980s, and has been copied elsewhere across Asia in more recent times.[101] In some formulations such zones, as in Johor, are deliberately placed so as to take advantage of the proximity of an international border.

Unlike the Thai case study above, these initiatives take place not on sacral land in an pre-modern city conceived as a cosmic capital, but on red-field sites in undeveloped agricultural or rural or semi-rural locations far outside the capital city. A major example of this is the Iskandar Development Region, now referred to as 'Iskandar Malaysia' (IM) in the state of Johor. While initially the zone was named South Johor Economic Region (SJER), it was renamed 'Iskandar' to show respect to the present Sultan's father, Sultan Iskandar, who was Ruler of Johor from 1981 to 2010, and King from 1984 to 1989.

IM lies mainly to the West and North of the state capital of Johor Bahru (JB). Unlike Bangkok, JB is not a traditional space having sacral significance. Johor, as the most important of the states that splintered from the Malacca empire, has moved its capital on many occasions, and JB (meaning 'New Johor') was founded only in the mid-nineteenth century, coming under British influence and urban

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[99] Harding (n.86).
[100] Likosky, M. (2005). *The silicon empire: Law, culture and commerce*. Oxford: Routledge, 237.
[101] Huang, Y. (2008). *Capitalism with Chinese characteristics: Entrepreneurship and the state*. Cambridge: Cambridge University Press, 225.

design norms soon after that. It therefore lacks a deep cultural or religious concept of space, resembling most other large Malaysian cities, with a center mainly created by Chinese developers in the nineteenth or early twentieth century. It has also been governed almost exclusively from the beginning by British-style planning laws and local government laws, and its suburban reach latterly by British-style regional development laws.[102]

IM was established in 2007. It occupies an area at the very Southernmost tip of the entire Eurasian land mass, with Singapore just one kilometer away across the strait that separates it from Johor. It is however connected to Singapore by a modern bridge, known as the second link, which is close to IM's epicenter, and an older causeway connecting Singapore to JB's city center. It contains five areas that overlap geographically with the local authority areas of Iskandar Puteri, JB itself, and Pasir Gudang. IM's 'main purpose is to attract foreign and local tax-break-induced investment in the region by cooperation both between federal, state and local governments, and with other countries, especially Singapore'. As Kheng Koon Ng has put it, '[m]odelled ostensibly after the Pearl River Delta Economic Zone, Iskandar Malaysia seeks to maximize spillover effects for business and industry from land-scarce Singapore as well as other destinations. In its wake, the SEZ brought an unprecedented building boom and speculation in the international property sector'.[103]

Under section 4 of the enabling act, the Iskandar Regional Development Authority Act 2007, the objective is to 'develop the region into a strong and sustainable metropolis of international standing'. Its precise functions, defined extensively in section 5, are essentially to develop policies and plans for development, and give advice to the actual legal decision-makers. Since IM is co-chaired by the Prime Minister and the Chief Minister of Johor, and the federal Finance Minister is also a member, its influence is obviously very strong, despite its lack of legal decision-making powers.

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[102] Nadalutti (n.93), 6.
[103] Ng, K. K. (2020). 'Johor Bahru's urban transformation: Authority and agency revisited', in Hutchinson, F. E. and Rahman, S. (eds.) *Johor: Abode of Development?* Singapore: ISEAS, pp. 407-423, 407.

Studies of this project acknowledge that the Sultan of Johor has much interest in, and influence over, IM. As an official interviewed in one study in 2017 stated: 'We adopt a persuasive strategy because the final decision goes to the local council and the Johor state. Sometimes they have their own plans, and sometimes they have their hands tight [sc., 'tied'] because there is someone bigger behind them, so it is not a forward straight engagement'.[104] While interviewees have been 'very reticent to talk about [the Sultan's] role in the IM building process' and his name appears nowhere in promotional literature concerning IM, it is 'apparent that the Sultan's interests and decisions influence the kind of governance that emerges and leads the building of this zone. In terms of the Sultan's network with businesses, he has strong relationships with key figures in the economic business sectors'.[105] The reticence in acknowledging the Sultan's role is obviously very different from the King of Thailand's overt role in Bangkok's urban development, and perhaps reflects different historical and constitutional assumptions concerning the role of the monarchy in a modern democratic and constitutional system of government.

Given the various interested parties in IM, and the Forest City project, a major development within IM, in which the Sultan also holds a large stake, it seems clear that his influence is large and can also be seen as beneficial in terms of bringing relevant parties together in order to create economic growth in Johor. In this sense, IM is partly, but not simply, the personal project of the monarch.[106] Sultan Ibrahim has always displayed a great interest in his state's development, and has invested large sums in major projects in the state. These include IM and the Forest City project; the proposed high-speed railway linking Singapore to Johor/ IM and Kuala Lumpur; and Maharani Energy Gateway, an oil and gas company in Johor.[107] In September 2024 he visited the People's Republic of China together with the TMJ, his three other sons, and the federal Minister for Housing and Local Government (who is, one notes, himself ethnically Chinese).

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[104] Ng (n.103), 20.
[105] Ng (n.103), 24.
[106] Leng K. Y. and Mavroeidi, V. (2014). *Iskandar Malaysia labours to develop*. Singapore: ISEAS Perspective, 6.
[107] Friel, M. (2024). 'Malaysia's new king has a $5.7B family fortune. Here's how he spends his money', *Business Insider*, 2 February. Available at: https://www.businessinsider.com/malaysia-king-billionaire-vintage-cars-jets-sultan-iskandar-johor-ibrahim-2024-2, accessed 26 September 2024.

He met with President Xi Jin Ping, and negotiated a deal involving Malaysian and Chinese companies to move forward the stalled high-speed rail project, which will benefit Johor, and the presently languishing Forest City project.[108] It is also reported that the Forest City project will benefit from a newly established Special Financial Zone based there,[109] as well as the investment of US$1 billion by a Korean company.[110] The involvement of the Ruler as well as economic imperatives seem to entail the impossibility of the project being allowed to fail.

This all raises the question, to what extent can Malaysia's Rulers exercise power and influence over development that goes beyond the confines of the constitutional text? Are they justified in participating personally in the process of development, or even orchestrating that process? Here we need to look more closely at the powers of the Rulers.

Business and the Monarchy

The King and Queen are prohibited by Article 34(2) and (3) of the Federal Constitution from holding 'any appointment carrying remuneration or actively engaging in any commercial enterprise'. Before 1976 (section 16, Constitution (Amendment) Act 1976), Article 34 referred to 'office of profit' rather than 'appointment carrying remuneration'. Interestingly enough, the 1956 draft of the Federal Constitution provided more extensively than the final version for restrictions on the powers of the King and his Deputy, although not the Queen. They were prohibited from holding any office of profit, and from managing or directing any profit-making enterprise, but were not prevented from holding or managing any private property of their own. However, in the case of Johor the State Constitution of 1895 makes no mention of any such restrictions. Concerns as to royal involvement in business have been expressed, for example by the former Prime Minister Tun Mahathir Mohamad, who has openly criticised the

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[108] Astro Awani (2024). *Malaysia's sultan to visit China, eyes infrastructure support*. Available at: https://www.astroawani.com/berita-dunia/malaysias-sultan-visit-china-eyes-infrastructure-support-488304, accessed 26 September 2024.
[109] Medina A. F. (2024). *Malaysia issues incentives for Forest City Financial Zone*. Available at: https://www.aseanbriefing.com/news/incentives-for-malaysias-forest-city-financial-zone/#:~:text=The%20financial%20zone%20within%20Forest,in%20Southeast%20Asia%2C%20especially%20Singapore, accessed 26 September 2024.
[110] Bernama (2024). *Korean firm to invest US$1b in Forest City to develop first K-culture town* (2024). Available at: https://www.malaysiakini.com/news/716441, accessed 26 September 2024.

Johor royal family, saying that 'they shouldn't be involved in business dealings because of the unfair influence it would have on the Malaysian people … [but] unfortunately, the Malays cannot say no to their rulers. Their culture is such that if the rulers want to do something, whatever the constitution or the law may say, they cannot say no'.[111] The Sultan has defended himself against such charges by pointing out that he has to earn a living like anyone else in business, and cannot rely solely on his civil list monthly allowance of RM27,000 (around US$6400).[112]

Whether Mahathir's criticism holds water legally is another matter, and in the absence of any judicial precedent it probably turns on the highly debatable distinction between actively and passively engaging in commercial enterprise. In effect, although the Federal Constitution, unlike the draft of 1956, does not mention specifically the exception of the *King* holding and managing private property, the Sultan of Johor *as such* is not prohibited from holding or managing his personal property, including strategic investments designed to modernise the state, nor from engaging in commercial enterprise. As we have seen, official documentation relating to IM does not mention the Sultan's involvement, and similarly with Forest City project, despite the fact that news of his involvement would presumably represent a public-relations coup. Nonetheless, the Sultan's involvement in these projects is clearly not denied. The important point is that, even if there are real doubts as to the propriety of such investments, it is inconceivable that their legitimacy would be openly challenged as a matter of law, and perhaps only Mahathir could get away with the kind of overt public challenge mentioned above. The Rulers are subject to legal process in a special court created in 1993 to try civil and criminal cases involving them. But it is difficult to see the basis on which such a case could be brought, and in any event the leave of the Attorney-General is required to file such a case (Federal Constitution of Malaysia, 1957, Article 182). The cultural norm therefore still prevails, as it does in Thailand, that it is in practice, as Mahathir himself said, simply impossible to say

[111] Friel, M. (2024). 'Malaysia's new king has a $5.7B family fortune. Here's how he spends his money', *Business Insider*, 2 February. Available at: https://www.businessinsider.com/malaysia-king-billionaire-vintage-cars-jets-sultan-iskandar-johor-ibrahim-2024-2, accessed 26 September 2024.
[112] Malay Mail (2015). *Johor sultan defends businesses, says can't depend on RM27,000 monthly allowance*. Available at: https://www.malaymail.com/news/malaysia/2015/03/18/johor-sultan-defends-businesses-says-cant-depend-on-rm27000-monthly-allowan/861545#:~:text=%E2%80%9CI%20cannot%20depend%20on%20my,pepper%20in%20the%2019th%20century, accessed 26 September 2024.

no to the Ruler. This remains true despite treaties, constitutions, laws, treatises, and conventions suggesting otherwise.

Nonetheless, that there are limits to the exercise of royal power were indicated by events concerning land management, a ‘central part of state government work, holding great implications for zoning and real estate development’ that occurred in 2014.[113] The Housing and Property Board Enactment (2014) established an agency to oversee development of housing and real property in Johor. As originally drafted, the Enactment gave the Sultan power to appoint board members, as well as to dissolve the board, and oversee its accounts. This led to concerns from some politicians and civil society leaders regarding the operational role that of the Sultan in these matters. Despite the large influence of the Rulers, it is highly unusual for specific statutory discretionary powers to be granted to a Ruler, outside the issue of religion (the Rulers are still heads of Islam in their states). One politician stated that he supported ‘the constitutional role of the Malay rulers as defined by the Federal Constitution … [But] efforts to give Sultan Ibrahim … executive powers should never happen’. Another criticised Johor’s Chief Minister, stating that he ‘should have acknowledged that the power of the people is greater than the power of the monarchy and not proceeded with the tabling [sc. of the bill].’ The Malaysian Bar Council cautioned the Johor state government that granting such far-reaching administrative powers to the Ruler would expose him to criticism. Thus, at the last hurdle and in the face of statements that the bill would be unconstitutional – the relevant provision was substituted with one requiring the Sultan to act on government advice, thus restoring constitutional rectitude. Nonetheless the bill remains in limbo, not having received the royal assent.[114] Even in this episode, it was in the end impossible to engineer a direct contradiction of the Ruler’s position.

A Power Behind the Law

Given the general lack of transparency around the IM investments, it is difficult to assess with any exactitude the importance of the Sultan’s role in Johor’s rapid development. But the studies of IM referred to above make it clear that this role

[113] Hutchinson and Nair (n.80), 24ff.
[114] Hutchinson and Nair (n.80), 347-8.

is extremely important. However, to repeat, this does not entail any legal powers as such being exercised by the Sultan. All relevant decisions are taken under statutory discretion by the development authority, local authorities and the state and federal governments, within the law as laid out in the enabling legislation, the Iskandar Regional Development Authority Act (2007); the Local Government Act (1976); and the Town and Country Planning Act (1976). Thus the monarchy in the Johor case, unlike in the Thai case, operates *behind rather than alongside* the formal legal-rational planning system. This system, despite its elements of public participation, scrutiny of development plans, and so on, remains very statist and top-down it its practical operation.[115] Given the IM enabling legislation, this is likely to be ever truer for development land outside the city.

The two laws dating from 1976 are both examples of Malaysian law following British precedents. Planning laws on the British pattern were introduced early in Singapore's colonial history, and were largely copied elsewhere in the region. Like Thai planning laws, Malaysian planning laws are based squarely on the UK Town and Country Planning Act (1947), and the Iskandar Regional Development Authority Act 2007 bears a strong resemblance to British 1940s 'new towns' legislation and other similar laws giving broad authority to statutory bodies to develop particular geographical areas (see, e.g., New Towns Act 1946 (UK)). Unlike in the case of Thailand, however, the Sultan of Johor does not exercise such powers outside the law. Rather he exercises large influence in two ways: first, as a major investor, and secondly, by influencing those who are statutorily empowered to make decisions, such as the development authority and relevant governments at federal, state, and local levels.

In contrast to Thailand, the expansion of royal power, either generally or in matters of land and development, has not become an issue of controversy, largely because most citizens will be unaware of this expansion (in its economic implications), or else because they approve of it (in political terms).[116] The

[115] Rabe, N. S., Rushdi, I. H., and Shukri, A. M. (2013). 'Comparative study on planning legislation and urban governance between Malaysia and Türkiye', *Journal of Architecture, Planning and Construction Management*, 13(2), pp. 46-56.

[116] A research project by the Institute of Southeast Asian Studies in Singapore in 2017 found that 75% of Johor residents approved of occasional interventions in politics by the Ruler. See Saat, N. (2017). 'Johor survey 2017: Attitudes towards Islam, governance and the Sultan', *ISEAS Perspective*, Issue 2017/ 83. Available at: https://www.iseas.edu.sg/wp-

economy of Johor is undoubtedly assisted in many respects by the Sultan's investments and exercise of influence. Johor's links with Singapore's are crucial. Around 300,000 Johoreans cross the border daily to work in Singapore, bringing high-value Singapore dollars into Johor's economy (Channel News Asia, no date). In April 2024 Prime Minister Anwar Ibrahim stated that Johor, whose economic growth is expected to exceed that of other Malaysian states in the next one to two years, is 'set to become the most economically developed in the country … the robust growth comes in anticipation of two high-impact projects, namely the Johor-Singapore Special Economic Zone (JS-SEZ) and the Special Financial Zone (SFZ) in Forest City' .[117]

Theoretical lessons drawn from the Thai and Malaysian experiences

In this article, we have attempted to show how modernization (in this case literally the development of built environment), can occur in ways that are orchestrated, supervised or in some cases even actually executed by the monarch. Here, our focus is exclusively on the two types of 'legitimate authority' as proposed by Max Weber—legal-rational and traditional domination.[118] Under the first type—the legal-rational system, political power is formally derived from bureaucratic rules and parliamentary law, under the ultimate supervision of the judiciary. In contrast, the legitimacy of the traditional ruler, including the monarchy, stems from 'the basis of long-standing custom' or 'the belief in the sanctity of the [dynastic] past'.[119] There is an assumption that modernization is expressed through the superseding of traditional authority by legal-rational authority. In Weber's construct modernization in its complete sense can only be achieved through, and is notably expressed by, the legal-rational.[120] Despite

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content/uploads/pdfs/ISEAS_Perspective_2017_83.pdf, accessed 17 August 2025. This appears to contract with the situation in Thailand.

117 Aman, A. S. (2024). 'Johor will be Malaysia's next growth engine thanks to Johor-Singapore SEZ and Forest City SFZ', *New Straits Times*, 13 August. Available at: https://www.nst.com.my/business/economy/2024/08/1090760/johor-will-be-malaysias-next-growth-engine-thanks-johor-singapore, accessed 26 September 2024.

118 Bendix, R. (1977). *Max Weber: An intellectual portrait*. Berkeley: University of California Press, 294ff.

119 Beetham, D. (1985). *Max Weber and the theory of modern politics*. London: Polity Press, 68; Schiel, K. (2005). *Monarchy: A primary source analysis*. New York: Rosen Publishing, 9.

120 Fong, J. (2009). 'Sacred nationalism: The Thai Monarchy and primordial nation construction', *Journal of Contemporary Asia*, 39(4), pp. 673-696, 675.

belonging to the traditional form of authority, the legitimacy of the monarchy can clearly only exist under the legal-rational in the narrow case where the monarch's role is almost purely symbolic. Here he acts on the advice of the agents of the legal-rational (that is, democratically elected, parliamentary accountable political leaders), who are in turn advised by expert civil servants, who keep the state on a legal and rational footing, with one or other degree of judicial control to ensure the rule of law operates in fact, not just in theory. [121]

In our case studies, the interesting issue we discover is not only that there are political settings in which modernization does not result in traditional authority being completely replaced by its legal-rational counterpart, but that in these settings, the monarch may act in ways that are inconsistent with, and even disregard, the primacy of legality. This remains true even where the monarch is, formally speaking, subject to constitutional constraints normally described as a state of 'constitutional monarchy' (Malaysia) or the DRKH (Thailand). To be clear, the monarch acts under his own power alongside but independently of a system of decision-making concerning the built environment (Thailand); or he acts to support but also to influence and advance such decision-making (Johor). The formula of 'acting on advice' does not capture the actuality of either the Thai or the Malaysian system. Even where the monarch's interventions are seen as constitutionally legitimate in some sense, where the text is extended in meaning or else ignored in practice, the role of the monarch is a proactive one. Our case studies also demonstrate how royal authority shapes and influences the design and implementation of laws related to town development. Our findings can be theorized more specifically as follows.

On the one hand, the Thai experience reflects how modernization of urban spaces serves as a battleground for the struggle for political dominance between the monarchy and the process of democratization. Two issues emerge from the Bangkok experience illustrated above. First, it supports an observation made by Rita Padawangi that '[u]rban development in Southeast Asia is a manifestation of power contestations.'[122] As a domain where the struggle for political dominance

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[121] De Visser, M. and Harding, A. (2022). 'Monarchical constitutional guardianship and legal métissage in Asia', *Asian Journal of Law and Society*, 9(3), pp. 345-362, 347.

[122] Padawangi, R. (2022). *Urban development in Southeast Asia*. Cambridge: Cambridge University Press, 4.

between the monarchy and reformists takes place, the power to define modernization through urban architecture has a constitutional significance. Designs of urban architecture visually convey the country's dominant 'constitutional identity'—that is, the fundamental characteristics of its constitutional system.[123] Put simply, apart from the revival of traditional rituals and customs, urban development has been another avenue for the monarchy to visualize its political dominance.[124] Second, power struggles in Thailand manifest not only through the physical design of modern urban structures but also through the manner of their legal implementation. Ostensibly, the PP introduced Bangkok to a legal-rational approach to town planning. The adoption of modern legislation in place of *Phrabrom Rachaongkarn* for planning implementation signifies the subservience of the monarchy to a more legal-rational governance. Although the revolutionary group did not succeed in firmly establishing constitutionalism and democracy, it at least made the legal-rational framework a primary mode of town planning in post-absolutist Thailand. Consequently, to restore royal hegemony through the neo-royalist ideal in post-1932 Thailand, the TCCS cannot entirely reject the IPR. Rather, it must be revived and implemented in a more legal and rational manner. However, this also means that while modern building control and town planning laws have effectively replaced *Phrabrom Rachaongkarn* as the main vehicle for urban modernization in Bangkok, they do not fully supplant the TCCS. In fact, their enforcement falls under the aegis of the TCCS, succumbing to its logic and rationale. The Thai experience ultimately reflects how town planning-related laws facilitate the monarchy's alignment with modernization in a way that enables it to preserve its sacral past.

In contrast to the Thai case, the Malaysian experience suggests how modern rational laws aimed at spearheading 'futuristic architecture' link the monarchy to the capitalist global market.[125] Moreover, in contrast to the IPR, which emphasizes the connection between urban development and civic participation,

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[123] Jacobsohn, G. (2010). *Constitutional identity*. Cambridge: Harvard University Press, 2-8; Leelapatana (n.13), 2.
[124] Fong, J. (2009). 'Sacred nationalism: The Thai Monarchy and primordial nation construction', *Journal of Contemporary Asia*, 39(4), pp. 673-696.
[125] Purwani, O. (2023). *The traditional royal-sponsored urban development in Yogyakarta; why different from futuristic Gulf cities?*. Available at: https://blogs.lse.ac.uk/seac/2023/08/16/the-traditional-royal-sponsored-urban-development-in-yogyakarta-why-different-from-futuristic-gulf-cities/, accessed: 9 October 2024.

Thai and Malaysian civil society tends to be acquiescent to royal-sponsored development projects. In fact, anyone questioning their legitimacy may face charges of lèse-majesté (Thailand) or sedition (Malaysia). Their interventions cannot in any but extreme cases, and perhaps not even then, be obstructed or even gainsaid, because it is virtually impossible to say no to their demands. This is, we suggest, especially the case where the monarch has a personal property or supervisory interest (Bangkok's civic district, or the Johor economy) in the manner in which development of the built environment occurs. It is doubtful whether any appropriate language even exists in Thai or Malay that can express the idea of simply saying 'no' to the monarch's desires.

Conclusion

The lesson drawn from Bangkok and Johor is that modernization may be achieved and even represented by different sources of legitimation. According to the political and social context, traditional and/ or legal-rational authority may be in evidence, and may exist in varying relations and proportions to each other. There appears to be no obvious progression over time from one to the other. In Thailand, modern legal-rational instruments, particularly building control and town planning legislation, have even turned a royal space like the Grand Palace into an epicenter of modern urban management in old-town Bangkok, thereby symbolically reinforcing the royal political pre-eminence. In the Johor case the status of the Ruler is enhanced by the visible rise of a vast area of new development and transport infrastructure. In fact, our case studies are both contemporary, ongoing development exercises affecting the built environment much more than would have occurred in previous decades. A case can be made that the power of monarchy in both cases has increased, not decreased, over time. The Thai King appears to exercise more power than his father and predecessor. Malay Rulers come and go and the office of King is filled anew every five years. But the present incumbent clearly assumes the exercise of great power and influence than his predecessors. The issue remains to what extent this situation is tolerated in changing times. In Thailand there have been extensive public protests concerning the King's exercise of personal power. No such protests have as yet been made in Malaysia, beyond the slight cavilling of a few politicians, and it appears from the evidence that the general public either supports the King's occasional interference in political matters, clearly a breach of constitutional norms, but one that seems legitimate. Or else the public is simply not aware of these issues in the case of behind-the-scenes use of a combination of property and influence. But even those who would undoubtedly be aware of these matters, such as leaders of the bar or those competing for contracts, do not in essence seriously challenge the legitimacy of the monarch's interventions.

Where this all ultimately ends remains uncertain. It is possible that the monarch is ultimately confined within the bounds of constitutional action. It is equally possible that the matter is fudged in such a way as to attempt to reconcile contradictory norms, which in Southeast Asian societies would be highly usual. It is equally possible that the present status quo will continue indefinitely. For the moment it is necessary to study and remain alert to the multiplicity of agencies (we have addressed only one) that are in practice conceiving and building the megacities and global economies of the future.

CHAPRER 5

THE EXECUTIVE-LED PLANNING REGIME OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION*

By Swati Jhaveri**

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Abstract

This paper considers the distribution and accountability of planning powers in the urban planning regime of the Hong Kong SAR. This paper identifies the power holders who are charged with steering urban planning, with a view to demonstrating that despite the existence of a multi-actor and consultative process, there is a still a concentration of power on planning matters in particular organs of the executive branch of government. It is not unusual for planning powers to be concentrated in the executive branch of government: however, in the Hong Kong context it is the particular concentration of powers in a small circle of power holders within the executive branch that might need reform. The discussion concludes with sketching out possible ways of dispersing power, within and outside the executive branch, to enhance the legitimacy of the planning regime, without compromising its efficacy.

Introduction

An ideal planning regime promotes sustainable development with due regard to the need to protect the environment and architectural heritage through as democratic a process as possible that adequately reflects the views of all stakeholders. The process also ought to take into account a broad range of development and contra-development considerations. These considerations are then adequately balanced in decision-making by the relevant planning authorities. The process for the exercise of planning power should be neutral, with no particular ideology (pro-development or pro-conservation) embedded in the framework.[1] When considered in the context of the lived experience of most planning regimes, it is clear that there will be challenges to the realization of such an idealized planning regime.

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[1] Patrick McAuslan, *The Ideologies of Planning Law* (Pergamon Press 1980); J Adshead, 'Revisiting the Ideologies of Planning Law: Private Property, Public Interest and Public Participation in the Legal Framework of England and Wales' (2014) 6(1) International Journal of Law in the Built Environment 174.

The challenges in the Special Administrative Region of Hong Kong (HKSAR) context are particular. The HKSAR's population is growing at a remarkable rate. This population growth creates a particular set of pressures on land use and planning in the HKSAR because of certain unique circumstances—the HKSAR has a relatively open border, allowing a regular influx of people into an already crowded physical space.[2] This population growth places pressure on housing and infrastructure, the development of which are pressing imperatives for the government. The geographical terrain of the HKSAR exacerbates the problems of population growth and density. The topography of the HKSAR, with a notable absence of extensive flatland, contributes to an overall physical land shortage for development.[3] Property and infrastructure developers, therefore, have had to deconstruct the natural environment. Hills and mountains need to be excavated, and, in these areas, land reclamation of the harbour is commonplace to 'create' new land for development. This deconstruction of the natural environment is a trigger for testing the balances struck between development and public interest concerns in the HKSAR. Another factor that complicates planning in the HKSAR is the increasing interface between the HKSAR and China on infrastructure projects. Cross-border projects like the Guangzhou-Shenzhen-HKSAR Express Rail Link and the Zhuhai-Macau-HKSAR Bridge are complex points of interface between the local planning regime and the cross-border planning regime in Mainland China.

It would be too ambitious to evaluate the entire planning regime of the HKSAR in a single article. This article has a more modest, but important, objective. It focuses on the question of the distribution and accountability of executive power in the context of urban, versus rural, planning since it is in these contexts that population growth is most acutely felt. This article identifies the power holders who are charged with steering urban planning, which involves striking the balance between competing interests with a view to demonstrating that, despite the existence of a multi-actor and consultative process, there is a still a concentration

[2] Hong Kong ranks second in the Open Border Index compiled by the World Economic Forum, https://www.worldatlas.com/articles/top-50-countries-on-the-open-border-index.html, accessed 2 November 2021. There are only two other Asian jurisdictions in the top 20: Singapore (1) and Japan (19).

[3] Town Planning in Hong Kong (Town Planning Division, Lands Department, 1984) 78; Noam Levin, Matan E Singer and Poh Chin Lai, 'Incorporating Topography into Landscape Continuity Analysis: Hong Kong Island as a Case Study' (2013) 2(4) Land 550, 551.

of power on planning matters within particular bodies of the executive branch of government. It is not unusual for planning powers to be concentrated in the executive branch of government; however, in the Hong Kong context it is the particular concentration of powers in a small circle of power holders within the executive branch that might need reform. The discussion concludes with sketching out possible ways of dispersing power, within and outside the executive branch, to enhance the legitimacy of the planning regime, without compromising its efficacy.

Overview of the statutory framework for town planning in Hong Kong

Urban planning in Hong Kong is regulated mainly by the Town Planning Ordinance (TPO)[4] and, in particular, by general statutory zoning maps prepared pursuant to the TPO. The Town Planning Board (TPB), established by the TPO, prepares statutory outline zoning plans (OZPs) for the different geographical districts in Hong Kong.[5] OZPs designate land within a particular district for different uses.[6] Such uses can include residential, industrial, commercial, transport infrastructure, use of land as a 'comprehensive development area',[7] or uses that promote conservation and the protection of the environment. Applications for planning permission must comply with the OZP. Adherence to any planning permission that is granted is maintained via various enforcement powers under the TPO. In addition, in Hong Kong the government is the 'head' landlord of most land[8] and is, therefore, also able to regulate development and

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[4] The focus of the paper is on urban planning. The Town Planning Ordinance, Cap 131 (1939) (TPO) is supported by a range of subsidiary legislation: Town Planning Regulations, Cap 131, sub leg A; Town Planning (Appeals) Regulations, Cap 131, sub leg B; Town Planning (Taking Possession and Disposal of Property Regulation, Cap 131, sub leg C.

[5] The geographical planning districts in Hong Kong are spread around Hong Kong Island, the Kowloon Peninsula, the Outlying Islands, and the New Territories https://www.pland.gov.hk/ pland_en/info_serv/tp_plan/images/sta_plan.jpg, accessed 24 November 2021.

[6] An outline zoning plan may be preceded by a 'development permission area plan' as a temporary measure. TPO (n 4) ss 3(1)(b), 20.

[7] A comprehensive development area plan is a special type of zoning plan introduced for larger scale renewal and development plans for new towns. The main purpose of such comprehensive planning is to implement broader development of an area taking into account environmental, traffic and infrastructure constraints. TPO (n 4) s 4(1)(f).

[8] Land in Hong Kong was previously owned by the Crown under British colonial rule and now the People's Republic of China (which has delegated management of lease management to the Hong Kong Special Administrative Region (HKSAR) government). The chief executive then has the power to grant leases over land for ownership. Basic Law of the Hong Kong Special

planning permission through the imposition and enforcement of lease conditions.[9]

This section provides an overview of the legislative framework governing urban planning in Hong Kong, with a focus on the TPO. It considers the objectives and procedures of the planning regime and what this indicates about the various priorities and interests embedded in the planning system in Hong Kong. More importantly, it looks at who the main power holders are within this legislative framework.

The objectives of the TPO

The TPO was enacted in 1939 and remained largely unchanged until 2000.[10] Major amendment exercises took place in 2000 and 2003, prompted by 'the increasing complexity of the social, economic and political environment in Hong Kong', which altered prevailing development needs.[11] These amendments purported to enhance the efficiency, transparency, and 'effectiveness' of the statutory planning process. The executive (via the Planning Department) consulted professional planning institutes, real estate developers, and environmental advocacy groups on the need for a more open system, which would involve the public more extensively in the entire planning process. At the

Administrative Region of the People's Republic of China (1990), ch V, art 7, s 2. Therefore, the sale and purchase of land in Hong Kong is essentially the sale and purchase of a leasehold interest in land. The nature of the interest of those who 'buy and sell' land in Hong Kong is complex: for example, arts 6 and 105 protect in various ways the 'right of private ownership of land'. See Judith Sihombing and Michael Wilkinson, A Guide to Hong Kong Conveyancing (LexisNexis 2014) chs 2 and 5. With one exception, there is no general system of freeholding of land in Hong Kong. The only exception is the land owned by St John's Cathedral. Lease granted by the government should not expire past 2047, which is when Hong Kong reverts back to Chinese rule.

[9] See Anton Cooray, 'Government as Ground Landlord and Land Use Regulation: The Hong Kong Experience' in Tsuyoshi Kotaka and David L Callies (eds), Taking Land: Compulsory Purchase and Regulation in Asian-Pacific Countries (University of Hawaii Press 2002) 96. The work of the outline zoning plans (OZPs), therefore, is supported by the enforcement of land lease conditions.

[10] This is unusual: Hong Kong went through significant urban redevelopment during this period. It is indicative of the fact that there is a significant amount of soft power that animates the planning regime. Roger Bristow, Land-Use Planning in Hong Kong: History, Policies and Procedure (OUP 1984) 557.

[11] Brief by the Planning and Lands Bureau to the Legislative Council (January 2000) para 2; Brief by the Housing, Planning and Lands Bureau to the Legislative Council (7 May 2003) para 1 (Housing Brief).

same time, it was thought to be necessary to introduce time limits at various stages of the process to improve the efficiency of the statutory plan-making process.[12]

The amendment exercises thus attempted to solve the perennial problem of how to balance the need for efficiency in progressing urban development to meet prevailing needs against sufficient consultation and the need for the government to reflect carefully on contra-development concerns like the environment.[13] As expressed by the Secretary for Planning and Lands in his brief to the Legislative Council in 2000:

> [t]he streamlining of the planning process as provided for under the Bill should expedite development and result in considerable economic gain to the community as a whole, albeit offset to some extent by other measures of the Bill that provide for more extensive public participation which tends to lengthen the planning process. ... Nevertheless, greater public involvement in the plan-making process and planning application system, greater fairness, greater attention to the environment and urban design aspects in the planning process and more effective development control are likely to be accepted by the wider community as a reasonable balance against the sole quest for economic gains.[14]

In the government's brief to the Legislative Council on the amendments, the Secretary for Planning and Lands affirmed that:

> [t]he Bill has placed due emphasis on environmental planning and will be conducive to the creation of a better environment. We have included environmental factors in the proposed planning process so that environmental considerations would be taken into account at every stage of the planning process.[15]

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[12] Report of the Bills Committee on the Town Planning Bill (30 May 2000) para 2 (Report on the Town Planning Bill 2000); Report of the Bills Committee on the Town Planning (Amendment) Bill 2003 (30 June 2004) para 4 (Report on the Town Planning (Amendment) Bill 2003).
[13] What McAuslan refers to as competing ideologies, albeit using different terminology. McAuslan (n 1) at 265.
[14] Report on the Town Planning Bill 2000 (n 12) paras 23-4.
[15] Ibid para 25. Similar brief statements were made on the human rights' implications of the amendments.

The next section evaluates how the executive manifested this balance in the various provisions of the TPO.

The Planning Process under the TPO

The process for drafting and approving an OZP is complex. The TPO envisages several rounds of public representations, followed by open hearings where the TPB deliberates on public representations, and then a further round of internal deliberations by the TPB that are closed to the public.

Pursuant to section 5 of the TPO, a draft OZP is open for public inspection for a period of two months. Section 6(1) provides that the public have two months to make representations to the TPB on the draft plan. The TPB should then, as soon as reasonably practicable after the expiration of the two-month period, make all representations made to it available for public inspection.[16] There is then an opportunity for public comment on these representations for a period of three weeks.[17] The TPB will then meet to consider these public representations and comments as soon as reasonably practicable, giving reasonable notice to the contributors.[18] The TPB then decides whether to propose any amendments to the OZP.[19] If the TPB makes amendments, it must make these available for another round of public inspection.[20] This is followed by another meeting of the TPB to consider whether to make further amendments to the draft OZP.[21] Once they have finalized it, the TPB submits the draft OZP to the Chief Executive-in-Council[22] for approval (together with any representations and amendments made to the original plan).[23] The Chief in Council can then approve, refuse, or refer the plans back to the TPB for consideration and amendment; if approved, the plans are then again exhibited for public inspection.[24] Pursuant to section 13 of the

[16] TPO (n 4) s 6(4).
[17] Ibid s 6A (1).
[18] Ibid s 6B.
[19] Ibid.
[20] Ibid s 6D.
[21] Ibid s 6F.
[22] The Chief Executive in Council denotes the situation where the chief executive—the head of government in Hong Kong—acts after consulting with the Executive Council (that is, the 'Cabinet' of the Hong Kong government): Interpretation and General Clauses Ordinance, Cap 1 (1966), s 3.
[23] TPO (n 4) s 8.
[24] Ibid s 89.

TPO, these plans then bind all public officers and bodies for the exercise of any powers vested in them.

Section 16 deals with the grant of specific planning permission applications. These applications are made to the TPB. The applicant must obtain the consent (where reasonably practicable) of any affected landowners and must make the relevant application available for public inspection. They are also required to post the applications in a prominent position on or near the land to which the application relates. There is a three-week period for public comment on the planning application. Any comments are then also made available for public inspection. Section 16(3) specifies that the TPB must consider a planning application within two months of receiving it. While the process for approving OZPs and planning permission applications provides an opportunity for public participation, the deliberation of public representations by the TPB is not open to the public, nor is the TPB required to provide reasons for its decisions.[25] It is therefore unclear how the TPB balances out the various competing considerations when making its decisions.

With respect to the preparation of the OZP and the grant of planning permission, as further discussed below, despite the involvement of the public in the planning process, the TPB and Chief Executive are vested with a significant amount of power to make the ultimate planning decision that can potentially override any public input. There may also be a concern that the balance embedded in the TPO may not be neutral, but in favour of development. This is not surprising and is typical of planning regimes—they are in favour of urbanized development to meet prevailing housing and infrastructure needs, which are the most pressing concerns in increasingly densely populated and stressed urban environments around the world. In the HKSAR context, this is apparent when considering the procedure for amendments to planning applications. Once approved, any amendments to planning applications are dealt with via a bifurcated process. Sections 16A(1) and (2) of the TPO distinguish between Class A and Class B amendments. In the interests of expediency in development, only the latter need

[25] The TPO does not require reasons. The TPB typically issues a 'Gist of Decisions'. See Guidelines on the Observation of Meetings of the Town Planning Board and Its Committees https://www.info.gov. hk/tpb/en/forms/pamphlet/observation_e.pdf, accessed 24 November 2021.

to be submitted to the TPB for approval and are then dealt with by a much simpler procedure than is used for the initial planning application approval under Section 16. Class A amendments are considered minor in nature. The TPB itself has the power to designate amendments as Class A and Class B. There are currently 19 categories of Class A amendments. This includes: changes in the gross floor area or plot ratio of a development; reduction or increase in the number of housing units under a certain threshold; changes in the number of building blocks originally proposed for a site; changes in building height under a certain threshold; changes in type and mix of uses within the same category of use; and changes in the total area size or location of public open space within a development project.[26] This places a significant amount of authority in the hands of the TPB. Section 16A(10) empowers the TPB to define and alter the list of Class A and B amendments over time through publication of a notice in the government gazette. Once published, the lists take immediate effect; there is no formal consultation process required to alter the lists.

The actual authority to consider whether to approve Class B amendments is with the TPB but can be delegated by them to the Director of Planning, Deputy Director of Planning, and Assistant Directors of Planning in the District Planning Branch of the Planning Department. It is only where the latter are inclined to refuse permission for Class B amendments that the matter is submitted to the TPB for consideration.[27] Such delegations of authority by the TPB are permitted pursuant to section 2(5)(b)(i) of the TPO. The argument is that this may be necessary to alleviate the workload of the TPB and/or facilitate decision-making by an alternative government division in terms of expertise and knowledge.[28] This concentration of power in a small circle of executive bodies is discussed further below.

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[26] Town Planning Board Guidelines no 36A for Class A and Class B Amendments to Approved Development Proposals, Doc TPB PG-No 36B (Hong Kong Government Gazette 2 March 2018) https://www.info.gov.hk/tpb/en/forms/Guidelines/TPB_PG_36.pdf, accessed 24 March 20214.

[27] Ibid at para 3.

[28] *Report on the Town Planning (Amendment) Bill* 2003 (n 12) paras 401.

The Executive-Led Planning Regime under the TPO

This section considers further the range of institutions involved in designing and implementing planning policy. It is clear from the discussion that follows that there is a concentration of power on planning matters with a relatively small circle of personnel and bodies within the executive. This may not be that distinct from the experience elsewhere. The executive branch (relative to the legislature and judiciary) typically has the relevant expertise and knowledge of the developmental imperatives of a particular city. It also has the reach and resources to carry out any public engagement involved in the planning process. In the Hong Kong context, the Basic Law has always been interpreted as embodying an executive-led system of governance.[29] Therefore, it should be unsurprising that power is concentrated in the executive branch. However, of particular note in Hong Kong is that the decision-making power is concentrated in a small circle of decision-making centres within the executive rather than spread across a network of executive and bureaucratic bodies. There may thus be a deficit of intraexecutive checks and balances. This is where the legislature, courts, and the public may be modest avenues to redress the balance, pending a broader dispersal of power across the executive branch. This is considered further below.

While there is extensive legislation setting out the planning regime of Hong Kong, the operationalization of planning policy is largely left to administrative discretion. The legislative framework is focused on empowering various decisionmaking bodies and implementing a certain process. The actual policy-making is achieved through non-statutory means with the OZPs evidencing what the development policy is in Hong Kong. This explains, to a significant extent, the growth in the use of 'soft law' (guidelines and policy documents) promulgated by the executive to structure its discretion. Through the increased 'soft law' the executive (versus the legislature) is central in defining planning policy goals. Legislation has become the secondary vehicle for defining policy and implementing and structuring planning power. This mirrors the experience of

[29] James TH Hang, 'Submission to the Public Consultation on 'Development of the HKSAR's Political System" for the Panel of Constitutional Affairs, Legislative Council, Hong Kong Special Administrative Region, LC Paper no CB(2)1155/99-00(03) https://www.legco.gov.hk/yr9900/english/panels/ca/papers/1155e03.pdf, accessed 24 March 2021.

other jurisdictions.[30] One of the most prominent examples of the use of soft law is the use of guidelines—specifically, the Hong Kong Planning Standards and Guidelines. These stipulate the general parameters for determining the scale, location, and site requirements of various land uses, community facilities, and infrastructure according to population and demographic factors. The relevant Guidelines aim to serve as a general reference to ensure that, during the planning of land use, the government will reserve adequate land for public utilities and facilities in new towns, new development areas, and other land development projects. The compilation of these Guidelines is coordinated by the Planning Department. The Guidelines are de facto binding on other relevant bureau and departments.[31]

There are a significant number of statutory bodies and government departments bound by these and other guidelines issued by the Planning Department, including the Antiquities and Advisory Board, the Antiquities and Monuments Office, the Antiquities Advisory Board, the director for environmental protection, the Advisory Council on the Environment, the Environmental Protection Department, the Urban Renewal Authority,[32] the Secretary for Home Affairs, the Home Affairs Bureau, the Audit Commission, the Food and Environmental Hygiene Department and the District Councils (including sub-committees), the Civil Engineering and Development Department, the Secretary for Planning, the

Secretary for Development, the Leisure, Cultural and Services Department, the Planning Standards Sub-Committee, the Drainage Services Department, the Transport Department, and the Country and Marine Parks Board. This is a diverse mix of government departments all crowding for space in the planning context. However, the statutory framework makes it clear that these various government bodies operate in an advisory capacity and ultimately do not possess any—*de jure* and, arguably, *de facto*—decision-making authority. Typically,

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30 See Greg Weeks, Soft Law and Public Authorities (Hart Publishing 2017), especially Part I (The Rise of Soft Law: Definitions and Issues).
31 *Hong Kong Planning Standards and Guidelines* (last updated 25 July 2018) https://www.pland. gov.hk/pland_en/tech_doc/hkpsg/full/index.htm, accessed 24 March 2021.
32 Set up by the Urban Renewal Authority Ordinance, Cap 563 (2001), replacing the Land Development Corporation—the function of the Urban Renewal Authority is to aid the regeneration of older urban areas.

decisions under the TPO involve the TPB (and its subcommittees), the Planning Department, and the Chief Executive in Council.

The TPO reposes a concentration of power in the hands of the TPB and the Chief Executive of the HKSAR when it comes to the statutory OZP that sets the meta-plan for the development of the HKSAR. The Chief Executive comes in at the end of the process; until then, the engine for the approval and vetting of plans is the powerful TPB.[33] Section 2 of the TPO provides that the Chief Executive appoints the TPB and that this shall consist of five official members and approximately 28 non-official *ex officio* members. There are no prescribed qualifications or explicit restrictions on who can be appointed to the TPB. Typically, this is headed by the Secretary or Permanent Secretary for Development (Planning and Lands). It is then staffed with: (i) other members of the government, drawn from the relevant departments and bureau (for example, the Transport and Housing Bureau, the Transport Department, the Home Affairs Department, the Environmental Protection Department, or the Lands Department); (ii) representatives of developers; (iii) representatives from utility companies; (iv) academics; and (v) business leaders. This shows some—much needed—emphasis on technical and economic expertise in matters of development and planning. There does not appear to be a convention of appointing nongovernmental or charitable organizations that may speak to public interest issues like heritage or the environment. It can be argued that this might undermine the representativeness of the TPB as a body.[34] Further, the heading up of the TPB by a member of the executive further undermines its independence. A 2018 study carried out by a local think-tank—the Bauhinia Foundation Research Centre—proposed the idea of self-nominations to the TPB and the setting up of a Select Committee in the Legislative Council to consider these nominations. This was largely motivated by a desire to increase the manpower of the TPB for greater efficiency, but it can also have a positive impact on the

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33 Sitting plenary and via two sub-committees: the Metro Planning Committee and the Rural New Town Planning Committee.

34 Indeed, the TPB has been the subject of much concern during amendment discussions with the TPO. *Housing Brief* (n 11) para 1 (on the operation and composition of the TPB, a major concern in terms of transparency and accountability).

representativeness and legitimacy of the TPB.[35] The absence of published and reasoned decision making by the TPB further creates a transparency gap.

With respect to the TPB, it is also important to factor in the role of the private sector. It is not uncommon for the latter to engage in informal discussions with the Town Planning Department—this is common in most planning regimes in different jurisdictions. The legal and regulatory personnel of property developers will be staffed and mobilized to maintain communications with planning departments to ensure they have a finger on the pulse on planning matters.[36] This creates a public perception risk that members of the public may feel that where there is any disagreement with the outcome of a planning permission application and/or an OZP, a developer may choose to deal with the issue by way of informal discussions and negotiations with the planning authorities versus a formal appeal—the concern being that this takes decision-making outside the realm of hard and soft law to a negotiated terrain between the public planning bodies and the private sector.[37]

The existing planning system would, therefore, benefit from reform to enhance representativeness, transparency, and accountability. One solution would be to reconfigure the planning process to disperse power across a wider network of administrative bodies working in concert with each other.[38] There is, in fact, precedent for such networked decision-making in the HKSAR in the case of the rezoning of Ap Lei Chau, an island just off the boundaries of the main Hong Kong Island, from commercial to residential use. The rezoning proposal was put forward to deal with the persistent housing shortage. To build large-scale housing,

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[35] Executive Summary of the Report of the Bauhinia Foundation Research Centre (21 September 2018) para 11. http://www.bauhinia.org/assets/document/Executive_Summary_eng_20180920. pdf, accessed 24 March 2021.

[36] Some are more cynical about these connections/relationships between developers and planning authorities. Oliver Wainwright, 'The Truth about Property Developers: How They Are Exploiting Planning Authorities and Ruining Our Cities' The Guardian (17 September 2014) https://www. theguardian.com/cities/2014/sep/17/truth-property-developers-builders-exploit-planning-cities, accessed 24 March 2021.

[37] On the question of appeals, it is also important to note that there are two different appeal processes under the Town Planning Ordinance. Appeals against planning permissions go to the Town Planning (Appeals) Board, which is an independent tribunal. Appeals against OZPs go to the Chief Executive in Council. Arguably, this is designed to ensure that macro policy issues are decided by the government, while only technical issues will be determined by a specialized tribunal.

[38] Edward Rubin, *Beyond Camelot: Rethinking Politics and Law for the Modern State* (Princeton University Press 2005) 4873.

the relevant OZP for Ap Lei Chau needed amendment. On 18 May 2015, the Planning Department consulted the District Development and Environment Committee of the Southern District Council (District Council)—a municipal governing body—on the rezoning proposal. In addition, on 20 May 2015, the Planning Department and the Transport Department attended a local residents' forum to explain the proposed rezoning and solicit residents' views. The Planning Department then submitted, in accordance with the TPO, the rezoning proposal in the second half of 2015 to the TPB for consideration. The submission to the TPB contained the comments received from the District Council, local residents, and concerned government departments. In respect of the proposed rezoning of Ap Lei Chau for residential use, the Transport Department carried out a traffic review to assess the impact of the traffic generated from the proposed residential development on major roads in Ap Lei Chau (including the Ap Lei Chau Bridge). The review outcome was utilized by the Planning Department to reconfigure the traffic flow on major roads and junctions in Ap Lei Chau.[39] There was a dispersal of de jure decision-making power to the various bodies involved, but it is clear that they had strong de facto influence on the eventual outcome.

Increasing such networked decision making and expanding the universe of decision-makers could help mitigate any concerns about the concentration of power.[40] Pending such broader reform, the legislative and judicial branches and civic society could have a limited role in prompting more modest changes in the overall balance of power. The following section looks at other statutory sources of power that may, possibly, achieve the same rebalancing of power.

[39] *Legislative Council Debates* (10 June 2015) 1276472 (Secretary for Development, Paul Chan Mo-Po).

[40] The 2000 and 2003 amendment exercise shows that the executive was keen to concentrate planning power within the Planning Department and its various sub-bodies (including the TPB). The Bills Committee also kept a tight control on how much the TPB could delegate its functions, rejecting amendments that would allow the TPB to delegate its functions to a smaller ad hoc committee and/or public officials for the sake of expediency and quick decisions.

Statutory balancing of power and interests—protection of the environment and heritage preservation

The work of the TPO can, in certain contexts, interact with a matrix of other legislation.[41] For example, with major infrastructure projects, there will also be a need to comply with the Environmental Impact Assessment Ordinance (EIAO).[42] Different types of planning—residential, commercial, rural, and infrastructural— may call for different strategies that fit the legal, political, and social issues that pertain to that planning context. The discussion in this section highlights how the EIAO and other contra-development legislation can rebalance power distribution and interests in the urban planning context.

The long title of the EIAO sets out that its purpose is 'to provide for assessing the impact on the environment of certain projects and proposals, for protecting the environment and for incidental matters'. The complex process for applying for an environmental permit starts with a submission by the applicant of a project profile that must comply with the requirements set out in a 'technical memorandum' (TM) issued by the Secretary for the Environment, Transport and Works (section 5(2)(b)).[43] The submission must be advertised in Chinese and English daily newspapers circulating in Hong Kong (section 5(2)(c)).

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[41] For example, the Buildings Ordinance, Cap 123 (1956), that deals with micro planning—that is, the specifications for the construction of the buildings on the site. See also Urban Renewal Authority Ordinance, Cap 563 (2001).

[42] Environmental Impact Assessment Ordinance, Cap 499 (1998), s 4, sch 23 (EIAO). These are typically major infrastructural projects; urban development projects affecting a certain size of the population; redevelopment projects affecting a certain size of the population; reclamation works; marine operations; dredging operations; reservoir and water supply works; waste storage; utility works; mineral extractions; industrial activities; agricultural and fisheries activities; fuel storage and transportation works; community facilities (like a wholesale market or crematorium); tourist and recreational developments; and residential developments.

[43] EIAO (n 42) s 16 authorizes the secretary to issue a technical memorandum' (TM) 'setting out principles, procedures, guidelines, requirements and criteria for, inter alia: (a) the technical content of a project profile; (b) the technical content of an environmental impact assessment study brief or environmental impact assessment report; (c) deciding whether a designated project is environmentally acceptable; (d) deciding whether an environmental impact assessment report meets the requirements of the environmental impact assessment study brief; (e) deciding whether the Director will permit an applicant to apply directly for an environmental permit under Section 5(9), (10) or (11); (f) resolving conflicts on the content of the environmental impact assessment study; brief and the environmental impact assessment report; (g) taking advice from other authorities; (h) deciding what is a material change, addition or alteration to an environmental impact or to a designated project; (i) the issue of environmental permits; (j) the imposition of environmental monitoring and audit requirements for designate projects as conditions in environmental permits'. The TM is not meant to be subsidiary legislation (EIAO (n 42) s 16(12)), although it functions very much like subsidiary legislation in guiding the

Following this, the applicant typically applies to the Director for a study brief,[44] which sets out the parameters for the environmental impact assessment study that must be completed for the project.[45] The environmental impact assessment report must comply with the requirements of any study brief and the technical memorandum.[46] Pursuant to section 6(3) of the EIAO, the Director then has 60 days to decide if the assessment report does indeed comply. The environmental impact assessment report is then exhibited for public inspection by the applicant.[47] In some circumstances, the applicant may also need to make a submission to the Advisory Council on the Environment for comment. The Advisory Council is a consultative body with the task of 'keep[ing] under review the state of the environment in Hong Kong; and [advising] the Government, through the Secretary for the Environment, on appropriate measures which might be taken to combat pollution of all kinds, and to protect and sustain the environment'.[48] The Advisory Council is made of non-government members, including academics, members of green groups, professionals, and business persons. Members of the executive—including the Permanent Secretary for the Environment and representatives of the Agriculture, Fisheries and Conservation Department, Planning Department, and Department of Health—attend meetings ex officio.

The Director then has 30 days after the close of the public inspection period and/or receipt of comments from the Advisory Council on the Environment—a consultative body with technical expertise—to decide whether to reject or approve (with or without conditions) the assessment report for the designated project.[49] During this period he may ask the applicant for further information to

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decisions of the director for environmental protection under the EIAO (e.g. ss 5, 6, 8, 10, 12, 13, 14).

[44] As noted by Fok JA in the judgment of the Court of First Instance in Chu Yee Wah v Director of Environmental Protection [2010] 3 HKC 227 (whose observation was endorsed by Tang VP in the Court of Appeal [2012] 1 HKC 35) the TM is a document that applies to all designated projects; a study brief, on the other hand, is project specific. The study brief sets the agenda for the rest of the process.

[45] EIAO (n 42) s 5(1)(a)(b), except in cases where no brief is needed and the applicant proceeds to carry out a report straight away.

[46] Ibid s 6(1).

[47] Ibid ss 6(4), 7(1), (2).

[48] See the Advisory Council's Terms of Reference https://www.epd.gov.hk/epd/english/boards/ad visory_council/ace_term.html, accessed 2 November 2021.

[49] EIAO (n 42) s 8(3).

address the comments received during the public inspection period.[50] If the Director rejects an environmental impact assessment report, he gives the applicant reasons for the rejection.[51]

Once the report has been approved, the applicant can then apply for an environmental permit for the project.[52] Pursuant to section 10 of the EIAO, the Director can grant or refuse a permit, having regard to the environmental impact assessment report, the technical memorandum, and any public comments, but also: '(b) the attainment and maintenance of an acceptable environmental quality; (c) whether the environmental impact caused or experienced by the designated project is or is likely to be prejudicial to the health or well-being of people, flora, fauna or ecosystems'.

There is thus a more pronounced duality to the information considered by the Director: the technical input from the study brief, technical memorandum and environmental impact assessment report but also public opinion and the comments from the Advisory Council on the Environment. The process seeks to calibrate both technical and public opinion on environmental issues in reaching a decision. The aim is to balance development and conservation of the environment. As noted in *Kowloon-Canton Railway Corporation v Director of Environmental Protection*:

> There are two main matters of public interest involved. Both are important. The first is the public interest in the protection of the environment upon which the quality of life in Hong Kong will increasingly depend. The second is the public interest in ensuring that major designated projects are brought to fruition in a timely and efficient manner. The time constrains put upon the Director for steps in the process and for his decisions show that the Ordinance aims to satisfy both interests. It is necessary in the implementation of the process that both should be kept in mind. This is so especially when major infrastructural projects (roads, railways, tunnels, reclamation works and the like) which may cause a variety of adverse environmental impacts are proposed.[53]

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[50] Ibid s 8(1), (2).
[51] Ibid s 8(6).
[52] Ibid s 8(5).
[53] EIA Appeal Board Appeal no 2/2000 (20 July 2001), cited by Fok JA at para 47 of his judgment

This balance between development and contra-development concerns is also captured by two other statutes: first, the Protection of the Harbour Ordinance (PHO).[54] This governs the reclamation of the harbour. In land-scarce Hong Kong, the government has had to resort to land reclamation for the purposes of development. Major infrastructure projects constructed on reclaimed land include the previous and current airport as well as most of the new towns built in Hong Kong since the 1970s.[55] Unlike the TPO and EIAO, this short Ordinance (consisting of just five sections and a Schedule) is not driven by public consultation and an approval process for any proposed reclamations. Rather, it aims at structuring decision making by the government in the area of land reclamation.

Specifically, there is a presumption against reclamation built into Section 3(1) of the Ordinance. Section 3(1) of the PHO recognizes the harbour as a special public asset and a natural heritage of the Hong Kong people, and for that purpose there shall be a presumption against reclamation in the harbour. Accordingly, pursuant to Section 3(2), all public officers and public bodies shall have regard to this when exercising any powers vested in them. The exercise of this power is subject to legislative and judicial oversight and is considered further below.[56] The PHO is a rare example of the combined impact of a social movement and the impact of a private member of the Legislative Council, the PHO being a private members' bill. This resulted in legislation that is presumptively against development that would impinge on the environment.[57]

The second statute that aims at balancing development against contradevelopment concerns relates to heritage preservation. This is dealt with by the Antiquities Authority, acting through the Secretary of Home Affairs under the Antiquities and Monuments Ordinance (AMO).[58] The Antiquities Authority can declare a particular site or building as a 'monument, historical building or

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in *Chu Yee Wah v Director of Environmental Protection* (n 44).

[54] Protection of the Harbour Ordinance, Cap 531 (1997). It is one of very few private members' bills introduced and passed in the Legislative Council.

[55] Including Tuen Mun, Tai Po, Sha Tin, Ma On Shan, West Kowloon, Kwun Tong and Tseung Kwan O.

[56] *Town Planning Board v Society for Protection of the Harbour Ltd* [2004] 1 HKLRD 396 (Court of Final Appeal) (Town Planning Board), which is discussed further below.

[57] See Lani Guinier and Gerald Torres, 'Changing the Wind: Notes Toward a Demosprudence of Law and Social Movements' (2014) 123 YLJ 2740.

[58] Antiquities and Monuments Ordinance, Cap 53 (1976).

archaeological or paleontological site or structure' pursuant to Section 3 of the AMO. A declaration of a site as a monument will prohibit its demolition, without a permit.[59] In making a declaration, the Antiquities Authority is advised by the Antiquities Advisory Board, which is responsible for grading buildings under Sections 17 and 18 of the AMO. This grading is non-binding but must be adequately considered by the Antiquities Authority.[60] Once a site is declared a monument, the Antiquities and Monuments Office then considers how a particular building or site is to be preserved. The Antiquities and Monuments Office is the executive arm of the Antiquities Authority. It is headed by a Chief Curator as its Executive Secretary and it has 36 curator grade officers. They all have professional training and knowledge in heritage preservation. In contrast, even though members of the Antiquities and Advisory Board are experts in their respective fields, they come from all walks of life, including the legal and commercial sectors. Although some members are professionals who have training in related fields like architecture, a number of members are not specialists in aspects of heritage preservation.

The PHO and AMO function differently from the TPO and EIAO. They do not operate on the basis of public consultation, but rather through a reliance on the exercise of executive discretion (by the Director for the Environment under the EIAO or the Secretary for Home Affairs acting through the Antiquities Authority under the AMO) on how to best strike the balance between development and conservation (whether of the environment or heritage). However, as with the TPO and EIAO, there is a concentration of power within the executive branches.

This concentration of power in the executive branch is not atypical and is representative of the experience of most jurisdictions: the executive branch possesses the necessary expertise and knowledge of public needs and resources to really drive planning to best meet the varied interests of society (infrastructure, housing, and so on). An ideal planning regime, therefore, would not seek to reduce the powers of the executive per se: instead, it would ensure that there is a

[59] Ibid s 6.

[60] *Chu Hoi Dick & Another v Secretary for Home Affairs* [2007] 4 HKC 263 (Court of First Instance) [Chu Hoi Dick]: although the courts will not assess the weight ascribed to the advice of the Board by the Authority. This meant that a Grade I classification by the Board in this case did not prevent the Authority from refusing to declare the relevant site a monument.

system of checks and balances in place to review the exercise of executive discretion. The system of checks and balances is discussed next.

The Legislative Council and Planning

The TPO was the subject of major amendment in 2000 and 2003. The deliberations at the time showed political engagement by the Legislative Council of those amendments. The executive was ultimately not able to pass any of the proposed amendments during that 2000 exercise. The report of the Bills Committee concluded that:

> [g]iven the complexity of the Bill and its far reaching implications on the community at large, the Bills Committee decided that it should not rush through the scrutiny of the Bill without going into the details of the various issues that may affect the planning and development of Hong Kong in the years to come. Members also took note that some professional institutes and real estate developers had indicated their support for adhering to the existing legislation rather than putting in place a new Bill hastily passed without careful scrutiny. In view of the foregoing, the Bills Committee decided to curtail its work. ...On 5 May 2000, with the agreement of the Bills Committee, the Chairman of the Bills Committee reported to the House Committee that it would be unrealistic to complete the scrutiny of the Bill within the current LegCo session in view of the extent of outstanding issues to be resolved. The House Committee agreed that the work of the Bills Committee should be curtailed and the Bills Committee dissolved. To facilitate future reference to the points raised by the Bills Committee and follow-up by future Legislative Council when the Bill is re-introduced, a table setting out the major concerns raised by the Bills Committee, the response from the Administration and the follow-up actions to be taken is at Appendix III.[61]

In its report, the Bills Committee expressed concerns that spoke to aspects of the balance that need to be struck to promote and build a good planning regime: the need for stronger public input in the planning process and the need for

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[61] *Report on the Town Planning Bill 2000* (n 12) paras 10-11.

transparency as well as efficiency and expediency in the process. Specifically, the Bills Committee was concerned with the composition of the TPB and whether members were in a position of conflict; the conduct and transparency of TPB meetings; the interface between the TPB and other administrative bodies involved in the planning process (for example, the Country and Marine Parks Board); and concerns about the scope for delays in the development process.[62]

The executive, therefore, had to go back to the drawing board. It tried again in 2003 to amend the TPO to streamline the planning procedures and enhance public involvement in the planning process. Acknowledging the scale of the concerns raised by the Bills Committee during the 2000 amendment exercise, the executive decided to amend the TPO in stages, 'giving priority to amendments which have general consensus and would produce immediate benefits to the community'.[63] The 2003 amendment exercise thus focused on expediting and streamlining the plan-making process; enhancing public involvement in the plan-making process by providing that both supportive and adverse representations—instead of objections—could be lodged when a plan is put on display; and enhancing the transparency of the system (by, for example, requiring the TPB to publish all applications for amendments of plans).

The Bills Committee came back again with concerns: in particular, the idea of proceeding with a phased and piecemeal versus an overarching and holistic approach to amendment to properly address fundamental issues, especially those relating to the operation and composition of the TPB. The piecemeal approach to amendment—given that the holistic approach had not worked in 2000—nearly derailed this 2003 amendment exercise, with some members of the Bills Committee expressing concern that amendments should not be made in isolation without knowing what further changes may need to be made down the line.[64]Eventually, the amendments were passed on the basis that other members of the Bills Committee felt that, while the amendments were limited in scope, they would go some way towards improving the plan making and planning

[62] Ibid, Appendix II.
[63] *Housing Brief* (n 11) para 1.
[64] *Report on the Town Planning (Amendment) Bill 2003* (n 12) para 9.

approval processes in terms of enhanced transparency and greater public participation.

The Legislative Council was also able to provide input on the content of the proposals. The executive proposed a streamlined one-stage process for the preparation of OZPs (down from a three-stage process). The Bills Committee was concerned that there would be less opportunity for external input throughout the process. In response, the executive branch recognized that:

> [h]aving regard to the...concern expressed by deputations and members of the Bills Committee and the fact that development pressure has eased off in recent years, the Administration agrees that it may not be desirable to condense the plan-making process. Without compromising on the objective to enhance public participation and transparency in the plan-making process, the Administration proposes to revise the plan-making procedures [to a two-stage process, by way of compromise].

This was thought to be a much better balance between the need for participation in planning and expediency.[65] This counter-proposal was done on the back of another round of public consultations, with the Bills Committee proactively reaching out to relevant stakeholders.[66]

The input of the Bills Committee was important during these amendment exercises. This inter-branch dialogue between the Legislative Council and the Executive worked well during the 2000 and 2003 amendment exercises—the result being an overall better balanced planning regime.[67] The way that two branches—executive and legislative—conceptualized the balance that needed to be struck within the TPO was distinct and different. The executive emphasized that the proposed amendments to the TPO aimed at enhancing the expediency of the process given the pressing developmental needs. Of equal importance for the Bills Committee was the fact that the proposals would improve the planmaking and approval process, enhancing transparency and public

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[65] *Report on the Town Planning (Amendment) Bill 2003* (n 12) para 18.

[66] The executive branch typically introduces the first draft of any legislation; subsequent amendments can be done either by the executive or by the Bills Committee in the Legislative Council.

[67] *Report on the Town Planning (Amendment) Bill 2003* (n 12) para 11.

participation.[68] The Bills Committee emphasized that, in scrutinizing the amendment bill, their main considerations were: '(a) whether the proposals could achieve their intended purpose to streamline and enhance public participation and transparency in the plan-making and planning approval processes; and (b) whether the proposals are adequate for the intended purposes'.[69] This was evident through their consideration of the various proposals—for example, to require that all planning applications be made available for public inspection and be sent to known stakeholders (for example, the Owners Corporations of Buildings, the District Council and Legislative Council Members, the District Planning Offices, the District Offices, the Rural Committee Offices, and the TPB Secretariat).[70] This was seen as a 'big step forward in enhancing transparency in the planning approval process'.[71]

There were junctures at which the Legislative Council agreed with the executive on the appropriate balance between expediency and public participation. For example, the Bills Committee agreed with the executive that there should not be an entrenched right to be heard for applicants for planning permission before the TPB. This was on the basis that TPB meetings would be open to attendance by the public; this was sufficient transparency.[72] The Bills Committee did push, however, for the requirement for open meetings to be specified in the TPO: to make explicit what had previously been implicit in the practice of the TPB.[73]

This takes us to another interesting aspect of the 2000 and 2003 amendment exercises. These were the last major amendment exercises. The TPO has not been the subject of major amendment in over 15 years. However, this may not be because the planning regime has not evolved or changed. Rather, a significant amount of the evolution of the planning regime may be happening outside of the legislative context through guidelines and the practices and behaviour of the TPB. For example, during the 2003 amendment exercise, the legislation was used to formalize and codify existing administrative arrangements on a number of

[68] Compare the *Brief by the Housing, Planning and Lands Bureau* (n 63) para 3 and the *Report on the Town Planning (Amendment) Bill 2003* (n 12) para 12.
[69] *Report on the Town Planning (Amendment) Bill 2003* (n 12) para 12.
[70] Ibid para 27.
[71] Ibid para 26.
[72] Ibid paras 28, 42-4.
[73] Ibid para 44.

matters, including the administration's process for accepting applications for amendments of plans by the public.[74] In addition, in 2003, the administration proposed an amendment to the TPO that would delineate the two types of amendments to planning permission discussed earlier in this article—Class A and Class B. Class A would be considered minor amendments; whereas, Class B amendments would be major and would need to be submitted to the TPB for approval, but would be subject to simpler procedures than those used for applying for planning permission in the first instance. The simpler procedure would involve not publishing proposed amendments for public inspection and comment. The TPB would be conferred with the power to specify whether amendments are Class A and/or B in the public government gazette.[75] This would build on the existing TPB guidelines for minor amendments to approved development proposals. The executive assured the Bills Committee that it would 'further consult the stakeholders before finalizing the Class A and Class B amendments'.[76] This was approved by the Bills Committee. This opened the door for more delegated authority to the executive under the legislation for decisions and policies and guidelines to be generated by the TPB and Director of Planning.[77]

There may thus be a number of planning practices that have not yet been formalized via legislation and codification; this shifts power from the legislative body in designing the planning regime to the executive. This shift still leaves the Legislative Council with the ability to exercise checks through debate and deliberation of the executive's practices and decisions on planning matters in general legislative debate. The Finance Committee of the Legislative Council, for example, can exercise some control over large-scale infrastructure projects through the scrutiny of spending for that project.[78] A prominent example of this is the Finance Committee's deliberations on the funding application for the

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[74] Ibid para 23. This included formalizing a right to be heard and time frame within which such applications would need to be heard.
[75] Ibid para 30.
[76] Ibid para 31.
[77] See ibid para 31 on the role of the director of planning under delegated authority via the Guidelines for Minor Amendments to Approved Development Proposals.
[78] Pursuant to Basic Law (n 8) art 73, one of the functions of the Legislative Council is 'to examine and approve budgets introduced by the government; to approve...public expenditure'. The Public Finance Ordinance, Cap. 2 (1983), and Rules of Procedure of the Legislative Council (especially Rule 71 relating to the Finance Committee) operationalize these powers.

construction of the Hong Kong Express Rail Link that would form part of a rail link connecting Guangzhou and Shenzhen (both in Mainland China) with Hong Kong. The project faced opposition from the public on various grounds, ranging from pollution to concerns over the role of cross-border law enforcement bodies in border control operations on the Hong Kong side of the border.[79] Ultimately, the Finance Committee approved the funding, which included a compensation package for residents who would be affected by the construction of the rail link.

The discussion demonstrates the varied powers of the Legislative Council: the checking power of the Legislative Council that was exercised during the 2000 and 2003 amendment exercises and also through debate over public spending on planning projects. This article now turns to consider the role of other actors providing input on the planning regime.

The Judiciary and Planning

Hong Kong has liberalized rules on standing, which means that anyone can potentially file an application for judicial review of a planning decision. A number of the landmark judicial review cases of planning decisions have, indeed, been commenced by applicants representing a public versus personal interest in the matter.[80] In view of the relative expertise of the executive in the area of planning, the courts have generally applied a broad margin of deference to the executive. This is common in other parts of the common law world—planning decisions have traditionally been demarcated as areas meriting judicial deference. The courts, accordingly, have consistently maintained a bright line distinction between a review of the 'legality' of administrative decisions and the 'merits' of the same decision:

> In judicial review, the court is concerned with the legality of administrative decisions. The court can examine whether an administrative decision has

[79] This has been the subject of an application for judicial review. *Kwok Cheuk Kin & Ors v Secretary of Justice*, CACV 10/2019 (11 June 2021).

[80] See *Chu Yee Wah v Director of Environmental Protection* [2011] 5 HKLRD 469 (challenging the ZhuhaiMacauHong Kong bridge project); *Chan Kai Wah v HKSAR* HCAL 40/2010, 26 May 2010 (Court of First Instance), CACV 126/2010, 15 March 2011 (Court of Appeal) (challenging the financing of the Hong KongGuangzhou high speed rail link). This includes challenges of government's policy versus specific planning decisions. See eg *Clean Air Foundation Ltd & Another v Government of the HKSAR,* HCAL 35/2007, 26 July 2007 (Court of First Instance).

> been made in accordance with the relevant legislative provisions and other common law principles securing the procedural and substantive fairness of the process. However, the court cannot substitute its own view as regards what decision should be made. Provided that the administrative decision is one a minister or an executive body can lawfully make, the court cannot interfere.[81]

This section considers prominent planning issues that go before the courts, to exemplify the courts' approach to review in planning matters. In the case of *Chan Kai Wah v HKSAR*,[82] the applicant sought leave to judicially review the decision of the Finance Committee of the Legislative Council to approve funding for a major infrastructure project in Hong Kong: the high speed rail link between Hong Kong and Guangzhou discussed above.[83] The applicant was unsuccessful on the basis that the decision that was being challenged was a legislative act versus an administrative act that could be subject to judicial review using normal administrative law principles. The court's reasoning was based on the fact that Article 73 of the Basic Law[84] bestows the Legislative Council (and its committees) with the constitutional power to approve taxation and public expenditure.[85] Therefore, while the courts can assess the procedural propriety of the act, they cannot review the political wisdom of the legislative approval in the way the applicants sought to argue.[86] The applicant attempted to reframe the application for judicial review to argue that the real ground of the challenge was the government's decision to locate the rail link and border control points at various locations in Hong Kong (which would purportedly blur the territorial divide of immigration and law enforcement powers between Hong Kong and China under the Basic Law).[87] On this, the court concluded that this, again, went to the issue

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[81] *Chu Hoi Dick* (n 60) para 1.
[82] HCAL 40/2010, 26 May 2010 (Court of First Instance), CACV 126/2010, 15 March 2011 (Court of Appeal).
[83] The government argued that the applicant lacked standing; however, they were ultimately unsuccessful on this point. The Court of Appeal held that the applicant did not need to have a personal or private interest in the outcome, and it was sufficient that he was an 'ordinary civicminded person'.
[84] The constitutional document of Hong Kong.
[85] CACV 126/2010, 15 March 2011 (Court of Appeal) para 16.
[86] CACV 126/2010, 15 March 2011 (Court of Appeal) para 17. See also Swati Jhaveri, Michael Ramsden and Anne Scully-Hill, *Administrative Law in Hong Kong* (2nd edn, LexisNexis 2013) 190201.
[87] CACV 126/2010, 15 March 2011 (Court of Appeal) para 19.

of the merits versus the legality of the government's decisions and was thus not reviewable.[88]

The issue surfaced again in relation to the actual operation of the rail link. To deal with the cross-border transfer of passengers using the rail link, a decision was made to co-locate immigration, customs, and quarantine clearance facilities of both Hong Kong and Mainland China at a newly built train station in Hong Kong. The rail system was constructed to connect Hong Kong with China's high- speed rail network. [89] The Hong Kong government announced in 2017 the implementation of a co-location arrangement that would deploy Mainland Chinese officers at a 'Mainland Port Area' of the Hong Kong station to conduct clearance procedures for passengers in accordance with Mainland Chinese laws.[90] This triggered the question of whether this accords with the Basic Law, which specifies that Chinese laws generally do not apply in Hong Kong except for those listed in Annex III of the Basic Law (and generally on issues of defence and foreign affairs).[91] On 18 November 2017, Hong Kong's Chief Executive and the Governor of Guangdong Province signed the Co-operation Arrangement for implementing the co-location arrangement. [92] On 27 December 2017, the National People's Congress Standing Committee (NPCSC) adopted a decision to approve the Co-operation Arrangement. In June 2018, Hong Kong's Legislative Council passed the relevant implementing local legislation.

[88] CACV 126/2010, 15 March 2011 (Court of Appeal) paras 26-30.

[89] Information Service Department, '10 Projects to Boost Economy, Add Jobs' (10 October 2007)https://www.news.gov.hk/isd/ebulletin/en/category/infrastructureandlogistics/071010/html/ 071010en06002.htm, accessed 24 March 2021.

[90] See Department of Justice, Transport and Housing Bureau and Security Bureau of the HKSAR Government, *Customs, Immigration and Quarantine Arrangements of the Hong Kong Section of the Guangzhou-Shenzhen-Hong Kong Express Rail Link,* LC Paper no CB(2)1966/16-17(01) (July 2017) http://www.legco.gov.hk/yr16-17/english/hc/papers/hccb2-1966-1-e.pdf, accessed 24 March 2021.

[91] For discussions, see Pui-Yin Lo, 'Hong Kong's Unique 'Co-Location' Arrangement' *Blog of the International Journal of Constitutional Law* (17 October 2017) http://www.iconnectblog.com/2017/10/hong-kongs-unique-co-location-arrangement, accessed 24 March 2021; Lin Feng, 'Constitutionality of the Co-Location Arrangement at the West Kowloon High-Speed Rail Terminus' (2017) 47 HKLJ 499; Po Jen Yap and Jiang Zixin, 'Co-Location Is Constitutional' (2018) 48 HKLJ 37.

[92] See the HKSAR government's press release (18 November 2017) http://www.info.gov.hk/gia/ general/201711/18/P2017111800419.htm, accessed 24 March 2021.

Section 6 of the Guangzhou-Shenzhen-Hong Kong Express Rail Link (Co-Location) Ordinance (Cap 632) (2018)[93] states:

> (1) Except for reserved matters, the Mainland Port Area is to be regarded as an area lying outside Hong Kong but lying within the Mainland for the purposes of: (a) the application of the laws of the Mainland, and of the laws of Hong Kong, in the Mainland Port Area; and (b) the delineation of jurisdiction (including jurisdiction of the courts) over the Mainland Port Area; and (2) Sub-section (1) does not affect the boundary of the administrative division of the [Hong Kong Special Administrative Region].

This aspect of the Ordinance was the subject of applications for judicial review.[94] Two of the applicants applied unsuccessfully to suspend the commencement of the Ordinance.[95] The co-location arrangement came into operation on 22 September 2018. The hearing of the challenges came afterwards in October 2018.

The Court of First Instance dismissed all the applications.[96] The judge held that the Ordinance was consistent with the Basic Law on the basis that on a fair reading of the Basic Law and having regard to its context and purpose, it was open to the Hong Kong legislature to enact the Ordinance. He also considered the NPCSC's Interpretation of the Basic Law on this point to be of conclusive weight.

Similar restraint is apparent in cases relating to the government's zoning powers. This is demonstrated by the court's approach in Re Thomas Lai.[97] The case concerned a change in government land policy on the designation of land as a country park with the consequence that the applicant's village would eventually become part of a country park. This would restrict the development of the land. The applicant argued that this breached a 'legitimate expectation' he had that the land would not be rezoned. This expectation allegedly arose from

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[93] *Guangzhou-Shenzhen-Hong Kong Express Rail Link (Co-Location) Ordinance.* https://www.elegislation.gov.hk/hk/cap632?pmc¼1&m¼1&pm¼0, accessed 22 February 2022.

[94] Namely, HCAL 1160, 1164, 1165, 1171 and 1178/2018.

[95] See *Re Leung Chung Hang Sixtus & Ors* [2018] HKCFI 1869, [2018] 5 HKC 138 (Court of First Instance).

[96] See *Re Leung Chung Hang Sixtus & Ors (No 2)* [2018] HKCFI 2657, [2019] 1 HKC 104 (Court of First Instance)

[97] HCAL 150/2013, 28 February 2014 (Court of First Instance).

correspondence he had with the Lands Authority and the past conduct of the government in that, from the establishment of country parks in Hong Kong in the late 1970s until the decision complained of in these proceedings, the government had not incorporated any of the 77 rural villages into any country park. The court found that there was sufficient evidence to suggest that the government had already adequately considered the impact of the legitimate expectation when making its decision to change its approach to zoning land as a country park. In any event, the government should have flexibility in its approach to developing land planning policy; tethering the government's actions to the legitimate expectation would be an undesirable degree of rigidity. This also would not lead to a significant injustice for the applicant since there was not a complete prohibition on the development of land by the applicant; he could apply for planning permission under the TPO.

The courts have also exercised restraint when asked to revisit the way the executive has struck a balance between development and contra-development concerns when making planning decisions. In the case of Chu Hoi Dick & Ho Loy v Secretary for Home Affairs,[98] the applicants challenged a decision by the Antiquities Authority acting through the Secretary of Home Affairs under the AMO. The Authority made a decision not to declare a pier—Queen's Pier in Central—as a 'monument' under Section 3 of the Ordinance. A declaration of the site as a monument would have prevented its demolition as part of a transport infrastructure development project. One of the questions for the court was whether the decision of the Antiquities Authority in question was unreasonable because of a failure to properly take into account all relevant considerations. The applicants argued that the Antiquities Authority had failed to consider the classification of Queen's Pier as a 'Grade I' site of 'outstanding' historical merit by the Antiquities Advisory Board, an advisory body established under section 17 of the AMO. The court held, however, that there was sufficient evidence to indicate that the Antiquities Authority had adequately considered this issue: indeed, they had asked the Antiquities and Monuments Office to review the mode of preservation in light of the consideration by the Board. The latter had weighed this classification by the Board against other characterizations of the Pier to

[98] *Chu Hoi Dick* (n 60).

conclude that it did not possess the requisite historical, archaeological, or palaeontological significance. The court could not agree with the applicant's view that it was 'irrational' for the Antiquities Authority to, in effect, override the views of the Antiquities Advisory Board. The court further did not accept the applicant's argument that a particular site must be recognized as a monument if it has 'some' historical significance as a matter of statutory construction of section 3 of the AMO. In the absence of specific language to this effect in the AMO, the Authority is free to set a stringent standard for assessing significance of a site.

A similar restraint by the judiciary to revisit the balance struck by the executive is apparent in the environmental context. In the case of Chu Yee Wah v Director of Environmental Protection,[99] the applicant—a resident of a public housing estate based near the site of the bridge linking Hong Kong, Zhuhai, and Macau—challenged the decision of the Director of Environmental Protection to approve the environmental impact assessment reports and issue environmental permits for the building of the bridge. The applicant's grounds for review included issues relating to the true construction of the EIAO and its requirements. In particular, the applicant sought to argue that the environmental impact assessment reports had been incorrectly prepared and, on the back of that, the Director of Environmental Protection's decision to approve the reports and grant environmental permits were similarly erroneous. In deciding in favour of the Director of Environmental Protection, the Court of Appeal held that

> 'it is often a question of professional judgment what information is required to be contained in an [environmental impact assessment report] to enable the Director to perform her duties. In that case unless the judgment is [unreasonable], the court is not entitled to interfere'.

The above discussion shows that the courts are willing to be seized of the matter, but while also recognizing the relative expertise of the executive. The courts' concerns over disrupting the separation of powers guides them to take this approach in the planning context. This exposes the need for developing a system of specialized adjudicative tribunals and appeals boards in Hong Kong on planning matters. The EIAO establishes the Environmental Appeals Board.

[99] [2011] 5 HKLRD 469 (Court of Appeal).

However, as of September 2021, there has only been one case referred to the Environmental Appeals Board. Pursuant to the TPO, an applicant aggrieved by a decision of the TPB on a planning application may apply for a review of the decision by the TPB, and if still dissatisfied, can then appeal to the Town Planning (Appeals) Board.[100]The decisions of the latter are final and can only be reviewed via judicial review.[101] This is also relatively under-utilized when compared with the number of planning applications. On average, there are less than 10 appeals every year.[102] The reasons for the underutilization of these Appeals Board are not clear.[103]

This might point to the need for litigants to more carefully consider their strategy in judicial review proceedings on planning matters. First, applicants should consider utilizing appeals boards under the various planning ordinances (EIAO, TPO, AMO, and so on). Second, in the cases considered above, the applicants adopted aggressive litigation strategies that sought to unravel a balance struck by the executive and, therefore, intervened in the merits of the latter's decision making, which courts are generally reluctant to review in common law systems like that of Hong Kong.[104]

A strategy that focuses more on the decision-making process versus the decision itself may be more successful. For example, in Re Thomas Lai, the applicant could have framed the issue so that it was not about a breach of his legitimate expectation as much as a need for him to be consulted prior to a change in the land planning policy for his geographical area.[105] There is evidence of the success of such grounds when looking at cases relating to public consultations more generally outside of the planning context. These principles are derived from a common law duty of procedural fairness, which is an accepted and well-settled

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[100] TPO (n 4) 1A, 17A.
[101] Ibid s 17B(9).
[102] Available at https://www.devb.gov.hk/tpab/en/decisions/index.html, accessed 2 November 2021.
[103] See earlier comments on how the private sector may deal with planning disputes via informal negotiations rather than a formal appeal.
[104] See Swati Jhaveri, 'Revisiting Taxonomies and Truisms in Administrative Law in Singapore' [2019] Singapore J Legal Studies 351; Kenny Chng, 'Form and Substance in Singapore Constitutional and Administrative Law' (2020) 15(2) Asian J Comparative L 363, for an analysis of this distinction between legality-merits in common law systems of administrative law.
[105] Swati Jhaveri 'Contrasting Responses to the 'Coughlan' Moment: Legitimate Expectations in Hong Kong and Singapore' in M Groves and G Weeks (eds), *Legitimate Expectations in the Common Law World* (Hart Publishing 2017) 267.

obligation for decision-makers in the Hong Kong context.[106] This would give the applicant some agency during the planning process, while not disrupting the exercise of the expert discretion of the executive branch.

A related strategy would be to invite the court to specify to the executive the parameters for striking a balance between development and the public interest, without the courts striking the balance themselves. This strategy worked in Town Planning Board v Society for Protection of the Harbour.[107] The applicant, an environmental interest group, sought to challenge the reclamation of the harbour. One of the key issues for the court in the case was the correct meaning of Section 3 of the PHO, which includes a presumption against reclamation.[108] The applicants argued, inter alia, that the TPB had considered and approved plans to reclaim parts of Victoria Harbour on the basis of a misinterpretation of Section 3 and, in particular, on the presumption against reclamation set out in Section 3(1). The Board had adopted the following approach:

> (1) The decision maker must have regard to all relevant considerations. The statutory presumption creates a compulsory material consideration to which he must pay due regard; and (2) He is required to undertake a weighing exercise for the purpose of deciding whether the public benefits of the proposed reclamation would outweigh the need to preserve the harbour. If so, the presumption would be rebutted.[109]

The Court of Final Appeal concluded that the TPB had erred in adopting the above approach. In characterizing the presumption as just one material consideration to be weighed against others, the TPB's approach did not attach sufficient importance to the presumption. The Court of Final Appeal took the view that, as a matter of statutory interpretation, the presumption must be interpreted in such a way that it can only be rebutted by establishing an overriding public need for reclamation. The Court further specified that a need should only be regarded as overriding if it is a compelling and present need. The need has to

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[106] Swati Jhaveri, 'Transforming 'Fairness' as a Ground of Judicial Review in Hong Kong' (2013) 11(2) IJCL 358.
[107] *Town Planning Board* (n 56).
[108] Protection of the Harbour Ordinance (n 54) s 3(1) ('[t]he harbour is to be protected and preserved as a special public asset and a natural heritage of Hong Kong people, and for that purpose there shall be a presumption against reclamation in the harbour').
[109] *Town Planning Board* (n 56) para 15.

be compelling so that it has the requisite force to prevail over the strong public need for protection and preservation. And it has to be a present need in the sense that taking into account the time scale of planning exercises, the need would arise within a definite and reasonable time frame. If the need would not arise over such a time frame, it would not have the strength to displace the presumption. And having regard to the nature of the overriding public need test and the requirement that there must be cogent and convincing materials to satisfy the test, the burden on those seeking to rebut the presumption is a heavy one. That this is so is commensurate with what is at stake: the impact on the extent of the reclamation of a special asset and aspect of the natural heritage of Hong Kong. In considering the exercise of any power in relation to any reclamation proposal, a public body must apply the overriding public need test and decide whether it is satisfied. This provides some structure for the executive to utilize when making land reclamation decisions. There must be materials before the decision-maker to satisfy them that there is an overriding public need for reclamation to rebut the presumption against it. To enable them to be so satisfied, the materials in the case in question must be cogent and convincing. If not, there would then be insufficient grounds to enable the decision-maker to be satisfied that the test is fulfilled. The requirement that the materials must be cogent and convincing flows from the stringency of the test.[110]

The precise strategy for commencing judicial review proceedings is, therefore, important. The remit of judicial review will necessarily be limited by the separation of powers. For example, following the Court of Final Appeal's decision in Town Planning Board v Society for Protection of the Harbour, it would still be open for the TPB to reach the same decision on harbour reclamation (indeed, it did). While revising the strategy for judicial review could generate outcomes that encourage the development of an idealized decision-making environment, judicial review will necessarily be limited in altering the way in which the balance is struck. The public have alternative avenues to provide input on the actual planning decision—this is through consultation exercises. This is considered next.

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[110] Ibid paras 32-52.

The public and planning

The discussion above shows how the public can get involved in planning decisions via the courts, in addition to their role in providing comments on draft OZPs and planning permission applications. The executive has indicated that it generally carries out extensive consultation on major planning proposals and zoning decisions prior to implementing them in OZPs.[111] The Planning Department will hold local residents' forums and consultations with the District Development and Environment Committee of the Southern District Council (the sub-committees of District Councils) on proposed planning decisions. For example, with the proposed redevelopment of the old airport site in Hong Kong, the Secretary for Development engaged 'civil society' on possible options (ultimately concluding that these options were not feasible).[112] This section considers further the role of the public in contributing to the design of planning policy in Hong Kong through broader consultation and engagement with the government.

Public consultations are not mandatory in Hong Kong. Since the enactment of the TPO, it has been the subject of two major amendments with consultations on the amendments. During the 2000 and 2003 amendment exercise, the Bills Committee invited stakeholders to provide their views on the amendments. This was done by placing advertisements for public consultations in the local Chinese and English newspapers and sending invitations to the District Councils and those that had previously made submissions in previous amendment exercises. In response, the Bills Committee received 140 written submissions. During the 2003 amendment exercise, consultation was also done by the executive prior to the introduction of the amendment bill in the Legislative Council. They consulted the Legislative Council Panel on Planning, Lands and Works, representatives from the major political parties, the Town Planning Board, the Land and Building Advisory Committee, the Real Estate Developers Association, and professional institutes. The executive then took on the task of balancing the various views—

[111] *Housing Brief* (n 11).
[112] Secretary for Development Paul Chan Mo-Po, *Legislative Council* (6 November 2013) 1819-25.

balancing between 'efficiency and fairness or openness of the system[and] private interest or sectoral interest and public interest'.[113]

The continuation and quality of public consultations could help enhance the involvement of the public. There are opportunities to develop the system of public consultations in the planning context. The recent public consultation exercise on easing the city's housing crisis provides an example of these opportunities. This consultation was carried out by a specially created Task Force on Land Supply. The task force comprised 22 non-official and eight official members (namely, members from the political and bureaucratic executive) appointed by the Chief Executive from various professional disciplines and sectors. This includes planning, engineering, architecture, land surveying, environment, academia, think tanks, social services, housing development, and district administration. The Terms of Reference of the task force was to:

> [make] a macro review of the sources of land supply, evaluates land supply options, and has launched a public engagement exercise to engage the community in discussions on the pros and cons of different options and their priorities. The objective of the Task Force is to achieve the broadest consensus and draw up a broad framework of recommendations on the overall land supply strategy and a prioritisation of different land supply options for submission to the Government, based on the opinions collected in the public engagement exercise.[114]

The process was the subject of some criticism for being under-representative of a broad enough range of views.[115] A firmer foundation for public engagement would help such consultations. For example, a public inquiry system as is utilized elsewhere could enhance meaningful public engagement.[116]

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113 *Housing Brief* (n 11) paras 78.
114 Task Force on Land Supply https://landforhongkong.hk/en/about_us/index.php, accessed 24 March 2021.
115 Shirley Zhao, 'Land Supply Consultation 'Rigged', ex-Hong Kong Planning Official Says of Public Exercise to Tackle City's Housing Crisis' South China Morning Post (22 September 2018) https:// www.scmp.com/news/hong-kong/hong-kong-economy/article/2165330/land-supply-consultation-rigged-ex-hong-kong, accessed 24 March 2021.
116 Karen Lee, *The Legitimacy and Responsiveness of Industry Rule-Making* (Hart Publishing 2018); for a discussion on how to strength public participation in planning systems, see Andrew Edgar, 'Deliberative Processes for Administrative Regulations: Unenforceable Public Consultation Provisions and the Courts' (2016) 27(1) PLR 18.

Conclusion: developing intra-executive checks

This article has highlighted how the planning regime in Hong Kong tracks regimes elsewhere in concentrating planning power in the executive branch. Against this, it has contextualized the system of checks and balances on the executive's planning powers by the legislature, judiciary, and public. In doing so, it has further highlighted the boundaries of those checking powers. What this highlights is the opportunity that exists to develop an intra-executive system of checks and balances, through the spread of decision-making power across a network of administrative bodies within the executive branch (the site of planning expertise, resources, and know-how). For example, the statutory bodies that animate the planning process—such as the TPB—would benefit from a broadening of its membership. In addition, the TPB could be made accountable to bodies and officials that sit outside the planning context and are part of the audit arms of the executive branch. The ambition of this article is not to set out the agenda for reform—this is a big question that merits independent and broader discussion. The aim of this article has been modest: it has been to illuminate the site of power within the executive branch and how judicial, legislative, and civic solutions will necessarily be limited—all of which points to the opportunity to develop and sophisticate the intra-executive system of checks and balances.

CHAPTER 6

THE ROLE OF THE CITIZEN IN PLANNING METROPOLITAN MANILA

By Mark Richard D. Evidente

Abstract

Under its 1987 Constitution, the Philippines adopted a legal framework for urban planning and local governance that is premised on local autonomy.[1] While that framework recognizes that metropolitan areas will have particular challenges that transcend the political and territorial boundaries of individual local governments, Metropolitan Manila has not developed an effective system that coordinates and reconciles the different programs and priorities of its 17 constituent local governments. These local governments retain and exercise their local autonomy for land-use planning which, under the Local Government Code of 1991 and many other laws and regulations, require significant stakeholder representation and consultation, thus providing mechanisms to participate in the planning process. Effectively engaging those mechanisms, however, remains a challenge.

Introduction

Metropolitan Manila officially includes 16 cities and one municipality[2], spanning an area of 636 square kilometres or 0.19% of the country's total land area, with an official resident population of 13,484,462 in the 2020 census, or 12.36% of

[1] Andrew Harding, *Territorial Governance in Southeast Asia* (Oxford, Hart/ Bloomsbury, 2025), ch 6.

[2] The cities of Manila, Quezon, Caloocan, Las Piñas, Makati, Malabon, Mandaluyong, Marikina, Muntinlupa, Navotas, Parañaque, Pasay, Pasig, San Juan, Taguig, and Valenzuela, and the municipality of Pateros.

the national population.[3] Functionally, however, the metropolis has expanded beyond these 17 local government units, spilling into the neighbouring provinces of Rizal, Bulacan, Laguna, and Cavite. It serves as the centre of government, business, education, and culture, and in 2023 generated 31.14% of the nation's gross domestic product.[4] The daytime population effectively doubles due to the commuters from the surrounding suburbs, who spend an average of three to four hours daily travelling to and from work.[5]

The sheer size of Metro Manila, as well as the number of autonomous local governments, with scattered hubs of business, government, education, and culture throughout the metropolis, creates unique challenges from the standpoint of planning law.

But how did the Metropolis reach this point? By what mechanisms is it currently governed? And how does the legal system allow citizens to participate in the planning process?

Before proceeding, let us establish how planning law is understood and practised in the Philippine context. What is called 'urban planning' or 'town and country planning' in other jurisdictions is referred to in the Philippines as 'environmental planning.' It is defined as 'the multi-disciplinary art and science of analysing, specifying, harmonising, managing and regulating the use and development of land and water resources, in relation to their environs, for the development of sustainable communities and ecosystems'[6]. As such, the legal dimensions of the practice span a broad range of substantive law, including property and property transactions, environment and natural resources, indigenous communities and heritage conservation, climate change and disaster risk mitigation, economic development policy and local governments. Depending on the substantive issues, its procedural law dimensions thus include the courts, administrative agencies and local councils and offices.

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[3] Philippine Statistics Authority, 2024 Philippine Statistical Yearbook, 3.
[4] Ibid, 3-32.
[5] The World Population Review estimates the broader metropolitan population at 25 million and ranks it as the fifth largest metro area in the world https://worldpopulationreview.com/world-city-rankings/largest-metro-areas-in-the-world accessed 10 October 2025.
[6] Environmental Planning Act of 2013, Republic Act No. 10587, section 4(a).

It is a challenge that in a country of over 100 million people —with 149 cities and 1,493 municipalities[7]—there were, as of 2021, only around 6,300 registered planners.[8] Prior to 2013, admission to practice required passing a licensure exam, on-the-job training in certain cases, and an educational background in planning, architecture, civil engineering, public administration, economics, and sociology.[9] Between 2013 and 2019, individuals from a considerably broader educational background could take the licensure exam with five years of relevant on-the-job training. Post-2019, however, one may only be admitted to the practice upon completing a degree or graduate diploma in the field of environmental planning, undertaking on-the-job training, and passing the licensure exam.[10] At present, many practitioners have an architecture or engineering background, and there are also those from some of the social and natural sciences. Only a small fraction is trained and admitted to the practice of law.

Planning law in the Philippines does not exist as a distinct field of legal study. It is not part of the standard law school curriculum. Required courses on local government law and land law touch on planning law tangentially.[11] On the other hand, there are at least 17 educational institutions that offer Environmental Planning at the baccalaureate or graduate level,[12] and the standard curriculum for a baccalaureate degree includes an introductory course on national planning and policy, and one on physical planning and regulation.[13]

While there are many lawyers whose practices regularly involve land registration, contending with or representing real estate development companies, or appearing before governmental agencies and local governments regarding specific

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[7] Department of Interior and Local Government, 'Number of Provinces, Cities, Municipalities and Barangays by Region (as of July 31, 2025)' https://www.dilg.gov.ph/PDF_File/factsfigures/dilg-facts-figures-2025917_cf67fceb3b.pdf, accessed 10 October 2025.
[8] Marion Micah R. Tinio, 'The State of Environmental Planning Education in the Philippines after RA No. 10587', University of the Philippines Center for Integrative and Development Studies, https://cids.up.edu.ph/wp-content/uploads/2025/05/The-State-of-Environmental-Planning-Education-in-the-Philippines-after-RA-No.-10587.pdf, accessed 10 October 2025.
[9] Presidential Decree No. 1308, section 16.
[10] Republic Act No. 10587, Sections 14 and 18.
[11] Legal Education Board Memorandum Order No. 24, series of 2021. 'The Revised Model Curriculum of the Basic Law Program.'
[12] Marion Micah R. Tinio, 'The State of Environmental Planning Education in the Philippines after RA No. 10587', University of the Philippines Center for Integrative and Development Studies, https://cids.up.edu.ph/wp-content/uploads/2025/05/The-State-of-Environmental-Planning-Education-in-the-Philippines-after-RA-No.-10587.pdf, accessed 10 October 2025.
[13] Commission on Higher Education Memorandum Order No. 60, series of 2017.

development projects, these are seen merely as subsets of a general litigation or administrative practice, or incidental to specific projects.

On one hand, there is some relevant jurisprudence. Most cases deal with the power of local governments to undertake zoning and land regulation, often involving agrarian reform and the conversion from agricultural to non-agricultural uses,[14] or the power of local governments to regulate particular activities.[15] In Metro Manila in particular, the Supreme Court has upheld a city's zoning ordinance as a valid exercise of police power, even when converting a residential zone into a commercial one results in impairing contractual obligations in a subdivision's deed of restrictions,[16] or the closure of industrial facilities on the ground of public safety.[17]

On the other, legal scholarship on land use and planning in the Philippines has yet to be fully developed, especially on urban issues and citizen engagement. Topics that have been explored delved more specifically into agrarian reform,[18] development rights,[19] coastal management,[20] air pollution,[21] traffic management,[22] environmental conservation,[23] climate change adaptation and

[14] *Heirs of Augusto Salas, Jr. V. Cabungcal, et al.* G.R. No. 191545, March 29, 2017, *Ong v. Imperial*, G.R. No. 197127, July 15, 2015, *Espiritu v. Torres Del Rosario*, G.R. No. 204964, October 15, 2014, *Ros v. Department of Agrarian Reform*, G.R. No. 132477, August 31, 2005, among others.
[15] The ability to regulate the establishment of cockfighting stadiums has been a recurrent theme. See *Du v. Jayoma*, G.R. No. 175042, April 23, 2012, *Tan v. Pereña*, G.R. No. 149743, February 18, 2005, *Canet v. Decena*, G.R. No. 155344, January 20, 2004.
[16] *United BF Homeowners Association, et al. v. Municipal City Mayor*, G.R. No. 141010. February 07, 2007
[17] *Social Justice Society, et al. v. Alfredo S. Lim*, G.R. No. 187836. November 25, 2014
[18] Janeth San Pedro, 'Agrarian Reform's Constraints on Land Acquisition and Development for Non-agricultural Use in the Philippines' (1999) 12 *Global Business & Development Law Journal* 319
[19] John David Atanacio and Roentgen Bronce, 'Unbundling the Bundle: Creation of Wealth and Rationalization of Land Use though Development Rights' (2013) 87 *Philippine Law Journal* 475
[20] Jay L. Batongbacal, 'The Crowded Shoreline: A Review of the Philippines' Foreshore and Shore Land Policy' (2002) 76 *Philippine Law Journal* 321
[21] Jose Cochingyan III, 'The Village – Spores of Attainment, Spurs for the Environmental Renewal of the Urban Airshed' (2009) 53 *Ateneo Law Journal* 855
[22] Dean Gerard Dulay and Emmanuel Benito Dulay, 'A Framework for Analyzing the Congestion Problem' (2017) 61 *Ateneo Law Journal* 978
[23] Jan Van der Ploeg, 'Recognizing Land Rights for Conservation? Tenure Reforms in the Northern Sierra Madre, the Philippines' (2016) 14(2) *Conservation and Society* 146; Mariya Chechina, 'Balancing Conservation and Livelihoods: A Study of Forest Dependent Communities in the Philippines' (2018) 16(4) *Conservation and Society* 420

mitigation,[24] and ancestral domains.[25] Some recent papers have begun to focus on the built environment, including the political economy of land ownership and land use planning,[26] the impact of the building code and other laws,[27] climate change and the built environment,[28] and accessibility to public transportation.[29]

There is therefore a significant opportunity to develop planning law as a distinct field of jurisprudence and scholarship —one that would benefit both the legal and environmental planning professions, as well as the public at large.

History

What is now known as the city of Manila has been a settlement for centuries before the colonial period. Manila is located at the mouth of the Pasig River at Manila Bay and that river in turn traverses a relatively narrow strip of land (8 kilometres at its narrowest) to connect Manila Bay to Laguna Lake. The settlement's location ensured Manila's connectivity to a network of communities not only on the Pasig River delta but also along the shores and tributaries of both Manila Bay and Laguna Lake. It also connected Manila by trade to settlements throughout Southeast and East Asia.[30]

In 1571, Spanish explorer Miguel Lopez de Legazpi seized and occupied Manila to dominate that political and economic network, setting the stage for Manila to become a crucial link between East and Southeast Asia with Spain and Europe via the Americas, through the Acapulco Galleon Trade in the centuries that

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[24] Brian Johnson, 'Integrating Climate change Adaptation and Mitigation for Land-use Planning in the Philippines: A Participatory, Watershed-Level Approach (2019) Institute for Global Environmental Strategies

[25] John Jerico Balisnomo, 'Ancestral Domain Ownership and Disposition: Whose Land, Which Lands' (1997) 42 *Ateneo Law Journal* 160; Cerilo Rico Abelardo, 'Ancestral Domain Rights: Issues, Responses, and Recommendations' (1994) 38 *Ateneo Law Journal* 87

[26] Jyrus B. Cimatu, 'Ang Batas at ang Balai: Establishing the Right to the City as a Path towards Liberty and Sustainable Prosperity' (2022) 66 UST Law Review 211.

[27] Marlon M. Cariño and Armando N. Alli, 'The Beauty and Madness of Metropolitan Manila: Laws Shaping its Built Environment', 67 *Ateneo Law Journal* 347.

[28] Antonio G.M. La Viña and Jameela Joy M. Reyes, 'Maladaptation, Loss and Damage, and the Built Environment: Limits and Possibilities,' 67 *Ateneo Law Journal* 377, and Gregorio Rafael P. Bueta and Jewel M. Culala, 'We Built This City from Rock to Shore: Reconceptualizing the Concept of the Built Environment vis-à-vis Environmental Protection and Climate Change in the 21st Century' 67 *Ateneo Law Journal* 442.

[29] Melanie Marron San Luis, 'Driving Change: How the Law Can Pave the Road for Accessible Public Transportation for People with Mobility Issues in the Philippines,' 67 *Ateneo Law Journal* 411.

[30] Intramuros Administration, Conservation Management Plan for Intramuros, 2019.

followed. Throughout the Spanish colonial period (1571 to 1898) Manila essentially consisted of the fortified settlement now known as Intramuros and was the political, military, religious, educational, and economic centre of the Philippines. The Spanish Laws of the Indies[31] influenced the design of Manila, connecting it with the entire system of city planning adopted by Spain throughout its empire.[32] The area regarded as Manila gradually expanded beyond the fort and absorbed nearby settlements – Binondo, Quiapo, Santa Ana, Malate, among others.

By the start of the American colonial period (1899 to 1946), many of the key institutions of government and religion had already moved out from Intramuros into the surrounding districts. Manila was then granted a new charter to include those areas, and in 1905 the American planner Daniel Burnham was commissioned to draft a master plan for the city. That was superseded in later decades by various plans, the most prominent of which was the Frost-Arellano Plan of 1941 to establish a new national government centre further out, 8 kilometres northeast, in Quezon City. Those plans, however, were derailed by the widespread destruction of Manila in the closing stages of World War II. In the decades following the War, Manila was unable to properly rebuild in a manner consistent with any of these plans and found itself, together with the surrounding cities and municipalities, struggling to cope with massive migration and settlement from the provinces.[33]

To address the spread of the urban core beyond Manila into its neighbouring cities and municipalities, then President Ferdinand Marcos issued Presidential Decree No. 824 (1975), creating Metropolitan Manila as a distinct political entity and establishing the Metropolitan Manila Commission to govern it. The Decree consolidated into one geographical area 'the cities of Manila, Quezon, Pasay and Caloocan and the municipalities of Makati, Mandaluyong, San Juan, Las Piñas, Malabon, Navotas, Pasig, Pateros, Parañaque, Marikina, Muntinlupa, and Taguig in the province of Rizal, and the municipality of Valenzuela, in the province of

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[31] Ordinances for the Discovery, the Population and the Pacification of the Indies http://codesproject.asu.edu/sites/default/files/THE%20LAWS%20OF%20THE%20INDIES translated.pdf, accessed 5 April 2020.
[32] Ian Morley, *Cities and Nationhood* (University of Hawai'i Press 2018) 33-34.
[33] See Nick Joaquin, *Manila, My Manila* (The Bookmark, Inc. 1999). See also Nathaniel Von Einsiedel, *Metro Manila: My City, My Home* (ASSURE, Inc. 2019), and Ian (n 11).

Bulacan'.[34] It placed this consolidated area under a corporate entity, Metro Manila, to be governed by the Metropolitan Manila Commission.[35] The Commission was headed by a Governor and a Vice-Governor and three Commissioners.[36] It should be noted, however, that this occurred under the Marcos authoritarian regime. The first Governor of Metro Manila was the first lady, Imelda Romualdez-Marcos, who served eleven consecutive years.

The Commission had powers to coordinate or establish shared public services (such as traffic, fire control, flood control, water, sewage, etc.) and it also exercised considerable supervisory powers, involving the power to review, amend, modify or repeal various acts of its component towns and cities. It was also responsible for '[insuring] and [monitoring] the undertaking of a comprehensive social, economic and physical planning and development of the area.'[37] To that end, one of the Commissioners was responsible for planning, which included the responsibility to 'formulate… long-range plans for the integration of common, essential, municipal and public services'.[38]

Months after the creation of the Metropolitan Manila Commission, a Human Settlements Commission was established, which was responsible for an 'integrated national plan on human settlements, and [identifying] and [developing] the spatial implications and components of national, and regional development plans, policies and programs.[39] Its focus was thus the development of standards and guidelines for land use and development regulations to be used by local governments.[40] These functions would then, two years later, be transferred to a newly created Ministry of Human Settlements.[41] Mrs. Marcos would also be appointed to head this Ministry contemporaneously with her governorship of the Metro Manila Commission.

By the end of the 1970s, Metro Manila planning was carried out by local governments, following standards promulgated by the Ministry of Human

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[34] Presidential Decree No. 824 (1975), section 2.
[35] Presidential Decree No. 824, section 1.
[36] Ibid, section 3.
[37] Ibid, section 4.
[38] Ibid, section 6.
[39] Presidential Decree No. 933 (1976), section 4.
[40] Ibid, section 8.
[41] Presidential Decree No. 1396, section 4.

Settlements, and subject to review by the Metro Manila Commission. However, the ability to implement many of these plans diminished with the economic and political crisis of the early 1980s, and this governance regime would ultimately be transformed by the 1986 revolution.

Local Autonomy and Planning

i) Constitutional Mandates

The 1986 Revolution led to a change in government and the drafting of a new Constitution. Adopted in 1987, the new charter was seen as a break from the authoritarian regime that preceded it. The constitution defined a concept of national development that spoke of the values of economic development, environmental protection and social justice, with the latter particularly in relation to labor, agrarian and urban land reform.[42] It also provided for state control of land and mineral resources,[43] and the regulation of their use and classification.[44] It further mandated autonomy for local governments,[45] recognition of the rights of indigenous cultural communities,'[46] and conservation of historical and cultural heritage.[47] Finally, it stressed the limitations on private property for the common good.[48] Critically, however, in a country where the control of land remains the foundation of wealth and power, the balancing of values articulated by the Constitution remains largely aspirational.

ii) National Administration

Shortly after the Revolution, the Ministry of Human Settlements was dissolved,[49] and its key functions divided among several agencies that were to be governed through a Housing and Urban Development Coordinating Council (HUDCC). It soon became apparent that mere coordination between the agencies was insufficient to implement the national mandates effectively. In 2019, just over thirty years after the Ministry of Human Settlements was dissolved, the

[42] See 1987 Philippine Constitution, Article II, section 9, 15, 16, 18, and 21, Article XIII, section 3, 9 and 10.
[43] 1987 Philippine Constitution, Article XII, section 2.
[44] Ibid, section 3.
[45] 1987 Philippine Constitution, Article II, section 25 and Article X, section 1 and 2.
[46] Ibid, section 22.
[47] Ibid, Article XIV, section 15 and 16.
[48] Ibid, Article XIII, section 1. See also Article XII, section 6.
[49] Executive Order No. 85 (1987).

Philippines created the Department of Human Settlements and Urban Development (the 'Department')[50] to more effectively implement national mandates for planning and development.

The Department is responsible for the development of policies and standards for housing and urban development, reviewing plans prepared by local governments and providing technical assistance to them in the preparation of those plans, among other functions.[51] As a consequence of the constitutional mandate for local autonomy, planning itself has been placed under the authority of local governments pursuant to the Local Government Code.

iii) The Hierarchy of Local Governance

Local governments are structured with the *barangay* (or village) at the bottom, a number of which comprise a city or municipality, which in turn, comprise a province. A city is differentiated from a municipality by a larger population and income as indicators of its level of urbanization. To address the challenges of urbanization, it also exercises the functions and powers of both a municipality and a province.[52] As a general rule, barangays are supervised by and part of programs of cities or municipalities, and the same goes for cities and municipalities in relation to provinces, except when a city has been declared independent of it by law.[53]

There is also a regional level of governance, called an 'administrative region', spanning several provinces and independent/highly urbanized cities. The region serves as a coordinative and administrative level between national government agencies and local governments. National government agencies will have regional offices that are responsible for implementing national programs.[54] Implementing those programs will involve coordination with the local governments, often through a Regional Development Council.[55] An administrative region does not, however, have a juridical personality of its own.

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[50] Republic Act No. 11201, passed on 14 February 2019.
[51] Ibid, section 5.
[52] See Local Government Code, Republic Act No. 7160, section 17.
[53] Republic Act No. 7160, section 452. See, further, Harding, above n2.
[54] The Administrative Code, Executive Order No. 292 (1987), Book IV, section 26.
[55] Republic Act No. 7160, section 411.

iv) The Local Government Code

The Local Government Code (the 'Code') stresses that local governments have been granted local autonomy 'to enable them to attain their fullest development as self-reliant communities and make them more effective partners in the attainment of national goals…'[56] To that end, as stated in 'general welfare' clause:

> Every local government unit shall exercise the powers expressly granted, those necessarily implied therefrom, as well as powers necessary, appropriate or incidental for its efficient and effective governance, and those which are essential to the promotion of the general welfare. Within their respective territorial jurisdictions, local government units shall ensure and support, among other things, the preservation and enrichment of culture, promote health and safety, enhance the right of the people to a balanced ecology, encourage and support the development of appropriate and self-reliant scientific and technical capabilities, improve public morals, enhance economic prosperity and social justice, promote full employment among their residents, maintain peace and order, and preserve the comfort and convenience of their inhabitants.[57]

Local governments also have the power to generate and apply resources (through the imposition of taxes, fees and other charges)[58] and to exercise eminent domain.[59] National government agencies are required to consult with local government units, non-governmental organizations and other sectors for projects being undertaken within the territorial jurisdiction of said local government units.[60] Specific services, facilities, powers and functions for each kind of local government unit are outlined in the Code.

The duty of planning ultimately falls on cities and municipalities. They have the general responsibility and power to reclassify lands, prepare land-use plans,

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[56] Republic Act No. 7160, section 2.
[57] Ibid, section 16.
[58] Ibid, section 18.
[59] Ibid, section 19.
[60] Ibid, section 26 and 27.

impose reasonable limits and restraints on the use of property, and adopt zoning ordinances.[61] Drafting the Comprehensive Land Use Plan (CLUP) is primarily the work of the city or municipal planning office, with the involvement of the local development council (LDC)[62] and other stakeholders. The CLUP is submitted to the municipal or city council for approval. For municipalities and component cities, the approved CLUP is then submitted to the province for review and ratification, with the goal of reconciling the different CLUPs of its component local governments. It has been practice that those of independent and highly urbanized cities, as well as the municipalities and cities of Metro Manila, are to be reviewed by the Department.[63] However, the Department of Human Settlements and Urban Development Act (Republic Act No. 11201) does not provide for it to review the CLUPs of the Metro Manila's LGUs (see section 5, Powers and Functions), but its Implementing Rules and Regulations do provide for the power of ratification (section 13.8) and review (section 19.10[a]). The Rules may be building on existing practice and attempting to address a gap in the law, however, given the lack of explicit statutory language vesting that power on the Department versus the fundamental nature of planning in relation to local autonomy, it may not withstand judicial scrutiny.[64]

v) Other Planning Mandates

While the Code focuses on land use planning, it also does require that local governments formulate various development planning instruments such as socio-economic development plans and public investment programs.[65] Under various laws - ranging from climate change and disaster risk reduction, forestry, coastal resources, environmental impact assessment and waste management, to tourism, special economic zones, farming and aquaculture - other planning processes and documents are also required.[66] Also, while the bulk of planning occurs at the

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[61] Ibid, section 20, 447(2) and 458(2).
[62] Ibid, section 106 and 109.
[63] Executive Order No. 72 (1993).
[64] At present, it appears that there are no decided cases defining the power of the Department in relation to land use planning.
[65] Republic Act No. 7160, section 109.
[66] The more important laws that directly impact of land use and on the planning process include the following: The Public Land Act (Commonwealth Act No. 141 (1936) as amended), The Forestry Code (Presidential Decree No. 705 (1975)), The Water Code (Presidential Decree No. 1067 (1976)), The Comprehensive Agrarian Reform Law (Republic Act No. 6657 (1988)), The National Integrated Protected Areas System Act (Republic Act No. 7586 (1992)), The Solid Waste Management Act (Republic Act No. 9003 (2001)), The Climate Change Act of 2009

municipal or city level, these plans must be drafted within a framework of other national, regional and provincial plans. The national government sets program priorities and provides funding and assistance, while provinces review the plans of their cities and municipalities for compatibility with their own and each other's development priorities. The CLUP must reflect all these evolving national policies and priorities because the Code states that the land use plans and zoning ordinances shall be 'in conformity with existing laws.' However, it is often the casethat local development plans are often inconsistent with what the CLUP requires, whether as a result of a lack of technical expertise to reconcile these differences, or as a product of conflicting interests.[67]

vi) Citizens

The space for citizens lies in the fundamental policies of representation and consultation. The Code requires provincial, city and municipal legislative councils or *sanggunian* to include sectoral representatives among their members – one representative each from the women and the workers sectors, and one from the 'urban poor, indigenous cultural communities, disabled persons, or any other sector as may be determined' by them.[68]

The Code also requires that national agencies 'conduct periodic consultations with appropriate local government units, nongovernmental and people's organizations, and other concerned sectors of the community before any project or program is implemented in their respective jurisdictions,'[69] as well as that the 'formulation and implementation of policies and measures on local autonomy shall be guided by… the participation of the private sector in local governance, particularly in the delivery of basic services…'[70]. Consultations are required with

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(Republic Act No. 9729 (2009)), The National Disaster Risk Reduction and Management Act (Republic Act No. 10121 (2010)), The Indigenous Peoples Rights Act of 1997 (Republic Act No. 8371 (1997)), The Cultural Heritage Act of 2009 (Republic Act No. 10066 (2009)), The Mining Act of 1995 (Republic Act No. 7942 (1995)), The Special Economic Zone Act of 1995 (Republic Act No. 7916), The Agriculture and Fisheries Modernization Act (Republic Act No. 8435 (1997)), The Revised Fisheries Code (Republic Act No. 8550 (1998)), The Tourism Act of 2009 (Republic Act No. 9593).

[67] Jyrus B. Cimatu, 'Ang Batas at ang Balai: Establishing the Right to the City as a Path towards Liberty and Sustainable Prosperity' (2022) 66 UST Law Review 211, see also Emma Porio, 'Citizen Participation and Decentralization in the Philippines' in Citizenship and Democratization in Southeast Asia, 2017

[68] Republic Act No. 7160, section 41(c).

[69] Ibid, section 2(c).

[70] Ibid, section 3(l).

local government units, non-governmental organizations, and other stakeholders for any national agency project or program that may cause significant environmental damage.[71] Furthermore, many statutes over the last four decades have included provisions that incorporated the involvement of civil society organizations, as well as allowed citizens a direct role in planning and planning related processes.[72]

Linking representation and consultation together – at least in a specific dispute affecting the environment – the Court has specifically ruled that 'Under the Local Government Code, therefore, two requisites must be met before a national project that affects the environmental and ecological balance of local communities can be implemented: prior consultation with the affected local communities, and prior approval of the project by the appropriate *sanggunian*. Absent either of these mandatory requirements, the project's implementation is illegal.'[73]

In the stricter sense of land use and zoning, civic involvement begins in the drafting processes of local plans, which involves working with the stakeholder representatives in the local development committee and with city and municipal councillors in the approval of plans and implementation of ordinances.[74] Once the ordinance has been passed, specific offices and bodies will be created to deal with zoning concerns. Under the Department's Model Zoning Ordinance, a Zoning Administrator implements the land use plan through the issuance of

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[71] Ibid, section 26. See also Jose Lina et al. v. Francisco Dizon Pano et al. G.R. No. 129093, August 30, 2001

[72] The Environmental Impact Assessment System provide for mechanisms of consultation and review by stakeholders. (Department Administrative Order No. 2003-30, Rule 5.3, implementing Presidential Decree No. 1586 (1978)) Special economic zones are required to include representatives from investors, labor, businesses outside the zone, in an advisory body for each zone (Republic Act No. 7916 (1195), section 15). Indigenous communities have the right to participate in decision making affecting them, and to free, prior, informed consent is necessary for the projects affecting their domains (Republic Act No. 8371, section 15, 16, and 58). The National Integrated Protected Areas System Act requires the inclusion of non-governmental or people's organizations representatives in Protected Area Management Boards. (Republic Act No. 7586 (1992), section 11, amended by Republic Act No. 11038 (2018), section 9.) The Cultural Heritage Act of 2009 allows any stakeholder to file petitions for the listing or delisting of heritage sites (Republic Act No. 10066 (2009), section 8). Laws on farming and fishery development provide for supports for farmers' and fisherfolk's groups, and their inclusion in consultations and decision-making (Republic Act No. 8435, section 6).

[73] Province of Rizal, et al. v. Executive Secretary et al. G.R. NO. 129546. December 13, 2005

[74] Republic Act No. 7160, section 106 and 109.

locational clearances, notices of non-conformity and notices of violation.[75] A Local Zoning Board of Appeals (LZBA), reviews violations of, or clearances or permits issued pursuant to the zoning ordinance,[76] and includes two members from private sector organizations, and two members from non-government and civil society organizations. The Department also provides an adjudicatory mechanism that hears disputes between homeowners and project developers and appeals from local zoning authorities.[77]

Finally, there exists as a general principle, a requirement that public participation, including notices and hearings, must occur prior to the adoption by agencies of rules and regulations.[78] As such, the space exists for civic engagement in the planning process within local government units.

As noted earlier, jurisprudence exists and is well established regarding the powers of local governments in relation to land use and zoning. One specific case – and admittedly *sui generis* – provides unique insight into the interplay of different forces and procedures.

In *Knights of Rizal v. DMCI Homes, Inc.,*[79] a real estate developer, DMCI, sought to construct a residential condominium behind (and within the vantage point of) the monument to the Philippine national hero, Jose P. Rizal. While DMCI had secured a building permit, the Manila City Council in response to public clamour issued a resolution investigating the issuance of the building permit, as the proposed project would 'dwarf the statue of our hero, and … ruin the line of sight of the Rizal Shrine from the frontal Roxas Boulevard vantage point.' The city building official asked the city's legal officer for an opinion on the Council's resolution. The legal officer said there was 'no legal justification for the temporary suspension of the building permit…' and the City of Manila and DMCI then sought the opinion of the National Historical Commission. The latter opined that since the project was outside the boundaries and buffer zone of the park surrounding the monument, it would not obstruct the view of the monument. The City Council nevertheless reiterated its opposition to the

75 Ibid, section 44.
76 Ibid, section 45 and 46.
77 Republic Act No. 11201 (2019), section 16.
78 Administrative Code of 1987, Executive Order No. 292, Book VII, section 9.
79 G.R. No. 213948, April 18, 2017.

building permit. DMCI wrote to the City Mayor seeking clarification regarding the zoning permit and indicated that while DMCI felt it was not necessary to go through the local zoning board, it was willing to comply with the zoning appeals process. The zoning board then issued a resolution in favour of DMCI but noted that DMCI's project exceeded the percentage of land occupancy and floor area ratio standards of the zone in which the project would be built. It nevertheless recommended the approval of the variance. The City Council, a year and a half after the building permit was issued, then adopted the zoning board's recommendations and allowed DMCI to proceed with the project. Against this backdrop, a civic organization, the Knights of Rizal (KOR), arguing the case was of 'transcendental importance' bypassed normal court processes and directly petitioned the Supreme Court.. The Court entertained the petition, but however ruled that there was no law prohibiting the construction of the condominium. It stated that the specific provisions of the zoning ordinance[80] relevant to heritage conservation were merely 'guides' and were not binding on the project, noting in particular that the project itself was outside the boundaries of the park surrounding the monument. Further, the National Cultural Heritage Act [81] focuses its protection on the physical integrity of heritage sites and the disruption of the view does not impinge on that physical integrity. The Court in particular noted that being an appellate body, it has no jurisdiction to make findings of fact. Absent a showing of grave abuse of discretion, it was inclined to respect the approval of the zoning board and the city council.

The case illustrates how the citizens can engage – and the limitations of engagement – with the planning process. On one hand, public clamour motivated the City Council to study the issuance of the building permit; on the other, there was a lack of direct or committed participation by the petitioner or other stakeholders in formal local zoning processes. A civic organization sought judicial relief, but by short-circuiting judicial processes, it limited the extent of relief it could obtain.

The case also illustrated the challenges posed by bureaucracy and the accommodations that were provided to the developer. As observed by the Court,

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[80] Manila City Ordinance No. 8119, section 47.
[81] Republic Act No. 10066.

the case involved findings of fact that should have been settled in local administrative proceedings, but the way the matter moved between different offices and agencies despite the existence of what should have been a straightforward administrative procedure points to something else. Note that, for instance, DMCI was able to obtain a permit for a building that exceeded the restrictions of the zone, or that it sought the intervention of the City Mayor and went to the zoning board when its permit was still pending review.

Planning for the Metropolis

i) The Framework

Recognizing that the general legal framework of local governments will be inadequate to deal with the challenges of metropolitan areas, the 1987 Constitution provides that:

> 'The Congress may, by law, create special metropolitan political subdivisions, subject to a plebiscite… The component cities and municipalities shall retain their basic autonomy and shall be entitled to their own local executives and legislative assemblies. The jurisdiction of the metropolitan authority that will hereby be created shall be limited to basic services requiring coordination.'[82]

Under this provision, whether a metropolitan authority would have a planning function – and the relationship of that function to that of the local governments it embraces – would be dependent on its charter. Planning is inherently a local function and is fundamentally linked with local autonomy. However, in metropolitan areas where human activities cross and ignore political boundaries, a considerable amount of planning coordination is necessary, just as how the Code empowers a province to coordinate and ratify the local plans of its component cities and municipalities. In a situation where a metropolitan area spans component cities and municipalities but is embraced by one province, the province can continue to perform that coordinative function. Where, however, the area spans multiple provinces or involves highly urbanized or independent

[82] 1987 Philippine Constitution, Article X, section 11.

cities, no viable entity exists to properly coordinate land use – except perhaps, the metropolitan authority to be established.

The Code also provides an alternative arrangement that may address shared local concerns in a manner that does not require national legislation. It allows them, through appropriate ordinances and agreements to 'group themselves, consolidate, or coordinate their efforts, services, and resources for purposes commonly beneficial to them.'[83] While this would have the benefit of flexibility in addressing specific needs – including concerns that go beyond the coordination of basic services – it is also an inherently temporary arrangement. Changes in local political leadership may also result in the abandonment of a mechanism that might otherwise be viable, if not successful.

ii) Governance

After Marcos' Metro Manila Commission was abolished in 1987, the Metropolitan Manila Authority[84] (MMA) replaced it, governed by a Council composed of the mayors of the metropolis' 17 cities and municipalities.[85] The MMA would be responsible for formulating policies on basic services requiring coordination or consolidation between the local governments and the promulgation of issuances regarding such basic services. The cities and municipalities of Metro Manila would be responsible for their respective jurisdictions, and local plans are to be submitted to the MMA for integration with sectoral and regional plans. The MMA was also tasked with reviewing legislation adopted by each local government for consistency with other local governments and advising them accordingly.[86]

The MMA had a short lifespan, being superseded in 1994 by the Metropolitan Manila Development Authority (MMDA).[87] It is the MMDA that is currently responsible for the metropolis.

The MMDA is also governed by a Council composed of all the mayors of the 17 local governments, with everyday operations overseen by a Chairman and Chief

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[83] Republic Act No. 7160, section 33.
[84] Executive Order No. 392 (1990).
[85] Ibid, section 2.
[86] Ibid, section 6.
[87] Republic Act No. 7924 (1994).

Executive Officer. The MMDA 'shall perform planning, monitoring and coordinative functions, and in the process exercise regulatory and supervisory authority over the delivery of metro-wide services within Metro Manila *without diminution of the autonomy of the local government units concerning purely local matters.*'[88] To that end, MMDA would be responsible for development planning and urban renewal, zoning and land use planning, and shared services such as transport and traffic, solid waste disposal, flood control and sanitation, among others.[89]

It is crucial, however, to emphasize the requirement of local autonomy. Thus, while MMDA's implementing rules would indicate that it is responsible for drafting a master plan for Metro Manila, and for local governments drafting their own plans to conform with that master plan,[90] the MMDA wields little power to enforce this. Also, the MMDA, in performing its functions, must 'consult, coordinate, and work closely with the local government units, the national government agencies, accredited people's organizations [POs], non-governmental organizations [NGOs] and the private sector operating in Metropolitan Manila. The parties involved may thereafter enter into the desired memorandum of agreement.'[91]

The MMDA, under its rules 'shall consult and work closely with people's organizations, and non-governmental organizations, and the private sector for the purpose of rationalizing development plans and ensuring wider participation in the implementation of its plans and projects.'[92] While the MMDA's charter does not provide for a specific mechanism for consultation, it observes the general administrative rule regarding public participation.[93] Individual cities and municipalities also conduct their own consultations under their own mandates when deliberating on measures proposed by the MMDA.

The Supreme Court has had the opportunity to define the powers of the MMDA, zeroing in on the specific powers vested in the MMDA by its charter. In

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88 Ibid, section 2. (italics supplied).
89 Ibid, section 3.
90 Implementing Rules of Republic Act No. 7924, section 14.
91 Ibid, section 14 and 15.
92 Ibid, section 23.
93 Administrative Code of 1987, Executive Order No. 292, Book VII, section 9.

Metropolitan Manila Development Authority v Bel-Air Village Association, Inc, [94] the Court was confronted with the question of whether the MMDA could order a residential community to open a private road to improve the flow of traffic. The Supreme Court ruled that while the MMDA had the power to set policies, and coordinate and regulate programs and projects concerning traffic management,[95] the Court emphasized that the opening of a private road involves the exercise of police power, and that since the MMDA is not a political subdivision, it does not wield police power and has 'no grant of authority to enact ordinances and regulations for the general welfare of the inhabitants of the metropolis.'

In a subsequent case questioning the power of the MMDA to confiscate a driver's licence, the Court reiterated and built on the *Bel-Air* ruling that the MMDA had no such power, unless it could demonstrate that such power had been delegated to it by the legislature.[96] Notably, one researcher discussing this case was of the view that when the MMDA's charter was being drafted, the proponents wanted to sidestep the messy requirement of conducting the plebiscite required by the Constitution to create a genuine metropolitan political subdivision. In doing so, the drafters ended up with an agency impotent to deal with the issues it was supposed to confront.[97]

Finally, in *Federation of Jeepney Operators and Drivers Association of the Philippines (FEJODAP), et al v Government of Manila, et al*[98]*,* however, the Supreme Court clarified these previous rulings. It ruled that in the first case of opening a private road, this involved an exercise of police power, which was specifically vested in the local government and not with the MMDA. In the second case involving the confiscation of a licence, the Court abandoned its previous ruling, instead stated that the MMDA was, based on the specific wording of its charter[99] and as clearly manifested in Congress' debates during its drafting, clearly empowered by Congress to regulate traffic for the entire metropolis:

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[94] Metropolitan Manila Development Authority v. Bel-Air Village Association, Inc., G.R. No. 135962, March 27, 2000.
[95] Republic Act No. 7924, section 5(e).
[96] *Metropolitan Manila Development Authority v. Garin,* G.R. No. 130230, April 15, 2005.
[97] Joseph Angelo D. Angel, 'Extracting the Tiger's Tooth: Metropolitan Manila Development Authority v. Garin' (2005) 50 *Ateneo Law Journal* 129
[98] GR No. 209479, July 11, 2023.
[99] Republic Act No. 7924, Section 5(f).

> Install and administer a single ticketing system, fix, impose and collect fines and penalties for all kinds of violations of traffic rules and regulations, whether moving or non-moving in nature, and confiscate and suspend or revoke drivers' licenses in the enforcement of such traffic laws and regulations, the provisions of RA 4136 and PD 1605 to the contrary notwithstanding…[100]

The Court went even further to state that the traffic ordinances of each local government unit must yield to the MMDA's regulations:

> While the Court recognizes that LGUs possess delegated legislative powers, and thus may enact regulations to promote the general welfare of the people, the fact remains that as agents of the State, it is incumbent upon them to act in conformity to the will of their principal. Necessarily, therefore, ordinances enacted pursuant to the general welfare clause of the LGC may not subvert the State's will by contradicting national statutes… It bears stressing that the policy of ensuring the autonomy of local governments was not intended to create an *imperium in imperio* and install intra-sovereign political subdivisions independent of the sovereign state. As agents of the State, LGUs should bear in mind that the police power devolved to them by law must be, at all times, exercised in a manner consistent with the will of their principal.

Given that Congress specifically granted this power to the MMDA – impliedly amending the Local Government Code – local autonomy must yield to the explicit mandate of a national law.

While there are also other rulings regarding the MMDA's powers,[101] the reasoning of the Court follows that of the foregoing cases – as the MMDA is not

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[100] *Federation of Jeepney Operators and Drivers Association of the Philippines, et al. v. Government of Manila, et al.*, GR No. 209479, July 11, 2023.

[101] See also *The Metropolitan Manila Development Authority et al., v. Viron Transportation Co. Inc.* G.R. No. 170656, August 15, 2007; *The Metropolitan Manila Development Authority et al., v. Trackworks Rail Transit Advertising, Vending and Promotions, Inc.*, G.R. No. 179554, December 16, 2009; *Samson V. Pantaleon, et al, vs. Metro Manila Development Authority*, G.R. No. 194335, November 17, 2020

a political subdivision, it does not exercise general police power, and it is constrained by the specific wording of its charter.

CONCLUDING OBSERVATIONS

What we draw from the above discussion is the following set of conclusions:

1. The locus for planning activities lies within local governments, primarily within cities and municipalities. Provinces, national agencies, and the Department provide ways for defining and reconciling different local plans and development priorities. However, cities and municipalities, consistent with local autonomy, are ultimately responsible for drafting and implementing their land use and development plans.

2. In Metro Manila, even while the MMDA exists and provides a mechanism for the different local governments to coordinate their plans and programs, and while national agencies assist in defining and reconciling plans and priorities, each city and municipality has considerable latitude to act independently of the other local government. The MMDA is not a local government unit and does not wield the fundamental powers of government; its powers are specifically limited and defined by its charter.

3. There are many mechanisms for citizens to be involved in local planning and implementation, ranging from being directly involved or indirectly through representatives in local planning processes and legislation, to invoking administrative rights to public participation, notice and hearing, or to availing of specific procedures on zoning or housing, or under specific laws, and ultimately, to seeking judicial relief.

While the space exists for stakeholders to work with the MMDA, the limitations of the MMDA's power, especially in relation to planning, emphasize that the main arena for engagement with planning remains the local government unit. While the Local Government Code sets forth the core principles and mechanisms, there are also many specialized laws and regulations that enshrine representation and consultation and thus allow citizens to engage with the planning process. This engagement can occur in the local legislature, working through elected councillors or sectoral representatives, or in the administrative process by participating in the drafting of plans, or proceedings of entities such as the Local Zoning Board. Some specialized laws may provide other forums for engagement with and through other agencies. Finally, judicial review is available.

A review of existing laws would indicate that a wide space exists for the individual or a group to work with the local government, but the *Knights of Rizal* case also suggests a lack of knowledge or appreciation of the procedures that govern these spaces, and that power and wealth through the control of land can bend these procedures or shape their outcomes. The relationship between land, wealth and power is nothing new. With rapidly escalating land values in metropolitan areas, the circle of access to land, wealth, power and the mechanisms to protect it draws ever tighter. But this drives home precisely the need to strengthen institutions that allow the citizen to protect their interests against the powerful and to secure the public welfare.

In this regard, the knowledge and ability of ordinary citizens to activate mechanisms on zoning and planning should be promoted and this can be an area to which public interest lawyers can devote time and resources. Just as the agrarian reform or environmental justice movements have created a class of public interest advocates for the benefit of disenfranchised or under-represented communities, urban land reform will benefit from that attention and support. Advocating through formal administrative and judicial mechanisms must remain an avenue available to those that are otherwise left out of stakeholder processes.

The review and adjudicatory mechanisms of the Department of Human Settlements and Urban Development will be crucial also in creating a more level playing field for the citizen. While the Department is at risk of regulatory capture, the offices and agencies under it have had a clear awareness of their social justice mandate, especially when adjudicating between real estate developers and purchasers of houses and lots. The same mandate and the broader regard for enhancing the public welfare should permeate its function of reviewing zoning board appeals.

Lastly, the proper creation of a metropolitan political subdivision – and not merely a coordinative administrative agency – is of critical importance to manage the needs of the 17 component cities and municipalities, as well as the needs of the greater urban sprawl in the neighbouring provinces. It will be concededly difficult to get each local government to cede some of its powers to a new political entity, but at this point, as the metropolis groans under the weight of its populace and sorely lacking infrastructure, the need for it is paramount. But the metropolitan government also offers the possibility of creating another mechanism for checking and balancing local autonomy. If it should have the power to direct and mandate the coordination of metropolitan-wide planning, it should have the ability to review not just the plans, but also how those plans are implemented.

CHAPTER 7

CITIZEN PARTICIPATION AND THE PLANNING LAW REGIME IN SINGAPORE

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Abstract

This chapter discusses salient features of the legal regime governing the planning of land use in Singapore. It is submitted that the law has, in general, successfully achieved the purposes of providing for the orderly urban development of a nation with a large population yet constrained by limited land area. Nonetheless, how the law is structured evinces a largely top-down approach providing limited opportunities for public consultation. This is likely to cause dissatisfaction with governmental policy- and decision-making at a time when people are increasingly outspoken on matters close to their hearts such as conserving heritage and the environment. The fact that the Government appears to be aware of this, and is taking steps to engage non-governmental organizations and members of the public in the planning process, is to be welcomed.

Introduction

PLANNING LAW, though regarded as fairly dry and technical, has a significant impact on people's lives as it shapes the surroundings in which they thrive. Used unwisely, relentless urban sprawls devoid of greenery and wildlife may be created. Citizens may develop a sense of rootlessness if familiar neighbourhoods or historic buildings and sites are bulldozed in the name of progress. Thus, it is imperative that the legal framework provides sufficient powers for governmental authorities to ensure that land development occurs methodically and safely. The law must also include adequate opportunities for the public to express their concerns and views on the development of the urban landscape, particularly in a compact city like Singapore.

Part I of this chapter discusses salient features of the planning regime, including the use of the Master Plan and Long-term Plans as planning tools; special designations that can be conferred on land, namely, conservation areas, national monuments, national parks, nature reserves, marine parks, tree conservation areas and heritage road green buffers; and the control of development of land by the Government by requiring prior written permission. Part II takes a brief look at two other legal rules relevant to planning law: the compulsory acquisition of land for public purposes, and the collective or *en bloc* sale of property subdivided into strata titles.

It is noted that, overall, the planning law framework has successfully achieved the purposes of providing for the orderly urban development of a nation with a large population yet constrained by limited land area. Nonetheless, how the law is structured evinces a largely top-down approach providing limited opportunities for public consultation. This is likely to cause dissatisfaction with governmental policy- and decision-making at a time when people are increasingly outspoken on matters close to their hearts such as conserving heritage and the environment. The fact that the Government appears to be aware of this, and is taking steps to engage non-governmental organizations and members of the public in the planning process, is to be welcomed.

I . Salient Features of the Planning Regime

A. The Master Plan

The main piece of legislation regulating planning in Singapore is the Planning Act,[1] the short title of which states: 'An Act to provide for the planning and improvement of Singapore and for the imposition of development charges on the development of land and for purposes connected therewith.' The Act is administered by the Minister for National Development,[2] who has appointed a government agency called the Urban Redevelopment Authority ('URA')[3] to be generally responsible for the operation of the Act.[4]

Planning of land development is ultimately based upon the Master Plan. The basis of the Master Plan, the latest version of which is the 2019 version,[5] is the Plan that was originally submitted to and approved by the Governor of Singapore in Council on 5 August 1958 under the Singapore Improvement Ordinance[6] as subsequently amended, and includes approved maps and a written statement.[7] The written statement is an integral part of the Master Plan that includes a summary of the main proposals of the Plan with other descriptive matter illustrating the proposals.[8] For example, the written statement accompanying Master Plan 2019 explains the zoning notations and plot ratios indicated in the

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1 Planning Act 1998 ('PA').
2 Constitution of the Republic of Singapore (Ministerial Responsibility) Notification 2025 (S 415/2025), para 2(1) read with the 1st and 13th Schedules.
3 Established by the Urban Redevelopment Authority Act 1989.
4 PA (n 1) s 5. Specifically, the Chief Planner of the Urban Redevelopment Authority ('URA') is appointed the competent authority for amending the Master Plan and drawing up Certified Interpretation Plans; the Chief Executive Officer of the URA is the competent authority for operation of other provisions of the PA; and the Housing and Development Board is the competent authority for dealing with use or material change in the use of land that is owned by the Board, leased by the Board to another person, or vested in the State but agreed by the State to be alienated to the Board, carried out without planning permission or in breach of any condition subject to which planning permission is granted: Appointment of Competent Authority (Cap 232, N 7, 2007 Rev Ed).
5 The Master Plan 2019 is accessible online on the website of the URA at <https://eservice.ura.gov.sg/maps/?service=MP>.
6 Cap 259, 1955 Ed (repealed).
7 PA (n 1) s 6. Where there is any contradiction, discrepancy or inconsistency between particulars shown on maps comprised in the Master Plan relating to the same area, the map to a larger scale prevails, and where the contradiction, discrepancy or inconsistency is between a map and the written statement, the written statement prevails: Planning (Master Plan) Rules (Cap 232, R 1, 2000 Rev Ed) ('PMPR') rr 17(1) and (2).
8 PA (n 1) s 2 (definition of *written statement*).

Plan and any amendments to it.[9] There are presently 31 types of land zoning.[10] In addition, to provide more detailed interpretation of the Master Plan, the URA prepares Certified Interpretation Plans on a larger scale than the maps in the Master Plan.[11]

Another tool that the URA employs in the planning process is the Long-term Plan. Introduced in 1971 as the Concept Plan, its aim is to guide land development over a 40–50-year horizon,[12] compared to the Master Plan which guides development over a 10–15-year period.[13] Rather than containing detailed planning norms, it is 'an expression of principles and policies of land space utilisation' and 'forms the framework for integrating land-use, transportation plans and infrastructural provisions'. The Long-term Plan guides the updating of the Master Plan.[14] The current Long-term Plan review dates from 2021.[15] While the Long-term Plan it is not statutorily required, it is prepared by the URA following extensive public input[16] and consultation with other government agencies, and is ultimately approved by the Minister.[17]

1. Special Designations

Where the Minister is of the opinion that any area is of 'special architectural, historic, traditional or aesthetic interest', they may approve a proposal to amend

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[9] *The Planning Act: Master Plan Written Statement 2019*, Urban Redevelopment Authority ('URA') website (15 October 2019) https://www.ura.gov.sg/-/media/Corporate/Planning/Master-Plan/MP19writtenstatement.pdf, accessed 30 September 2025 ('*Written Statement 2019*').
[10] Ibid, [5.5] and Table 1.
[11] PA (n 1) s 7.
[12] *About the Concept Plan*, URA website (last updated 12 November 2018) https://www.ura.gov.sg/Corporate/Planning/Concept-Plan/About-Concept-Plan.
[13] *Master Plan*, URA website (last updated 29 September 2025) https://www.ura.gov.sg/Corporate/Planning/Master-Plan/ accessed 30 September 2025.
[14] SY Tan, HW Tang and KFK Low, 'Planning and Development' in *Tan Sook Yee's Principles of Singapore Land Law* (3rd ed, LexisNexis, Singapore 2009) 751, 753, [23.8] (referring to the former Concept Plan).
[15] *Space for Our Dreams: Long-term Plan Review 2021* (URA, Singapore 2022) https://www.ura.gov.sg/-/media/Corporate/Planning/LTPR21/LTPR_publication.pdf, accessed 30 September 2025.
[16] *Public Engagement Journey*, URA website (last updated 29 September 2025) https://www.ura.gov.sg/Corporate/Planning/Long-Term-Plan-Review/Public-Engagement-Journey, accessed 30 September 2025. For the preparation of the Concept Plan 2011, the URA conducted a lifestyle survey and held focus groups on 'quality of life' and 'sustainability and identity': JTT Lee, 'We Built This City: Public Participation in Land Use Decisions in Singapore' (2016) 10 Asian J Comp L 213, 217–218.
[17] M Grant, *Singapore Planning Law: Commentary on the Planning Act 1998* (Butterworths Asia, Singapore 1999) 53.

the Master Plan to designate the area as a conservation area.[18] A conservation area may comprise an area, a group of buildings, or even a single building.[19] There are more than 7,000 conservation areas generally falling into four categories: the historic districts of Chinatown (made up of Bukit Pasoh, Kreta Ayer, Tanjong Pagar and Telok Ayer), Kampong Glam and Little India; the residential historic districts of Blair Plain, Cairnhill and Emerald Hill; secondary settlements; and bungalows.[20] The URA is authorized to issue guidelines for the conservation of buildings or land within a conservation area, and for protection of their setting (commonly termed envelope control guidelines).[21] Revised conservation guidelines were published in December 2017,[22] and deal with matters such as how buildings within conservation areas are to be restored and the permitted uses of such buildings. Specific facade restoration guidelines have also been drawn up for some individual buildings. The process for the designation will be examined in the next section.

It has been pointed out that while in practice the URA gives written notice to landowners of proposals to include their properties in a conservation area, once a conservation area has been designated the law does not require this fact to be noted on the land titles of the affected properties.[23] This may be contrasted with preservation orders made to declare properties as national monuments,[24] described below. While prospective purchasers of properties would find out

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[18] PA (n 1) s 9(1).
[19] Ibid, s 9(2).
[20] *Conservation Principles*, URA website (December 2023; last updated 29 September 2025) https://www.ura.gov.sg/Corporate/Guidelines/Conservation/Conservation-Guidelines/Part-1-Overview/Introduction, accessed 30 September 2025.
[21] PA (n 1) s 11. The *Conservation Guidelines*, *ibid*, Pt 3, define *envelope control sites* as 'vacant lands and buildings located within Conservation Areas, but not designated for conservation'. A previous edition of the *Conservation Guidelines* stated that the objective of envelope control guidelines 'is to ensure that new buildings will continue to respect: (a) The characteristics of the existing street, such as the provision of covered walkways and the continuity of the streetscape, and (b) The overall scale and character of the area': *Conservation Guidelines*, URA website (December 2017) [3.2.1] https://www.ura.gov.sg/Corporate/Guidelines/Conservation/-/media/E20551594A1C4A899F12E5F124ECE008.ashx, accessed 22 October 2018.
[22] *Conservation Guidelines*, *ibid*, and see *Revised Conservation Guidelines, Technical Handbooks and Strategic Sale Sites* (Circular to Professional Institutes No URA/PB/2017/08-PCUDG; 15 December 2017) https://www.ura.gov.sg/Corporate/Guidelines/Circulars/dc17-08, accessed 29 September 2025.
[23] Grant (n 17) 60–61.
[24] A preservation order that affects registered land is regarded as a statutory obligation under the Land Titles Act 1993, s 142, and a notification of it will be made by the Registrar of Titles on the folio of the land-register or the document of title relating to the affected property: see the Preservation of Monuments Act 2009 ('PMA'), ss 11(8) and (9).

about conservation area designations when they make a pre-contract requisition to the URA, existing owners might be unaware of this status that has been conferred on their properties and might inadvertently carry out unauthorized works that do not require planning permission.[25]

A few other schemes relevant to planning law are worthy of mention at this point: the national monuments scheme; the designation of national parks, nature reserves and marine parks; and measures for the conservation of trees and plants. Under the Preservation of Monuments Act,[26] the Minister for Culture, Community and Youth[27] is empowered, after consulting the National Heritage Board ('NHB'),[28] to make a preservation order placing a monument under the NHB's protection.[29] The word *monument* is compendiously defined as:[30]

> [T]he whole or any part of, or the remains of —
>
> (a) any building, structure, erection, statue, sculpture or other work, whether above or below the surface of the land, and any cave or excavation;
>
> (aa) any site;
>
> (b) any site comprising the remains of any such building, structure, erection, statue, sculpture or other work or of any cave or excavation; or
>
> (c) any site comprising, or comprising the remains of, any vehicle, vessel, aircraft or other movable structure or part thereof which neither constitutes

25 Grant (n 17) 60–61.
26 PMA (n 24).
27 Constitution of the Republic of Singapore (Ministerial Responsibility) Notification 2025 (n 2), para 2(1) read with the 1st and 3rd Schedules.
28 Established by the National Heritage Board Act 1993.
29 PMA (n 24) s 11(1). A preservation order extends to '(a) all the land containing the monument; and (b) any land adjacent to the monument which is in the same ownership as the monument and which the Minister is satisfied should also be protected under this Act in order — (i) to preserve the monument in its setting; (ii) to provide or facilitate access to the monument; or (iii) to provide for the exercise of proper control or management with respect to the monument': s 11(3).
30 *Ibid*, s 2 (definition of *monument*).

nor forms part of any work which is a monument within paragraph (a),

and includes any machinery attached to or forming part of a monument which cannot be detached from the monument without being dismantled; […]

A *site* is:

(a) any open space;

(b) any inland waters; or

(c) an area of land (including any building, structure, erection, statue, sculpture or other work, vegetation, inland waters or physiographical formation, or any combination thereof) containing anything that evidences human activity, present or past,

but excludes a site falling within paragraph (b) or (c) of the definition of 'monument'.

Once a monument is subject to a preservation order, it is known as a national monument.[31] A number of requirements concerning what may be done with the site then kick in. For example, a legal duty is imposed on the owner and the occupier of a national monument to 'take all reasonable measures to ensure that the national monument is properly maintained at all times in accordance with such guidelines as may be issued by the Board'.[32] The NHB may also issue to the owner or occupier a preservation notice requiring works for the preservation, maintenance or repair of the site to be carried out at their expense.[33] Works may only be carried out on a national monument (or a proposed national monument)[34] with the NHB's prior written permission, and the Board may impose conditions on the works as it thinks are necessary to protect the monument, including

[31] *Ibid*, s 2 (definition of *national monument*) and s 11(2).
[32] *Ibid*, s 13(1).
[33] *Ibid*, s 13(2). Failure to comply with a preservation notice is a criminal offence: s 13(7).
[34] A *proposed national monument* is a monument in respect of which written notice of the Minister's intention to make a preservation order has been issued: PMA (n 24) s 2 (definition of *proposed national monument*) read with s 11(7)(a); and see the text accompanying n 40.

requiring works to be carried out to certain specifications, and restoring the site if the works cause damage.[35] Permission may be refused if the NHB is:[36]

> of the opinion that the works proposed to be done in relation —
>
> (a) to a national monument or any part of a national monument, or to the land or site on which the national monument is located, would affect the character or appearance of the national monument in a manner which is inappropriate or unbefitting a national monument; or
>
> (b) to a proposed national monument or any part of a proposed national monument, or to the land or site on which the proposed national monument is located, would irreparably alter the historic, cultural, traditional, archaeological, architectural, artistic or symbolic significance attached to it or any other condition of the proposed national monument before a decision whether or not the proposed national monument should be protected by a preservation order.

The NHB must be notified of any change in ownership of a proposed national monument, monument or land affected by a preservation order.[37] Finally, it is a criminal offence to wilfully deface, damage or otherwise interfere with a national monument or proposed national monument. The maximum penalty is a fine not exceeding $30,000, imprisonment not exceeding six months, or both.[38] In addition, the court can order that a convicted person restore the national monument or proposed national monument at their own expense, or pay the NHB the cost of doing so.[39]

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[35] *Ibid*, s 15(2). Carrying out works without permission and failing to comply with any condition are offences (s 15(4)), and the court may additionally order a convicted person to restore the national monument at his or her own expense or pay to the NHB a sum equivalent to the cost of such restoration (s 15(5)).
[36] *Ibid*, s 15(3).
[37] *Ibid*, s 11(10). Failure to do so is a criminal offence: s 11(11).
[38] *Ibid*, s 22(1).
[39] *Ibid*, s 22(2).

The procedure for making, amending or revoking a preservation order is as follows. The NHB must first give written notice of the Minister's intention to take any of these steps to 'the owner and occupier of the monument and any land adjacent to the monument which will be affected by the making, amendment or revocation (as the case may be) of the preservation order',[40] giving these persons a 'reasonable period' within which to submit objections, if any.[41] The Board is then required to 'consider every objection' received and make recommendations to the Minister in relation to them.[42] However, there is no requirement for the general public to be notified that any actions being considered in respect of a site, meaning there may be little opportunity for civil society groups, for example, to make representations concerning the amendment or revocation of a preservation order.[43] There is also no specific procedure for the public to suggest that particular sites be declared national monuments, though presumably one could simply write to the NHB or the Minister on the matter.

The same is largely true for designations made pursuant to the Parks and Trees Act 2005 ('PTA') for safeguarding the natural environment. Under the Act, national parks[44] and nature reserves[45] may be set aside for all or any of the following purposes:[46]

(a) the propagation, protection and conservation of the trees, plants, animals and other organisms of Singapore, whether indigenous or otherwise;

(b) the study, research and preservation of objects and places of aesthetic, historical or scientific interest;

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[40] *Ibid*, s 11(7)(a).
[41] *Ibid*, s 11(7)(b).
[42] *Ibid*, s 11(7)(c).
[43] Lee, 'We Built This City' (n 16) 227–228.
[44] The concept of a national park was introduced by the National Parks Act 1990 (No 10 of 1990), in force on 6 June 1990.
[45] Nature reserves were first designated by the Nature Reserves Ordinance 1951 (No 15 of 1951), s 3 read with the Schedule. The first nature reserves were the Municipal Catchment Area (made up of parts of Sembawang, Mandai, Ulu Kalang, Bukit Timah and Toa Payoh), the Bukit Timah Forest Reserve, the Kranji Forest Reserve, the Pandan Forest Reserve, and Labrador. The relevant provisions were successively incorporated into the National Parks Act 1990, *ibid*, the National Parks Act 1996 (No 22 of 1996), and the Parks and Trees Act 2005 (No 4 of 2005).
[46] Parks and Trees Act (n 45) ('PTA') s 7(3).

(c) the study, research and dissemination of knowledge in botany, horticulture, biotechnology, or natural and local history; and

(d) recreational and educational use by the public.

At present, two areas have been designated as national parks (Singapore Botanic Gardens and Fort Canning Park),[47] and four as nature reserves (the Bukit Timah Nature Reserve, Central Catchment Nature Reserve, Labrador Nature Reserve and Sungei Buloh Wetland Reserve).[48]

National parks and nature reserves are protected in that the approval of the Commissioner of Parks and Recreation is required for various activities within these areas, including cutting, collecting or displacing any tree or plant;[49] setting up any buildings or structures; digging, clearing or cultivating any land; and dumping earth, gravel, refuse or other material.[50] In general, carrying out any activity within a national park or nature reserve which a person knows or ought reasonably to know to cause or may cause alteration, damage or destruction to any property, tree or plant is prohibited.[51] Also prohibited without permission are disturbing, displacing and hunting animals[52] within national parks and nature reserves,[53] and releasing or abandoning animals inside such areas.[54] Carrying out any activity within these areas which a person knows or ought reasonably to know causes or may cause injury to, or the death of, any animal or other organism[55]

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[47] *Ibid*, s 2 (definition of *national park*) and s 7(1) read with Pt I of the Schedule.
[48] *Ibid*, s 2 (definition of *nature reserve*) and s 7(2) read with Pt II of the Schedule.
[49] *Tree* 'includes a single-stemmed palm and any part of a tree or single-stemmed palm (including its seedling, sapling or reshoot)', while *plant* 'means any member of the plantae, protista, monera or fungi kingdom, and includes any angiosperm, gymnosperm, pteridophyte, bryophyte, algae, lichen or fungus': *id*, s 2.
[50] *Ibid*, s 8(1).
[51] *Ibid*, s 8(2). The maximum penalty for committing an offence under ss 8(1) and (2) is a fine not exceeding $50,000, imprisonment not exceeding six months, or both, and in the case of an offence continuing after conviction a further fine of $500 per day may be imposed: s 8(3).
[52] An *animal* is 'any mammal (other than man), bird, reptile, amphibian, fish (including shellfish), insect or any other living creature, vertebrate or invertebrate, and includes any egg or young thereof': *id*, s 2.
[53] *Ibid*, s 9(1).
[54] *Ibid*, s 9(3).
[55] An *organism* is '(a) a genetic structure that is capable of replicating itself, whether that structure comprises all or only part of an entity, and whether it comprises all or only part of the total genetic structure of an entity; or (b) a reproductive cell or developmental stage of an entity referred to in paragraph (a)': *id*, s 2.

within a national park or nature reserve is forbidden.[56] Finally, it is an offence to wilfully or negligently destroy, damage or deface any object of zoological, botanical, geological, ethnological, scientific or aesthetic interest within any national park or nature reserve.[57]

The Parks and Trees Act also provides for protection of the natural environment outside national parks and nature reserves. Any area of the sea or seabed may be set aside for conservation of marine organisms as a marine park,[58] which is a type of public park.[59] Currently, only one has been designated. Known as the Sisters' Islands Marine Park, it occupies about 40 hectares around the Sisters' Islands (Pulau Subar Darat and Pulau Subar Laut) and along the western reefs of Pulau Tekukor and St John's Island,[60] all to the south of the main island of Singapore. In 2024 it was announced that a second marine park is planned at the southern part of Lazarus island and the reef off Kusu Island.[61]

The Minister for National Development[62] may, if they think it is expedient in the interests of amenity to provide for the conservation of trees, and after consulting the National Parks Board ('NParks'), designate any geographical area in Singapore outside a national park or nature reserve as a tree conservation area.[63] Two such areas have been designated, one in the south and the other in the east part of Singapore.[64] Unless approval of the Commissioner has been obtained,

[56] *Ibid*, s 9(2). Again, the maximum penalty for committing an offence under ss 9(1)–(3) is a fine not exceeding $50,000, imprisonment not exceeding six months, or both, and in the case of an offence continuing after conviction a further fine of $500 per day may be imposed: s 9(4).
[57] *Ibid*, s 10(1). The maximum penalty is a fine not exceeding $20,000: s 10(3).
[58] *Ibid*, s 2 (definition of *marine park*) read with Pt III of the Schedule.
[59] *Ibid*, s 2 (definition of *public park*).
[60] *Sisters' Island Marine Park*, National Parks Board website (29 September 2018) https://www.nparks.gov.sg/gardens-parks-and-nature/parks-and-nature-reserves/sisters-islands-marine-park, accessed 23 October 2018.
[61] S Begum and WX Leow, 'S'pore's Proposed Second Marine Park in Lazarus South, Kusu, is Home to Rare Rocky Shore, Coral Habitats', *The Straits Times* (9 May 2024) https://www.straitstimes.com/singapore/s-pore-s-proposed-second-marine-park-in-lazarus-south-kusu-is-home-to-rare-rocky-shore-coral-habitats.
[62] Constitution of the Republic of Singapore (Ministerial Responsibility) Notification 2025 (n 2).
[63] PTA (n 45) s 13. Tree conservation areas and heritage road green buffers were introduced by the PTA, in force on 1 August 2005.
[64] Parks and Trees (Preservation of Trees) Order (Cap 216, O 1, 1998 Rev Ed).

cutting[65] or damaging a tree with a girth exceeding one metre[66] growing on a tree conservation area, or on vacant land whether within or outside a tree conservation area,[67] is an offence.[68] The Commissioner may also issue a tree conservation notice with respect to a tree with a girth exceeding one metre or group of such trees within a tree conservation area or on vacant land to require a person to cease or refrain from any activity; to alter, demolish or remove any material, structure or building; or to take other measures considered necessary to maintain or conserve the tree or group of trees.[69]

In order to conserve the flora or vegetation in any area not within a national park or nature reserve as important elements of the surrounding streetscape or landscape, the Minister may designate a green verge[70] or other area located along or on land fronting, adjoining or abutting any street, whether within or outside a tree conservation area, as a heritage road green buffer.[71] At present, heritage road green buffers have been designated along Arcadia Road, Lim Chu Kang Road, Mandai Road, Mount Pleasant Road and South Buona Vista Road.[72] NParks has the function and duty to maintain all heritage road green buffers.[73] Unless the Commissioner's approval has been obtained, cutting any tree or plant within a

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[65] *Cutting* in this context means felling or lopping a tree, while *damaging* includes '(a) poisoning the tree or plant through — (i) applying any herbicide or other plant toxic chemical to it; or (ii) spilling (including washing off or directing water contaminated by) any oil, petroleum, paint, cement, mortar or the like onto the root zone of the tree or plant; (b) ringbarking the tree or plant or scarring its bark when operating any machinery, or by affixing any object (such as a sign) to it using nails, staples, wires or other means; (c) using tree climbing spikes on a healthy tree (except for the purpose of gaining access to an injured person on it) or fastening materials that significantly restrict the normal vascular function of the trunk or branches of the tree or plant; and (d) causing damage to the tree's or plant's root zone by compaction, excavation or asphyxiation (including filling or stockpiling it with materials)': PTA (n 45) s 2.
[66] The girth is to be measured one metre from the ground: PTA (n 45) s 14(4), and the Parks and Trees Regulations (Cap 216, Rg 1, 2006 Rev Ed), reg 20A.
[67] *Vacant land* is defined as '(a) any land upon which no building or other structure exists; or (b) any land which the Commissioner has reasonable grounds to believe is not occupied by anyone, and includes any land upon which exists any building or other structure which is constructed or used contrary to any written law': PTA (n 45) s 2.
[68] *Ibid*, s 14(1). The maximum penalty is a fine not exceeding $50,000: s 14(2). Such protection for trees has existed since the Trees and Plants (Preservation and Improvement of Amenities) Act 1970 (No 59 of 1970), in force on 12 February 1971. The relevant provisions were successively incorporated into the Parks and Trees Act 1975 (No 14 of 1975), and the PTA (n 45).
[69] PTA (n 45) s 15(1).
[70] A *green verge* is 'the portion along the centre median or side of a public street, or a traffic island within a public street, which is provided for the growing of trees or plants': *id*, s 2.
[71] *Ibid*, s 16(1).
[72] Parks and Trees (Heritage Road Green Buffers) Order (Cap 216, O 2, 2006 Rev Ed).
[73] PTA (n 45) s 17(1).

buffer is not allowed,[74] and doing so or otherwise damaging any such tree or plant is an offence.[75] Similarly, it is forbidden without permission to alter, close up or remove any buffer; erect or place any structure or object in, above, across or under any buffer; or erect, construct or lay within any buffer any fence, retaining wall, foundation, manhole, pipe, cable, mains or any obstruction or structure, whether temporary or permanent, and doing so is an offence.[76]

The requirements laid down in the Parks and Trees Act must be complied with by government agencies.[77] In particular, the Land Transport Authority ('LTA') is required to consult NParks before carrying out activities or works within heritage road green buffers.[78]

Since 2001, NParks has managed a heritage tree scheme, under which trees that 'are typically more than 5 metres in girth and are noted for their botanical, historical, social, cultural and/or aesthetic value'[79] may be nominated by the public for inscription in a Heritage Tree Register. As of 1 October 2019 the register contained 255 trees. While NParks will take steps in respect of heritage trees such as installing interpretive signs and protective lightning rods,[80] it does not appear that such trees are given any additional protection by the Parks and Trees Act unless they are within a national park, nature reserve, tree conservation area or heritage road green buffer.

The process for designating, amending or revoking national parks, nature reserves and marine parks simply involves the Minister consulting on the matter with NParks, and then issuing an order (a type of subsidiary legislation) to amend the Schedule to the Act, which is then published in the *Government Gazette* and

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[74] *Ibid*, s 18(1).
[75] *Ibid*, s 18(2). The maximum penalty is a fine not exceeding $50,000. In determining the amount of fine to be imposed, the court is to, in particular, have regard to any financial benefit which has accrued or appears likely to accrue to the person convicted in consequence of the offence: s 18(3).
[76] *Ibid*, s 19(1). The maximum penalty is a fine not exceeding $50,000, and in the case of an offence continuing after conviction a further fine of $500 per day may be imposed: s 19(2).
[77] *Ibid*, s 3(1): 'This Act shall bind the Government except that nothing in this Act shall render the Government liable to prosecution for an offence.'
[78] *Ibid*, s 2 (definition of *road authority*) and s 19(3).
[79] *About Heritage Trees*, NParks website (last updated 29 August 2025) https://heritagetrees.nparks.gov.sg/heritage-tree-scheme/, accessed 30 September 2025.
[80] *Heritage Trees*, NParks website (last updated 1 October 2019) https://www.nparks.gov.sg/gardens-parks-and-nature/heritage-trees, accessed 23 January 2020.

presented to Parliament.[81] The same procedure applies to tree conservation areas and heritage road green buffers, except that there is no necessity to lay an order before Parliament because no change to the Schedule to the Act is required.[82] As with the Preservation of Monuments Act, the Parks and Trees Act does not envisage any public participation in the above processes, and thus makes no provision for public notification of, or input into, the Minister's decisions.

2. Amendment of the Master Plan

The URA may from time to time submit proposals for amending the Master Plan to the Minister for National Development,[83] and is required to review the entire Master Plan at least once every five years after 1 April 1998 and submit to the Minister a report of the review together with proposals for amendment considered expedient.[84] Such amendments may provide for rezoning, changes to plot ratios, changes to the written statement, and other purposes.[85] As previously mentioned, the Master Plan must also be amended to designate a conservation area.[86] An amendment proposal must be advertised by being published in the *Government Gazette* and in one English, Chinese, Malay and Tamil newspaper circulating in Singapore, giving a period of not less than two weeks for objections to and representations concerning the proposal to be made.[87]

Where objections and representations have been received, the Minister is required to provide the persons submitting them an opportunity of appearing before a hearing or a public inquiry.[88] The Minister is responsible for appointing the person or persons that will preside at the hearing,[89] and the URA is to issue a public notice about the identities of these persons and when the hearing will take place. The Authority must also notify the persons who submitted objections or representations, and other persons that it considers to have a special interest in

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[81] PTA (n 45) s 62.
[82] *Ibid*, ss 13(1) and 16(1). Neither of these sections expressly states that a tree conservation area or heritage road green buffer may be amended or revoked, but a general power to do so is provided by the Interpretation Act 1965 ('IA'), s 19(a).
[83] PA (n 1) s 8(2).
[84] *Ibid*, s 8(1).
[85] *Ibid*, s 8(3).
[86] *Ibid*, s 9(1).
[87] PMPR (n 7) r 4 read with r 2 (definition of *notice by advertisement*).
[88] *Ibid*, r 6(1). Hereafter, the word *hearing* will be used as a shorthand to refer to both hearings and public inquiries.
[89] *Ibid*, r 10.

the matter.[90] The persons presiding at the hearing are empowered to issue summonses to individuals to require them to give evidence or to produce documents or other material,[91] and are duty-bound to submit in writing their findings and conclusions to the Minister.[92] In turn, the Minister is legally required to consider, among other things, any objections or representations that have been submitted and the findings and conclusions of the hearing before deciding whether to approve or reject the proposal to amend the Master Plan.[93]

The existence of the procedure described above suggests that, just as the public is consulted when the Long-term, Plan is updated, an opportunity for public participation is built into the Master Plan process. Indeed, the law only expressly states two situations where it is unnecessary for a hearing or public inquiry to be held: if an objection or representation 'is of a frivolous nature',[94] and if the Minister is 'satisfied that a proposal for an amendment to the Master Plan is not material in nature'.[95] However, an incident which occurred at the end of 2013 and the start of 2014 indicates that public participation in the process may be curtailed in another way. In November 2013, the URA launched the Draft Master Plan 2013, which indicated a proposal to amend the Master Plan to rezone a strip of land running across two adjoining historic cemeteries, Bukit Brown Cemetery and Seh Ong Cemetery,[96] from 'cemetery' to 'road'. This was for the purpose of constructing what is now called Lornie Highway to relieve traffic congestion in the area and to cater to future demand arising from redevelopment of the area.[97] In fact, planning for the road had begun well before that date, and the exhumation of some 3,000 tombs started in October 2013.

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[90] *Ibid*, rr 12(1) and (2).
[91] *Ibid*, r 13(1)(a). It is an offence for a person to refuse or wilfully neglect to attend a hearing in obedience to a summons or to give evidence, and to wilfully alter, suppress, conceal, destroy or refuse to produce any document, electronic record or other thing which he or she may be required to produce: r 13(2).
[92] *Ibid*, r 14.
[93] *Ibid*, r 6(2).
[94] *Ibid*, r 6(1).
[95] *Ibid*, r 6(3).
[96] Hereinafter collectively referred to as 'Bukit Brown Cemetery'.
[97] J Tai, 'First Section of Lornie Highway, Formerly Bukit Brown Road, Opens to Traffic', *The Straits Times* (28 October 2018) https://www.straitstimes.com/singapore/transport/first-section-of-lornie-highway-formerly-bukit-brown-road-opens-to-traffic, accessed 30 September 2025; *Lornie Highway*, Land Transport Authority website (22 October 2018) https://www.lta.gov.sg/content/ltaweb/en/roads-and-motoring/projects/LornieHighway.html, accessed 27 October 2018.

In response to the Draft Master Plan, a number of civil society groups, including All Things Bukit Brown, the Nature Society (Singapore), the Singapore Heritage Society and SOS Bukit Brown, submitted objections to the rezoning proposal. Nonetheless, no hearing was convened; instead, the representors received the same standard-form letter dated 5 June 2014 from the Ministry of National Development stating that 'the conservation of Singapore's heritage is factored into our land use plans […] [b]ut there will be occasions when trade-offs will need to be made in our land use decisions'. The letter noted that the reasons why the highway was needed 'have been presented and debated in Parliament. The final road alignment was determined with inputs from agencies, such as the National Parks Board on biodiversity and the Public Utilities Board on drainage in the area.'[98] The next day, 6 June, the Master Plan 2014 was gazetted. In a written response dated 9 July 2014 to a parliamentary question on whether hearings or public inquiries had been held prior to the gazetting of the Master Plan, the Minister said:[99]

> We conducted one hearing where the feedback raised new matters which were substantive, which we required further clarifications on and which pertained to a new proposal in the Master Plan. With the gazette of the Master Plan, the Draft Master Plan process has been completed.

This suggests the MND takes the position that it may dispense with a hearing if objections to or representations concerning proposed amendments to the Master Plan raise no 'new' and 'substantive' matters, even though the relevant rules do not make provision for this. Moreover, the incident appears to demonstrate that

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[98] This is from the text of letter posted on All Things Bukit Brown's Facebook page: AJ Leow, 'Heritage Singapore – Bukit Brown Cemetery', Facebook https://www.facebook.com/groups/bukitbrown/permalink/659660330770851/. The Singapore Heritage Society received a similarly worded letter.

[99] 'Feedback and Objections Received for Draft Master Plan 2013', *Singapore Parliamentary Debates, Official Report* (9 July 2014), vol 92 (no column numbers assigned); see also *Written Answer by Ministry of National Development on Draft Master Plan 2013*, Ministry of National Development website (9 July 2014) http://app.mnd.gov.sg/Newsroom/NewsPage.aspx?ID=5483, accessed 6 August 2014; archived at http://perma.cc/36A5-YXDU.

amending the Master Plan is not a precondition for the planning and execution of development resulting in drastic changes to land.[100]

B. Development Control

1. Applications for Written Permission

The other major feature of the planning regime is the requirement that the permission of the URA must be obtained to develop land outside a conservation area, carry out or permit the carrying out of works within a conservation area, or subdivide or permit the subdivision of land. The types of permission required are respectively known as planning permission, conservation permission and subdivision permission,[101] and are forms of what the Planning Act terms 'written permission'.[102]

The Act defines development as 'the carrying out of any building, engineering, mining, earthworks or other operations in, on, over or under land, or the making of any material change in the use of any building or land',[103] and lists out at some length activities that are deemed to involve and not involve development of land,[104] and that are regarded as material changes to the use of land.[105] For example, demolishing, reconstructing or adding to a building amounts to development;[106] while external or internal decorative, painting, renovation or building works to a national monument are defined as building operations and so require planning permission.[107] Works within a conservation area comprise development of land within such an area, and any external or internal decorative, painting, renovation or other works to any building within an area which may affect its character or appearance.[108]

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[100] Lee, 'We Built This City' (n 16) 218–221.
[101] PA (n 1) ss 12(1)–(3). Contravention of these provisions amounts to a criminal offence: ss 12(4)–(4C). *Subdivide* is defined in s 4.
[102] *Ibid*, s 2 (definition of *written permission*).
[103] *Ibid*, s 3(1).
[104] *Ibid*, ss 3(2)–(3).
[105] *Ibid*, s 3(3).
[106] *Ibid*, s 3(3)(d).
[107] *Ibid*, s 3(3)(h).
[108] *Ibid*, s 2 (definition of *works within a conservation area*).

A person need not be the owner of land to apply for written permission,[109] but if they are not, the written consent of the owner or, if deceased, the owner's legal personal representative must be obtained by the applicant.[110]

Applications for permission are generally determined by the URA, though the Minister is empowered to require certain applications or classes of applications to be referred to them for determination.[111] In deciding whether to grant permission, the URA is bound to 'act in conformity with the provisions of the Master Plan and any Certified Interpretation Plan in so far as they may be relevant'.[112] The written statement of the Master Plan indicates that the Authority will take into consideration planning guidelines (for example, guidelines relating to building use and form, urban design and plot size) and conservation guidelines that it has issued, guidelines for monuments issued by the NHB, and guidelines for nature reserves and national parks issued by NParks.[113]

One potential weakness of the process is that there is no legislative requirement for the URA to have applicants to carry out and submit environmental or heritage impact statements that will be considered by it when determining if written permission should be granted, even where conservation areas are concerned. Another is that, unlike the procedure for amending the Master Plan, there is no requirement for development applications to be publicized.[114] Nor is any procedure provided for third parties who may be interested to make representations concerning applications, such as owners and occupants of

[109] Grant (n 17) 81.
[110] Planning (Development) Rules 2008 (S 113/2008), r 3(3).
[111] PA (n 1) s 21(1). The Minister's decision is then communicated to the URA, which is required to grant or refuse permission in accordance with the decision: s 21(2). Decisions by the Minister 'shall be final, and shall not be subject to appeal […] or challenged or questioned in any court': s 21(4).
[112] *Ibid*, s 14(1). Section 14(2) sets out situations where, if the Minister approves, the URA need not act in accordance with the Master Plan and any relevant Certified Interpretation Plan. In such cases, the URA is required to 'determine the application in the manner as the Minister may approve': s 14(3).
[113] *Written Statement 2014* (n 9) [10.1(i)].
[114] The URA is only obliged to keep for public inspection a record of written permissions that have been granted and refused, and decisions made by the Minister upon appeals against the URA's decisions: PA (n 1) s 23.

adjoining land, and environmental and heritage non-governmental organizations, to do so.[115]

2. *Development of State Land and Land Owned by Statutory Boards*

It seems unclear, at least on the face of the legislation, whether the Government itself has to comply with the development approval process set out in the Planning Act when it proposes to develop State land. On the one hand, it could be argued that the Government is exempt from the process because the Act does not expressly state that its provisions bind the Government.[116] In that scenario, presumably there would still be procedures internal to the URA or the Ministry of National Development for assessing such proposals. On the other, there exists a piece of subsidiary legislation, the Planning (Development of Land Authorisation for Applicable State Property) Notification 2015,[117] by which the Minister has given blanket authorization for certain types of material changes of use of, and additions and alterations to, 'applicable State property'[118] and 'applicable statutory board property'.[119] For instance, materially changing the use of such State property to use as an art gallery, office or residential dwelling, or carrying out addition or alteration works for those uses, is authorized by the Notification[120] provided that the following conditions are satisfied:[121]

i. The URA decides that the Government does not need to submit an application for written permission.

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[115] N Khublall and B Yuen, 'Issues and Possible Future Developments' in *Development Control and Planning Law: Singapore* (Longman Singapore, Singapore 1991) 265–266; Lee, 'We Built This City' (n 16) at 221–222.
[116] Section 54 of the IA (n 82) states: 'No Act shall in any manner whatsoever affect the rights of the Government unless it is therein expressly provided, or unless it appears by necessary implication, that the Government is bound thereby.' See also Grant (n 17) 114.
[117] S 411/2015 ('State Property Notification').
[118] Defined as 'any State land or building on State land for which the State has granted a tenancy or licence but does not include excluded property': State Property Notification, *id*, para 2. *Excluded property* means '(a) any building in a conservation area marked as a conserved building in the conservation guidelines issued by the competent authority under section 11 of the Act; or (b) any monument in respect of which there is in force a preservation order under the Preservation of Monuments Act (Cap. 239)': *ibid.*
[119] Defined as 'any land or building owned by a statutory board for which the statutory board has granted a tenancy or licence but does not include excluded property': *ibid.*
[120] State Property Notification, *ibid*, para 3(1). For applicable State property, the allowable uses are set out in the First and Second Schedules to the Notification; for applicable statutory board property, only the uses in the Second Schedule are allowed: paras 3(1) and (2).
[121] *Ibid*, para 4(1). Similar, but not identical, conditions apply to applicable statutory board property: para 4(2).

ii. The approval of a Collector of Land Revenue, and of any other relevant authority, has been obtained.

iii. All addition and alteration works comply with relevant planning guidelines, including guidelines on building setback, site coverage and building height, issued by the URA.

iv. For what are termed Type A authorized uses,[122] the addition and alteration works do not result in an increase in floor area exceeding 10% of the total existing floor area of the property or, in the case of vacant land, 10% of the existing land area.

v. The works or use of the property does not create any nuisance, annoyance or inconvenience to the amenities of the surrounding locality.

The presence of the Notification – and in particular the provision set out in paragraph (i) above – thus appears to suggest that there are some types of development that the URA would expect the Government to apply for written permission to carry out. It should be noted that statutory boards, defined in the Notification as bodies corporate established by or under any public Act to perform or discharge public functions,[123] are not generally regarded as part of the Government, and so would routinely have to apply for written permission to develop their property unless the change of use or works are already approved by the Notification.

This is an appropriate point to examine section 21(5) of the Act, which states:

> Where the competent authority intends to develop or to carry out works within a conservation area on any land belonging to him, he may be directed by the Minister to furnish to the Minister particulars relating to the development or works and the Minister may give such further directions as he considers fit in relation thereto.

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122 Set out in the First Schedule to the Notification, *ibid.*

123 *Ibid*, para 2.

One commentator has suggested: 'The intention behind sub-s (5) appears to be to provide a safeguard in cases where the competent authority would inevitably be placed in a position of conflict of interest. It is, however, ambiguous. Given that in practice the competent authority is an individual office holder, rather than a Ministry or corporation, the requirement can strictly extend only to land owned by him in a personal capacity. Land owned by the Urban Redevelopment Authority for example, is not land owned by the competent authority.'[124]

Indeed, the competent authority responsible for dealing with applications for written permission is declared to be the Chief Executive Officer ('CEO') of the URA rather than the Authority itself.[125] However, if section 21(5) was intended to avoid a conflict of interest situation when the CEO is seeking to develop land that he or she owns in a personal capacity, why does the provision not extend to all land instead of being limited to land within a conservation area? It may be that the parliamentary intention was in fact to require the Minister to assess applications for written permission in respect of URA-owned land within conservations areas, given the particular significance of such lands, but that the provision was infelicitously drafted.

In any case, the issue raised above in relation to applicants who are private parties equally applies where land that is sought to be developed belongs to the State or to a statutory board – there is no legal requirement for the public's views to be sought prior to the development being proceeded with. In the fortnight leading up to the Government's official announcement on 12 September 2011 that Lornie Highway was to be built through Bukit Brown Cemetery,[126] the Singapore Heritage Society ('SHS') was invited to attend a series of meetings with the LTA and the URA, but according to the Society, '[t]he primary purpose of these meetings was for the authorities to explain the need for the road, URA's efforts at conserving old buildings, to manage public opinion, and to tap on SHS's network in order to organise the documentation of the 5000 graves that would

124 Grant (n 17) 114.
125 Appointment of Competent Authority (n 4).
126 Land Transport Authority, URA and National Parks Board, 'Construction of New Dual Four-lane Road to Relieve Congestion along PIE & Lornie Road and Serve Future Developments', Urban Redevelopment Authority (12 September 2011) http://www.ura.gov.sg/pr/text/2011/pr11-109.html, accessed 8 January 2014.

be exhumed.'[127] Essentially, the meetings were not for the purpose of seeking the Society's views on the project or exploring whether there were alternatives that could minimize the impact on the cemetery.

The Government's reluctance to provide information also meant its claims that the highway was needed and that alternatives which would have avoided funnelling it through the cemetery were unsuitable were hard to properly assess. In a position paper dated January 2012, the SHS argued that it should be the standard operating procedure for the Government to conduct systematic studies on the environmental and heritage impact of land development projects before they are proceeded with,[128] which suggests that at the time it was unclear to the Society whether such studies had been done, or at least that the studies had not been made publicly available. It appears that the LTA did conduct an environmental impact assessment but declined to share the report in full.[129] It remains uncertain the extent to which the heritage value of the cemetery was considered. The Government did acknowledge that improvement was needed to the consultation process.[130]

The handling of the Bukit Brown Cemetery project can be compared to how another project was dealt with. In February 2013, the Government indicated that it planned to construct a new Mass Rapid Transit ('MRT') line to be known as the Cross Island Line, which was intended to run through the Central Catchment Nature Reserve. The Nature Society (Singapore) ('NSS') called on the Government to reroute the line so that it avoids passing through 'an area of 150 year old regrowth forest containing a significant proportion of Singapore's remaining primary lowland Dipterocarp Forest and including one of Singapore's

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[127] T Chong, *Position Paper on Bukit Brown* (Singapore: Singapore Heritage Society, 2012) at 15 http://www.singaporeheritage.org/wp-content/uploads/2011/11/SHS_BB_Position_Paper.pdf, accessed 22 October 2012.
[128] *Ibid*, 13–14.
[129] Z Feng, 'Bridge Will Help, Say Some Experts', *The Straits Times* (23 March 2012) 6; X Li and G Chua, 'Navigating a New Terrain of Engagement', *The Straits Times* (30 March 2012) 26–27. See also J Huang, 'Resurgent Spirits of Civil Society Activism: Rediscovering the Bukit Brown Cemetery in Singapore' (2014) 87(2) JMBRAS 21, 31–32.
[130] Tan Chuan-Jin, the Minister of State for National Development, was quoted in the press as saying 'We could have done better, a bit more of these conversations and briefings when we announced some of these things, maybe get more stakeholders and earlier.': F Yen, 'Bukit Brown: Room for Some Flexibility, Says Tan Chuan-Jin', *The Straits Times* (6 November 2011) 14–15, cited in the *Position Paper on Bukit Brown*, *id,* 15, n 13.

two most pristine rainforest stream systems'.[131] It expressed the view that '[t]he nature reserve should not be treated as vacant State land available to be used for the convenience of transport infrastructure or other purposes', which would go against the purpose of declaring the area to be a nature reserve in the first place.[132]

The LTA then hired a global environmental consultancy to study the environmental impact of the project. Phase 1 of the study, which examined the impact of soil investigation works needed to test the suitability of the ground for tunnelling works, took place between August 2014 and December 2015.[133] In February 2016 the full Phase 1 environmental impact assessment ('EIA') report was made publicly available on the LTA's website.[134] It indicated that the impacts were likely to be of moderate or major significance, but could be 'reduced to as low as reasonably practicable' once mitigation measures were taken.[135] The LTA announced that the mitigation measures would include inviting nature groups to observe the soil investigation works, noting that it would 'work with NParks and the nature groups closely to ensure that all mitigating measures are rigorously implemented. We have received very useful feedback from the various stakeholders, including nature group representatives, and we have taken in most of their suggestions on a further set of mitigating measures for the conduct of the works.'[136] The Authority also said that it had held 'many discussions with

[131] *Cross Island Line: Discussion and Position Paper*, Nature Society (Singapore) website (18 July 2013) 5 https://www.nss.org.sg/documents/(NSS)%20Cross-Island%20Line%20Position%20Paper.pdf, accessed 29 August 2017.
[132] *Ibid,* 3.
[133] 'LTA Gazettes Environmental Impact Assessment (Phase 1) Report for Cross Island Line', LTA website (5 February 2016) https://www.lta.gov.sg/apps/news/page.aspx?c=2&id=85079f03-0c50-46e2-b44d-328034a5a838, accessed 19 April 2016.
[134] HM Chew, 'Controversy over Cross Island Line: 12 Questions about the MRT Line Answered', *The Straits Times* (22 February 2016, updated 3 March 2016) https://www.straitstimes.com/singapore/controversy-over-cross-island-line-12-questions-about-the-mrt-line-answered, accessed 30 March 2018. The report may be accessed at 'Cross Island Line Environmental Impact Assessment Reports', LTA website (20 September 2018) https://www.lta.gov.sg/content/ltaweb/en/publications-and-research/reports/crl-eia.html, accessed 14 December 2018.
[135] See page 11 of the non-technical summary of the Phase 1 environmental impact assessment report on the LTA website at https://www.lta.gov.sg/content/dam/ltaweb/corp/PublicTransport/files/Final%20SI%20EIA%20Executive%20Summary.pdf, accessed 26 August 2016.
[136] 'Site Investigations to Study Two Alignment Options for the CRL', LTA website (8 June 2016) [6] https://www.lta.gov.sg/apps/news/page.aspx?c=2&id=9e739684-b3c0-40b8-8e20-294274f3d35f, accessed 14 December 2018.

nature groups, residents and other stakeholders', including a civil society movement called Love Our Macritchie Forest.[137]

Phase 2 of the assessment, which considered the environmental impact on the nature reserve of the MRT line's construction and operation, was scheduled to begin in the third quarter of 2016,[138] and the EIA report was published in September 2019.[139] While the works for either alignment of the Cross Island Line would inevitably have some environmental impact, according to the LTA their environmental consultant had advised that this could be 'adequately managed with comprehensive mitigation measures and monitoring plans in place'.[140] Ultimately, it was decided that the line would pass underneath the nature reserve rather than be routed around it.[141] Nonetheless, the handling of the Cross Island Line project may herald the adoption of a more consultative approach towards the planning of land development by the Government. In the absence of any legal framework formalizing public participation in the process, this is to be welcomed.

3. Conditions for Planning or Conservation Permission

If the URA decides that planning or conservation permission should be granted, it may impose various conditions on the grant,[142] for example, that the permission is only valid for a certain period, that any work must commence by a specific time,

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137 Ibid, [2]. On 22 June 2018, the Love Our Macritchie Forest group invited members of the public to send in questions to be submitted to the LTA about the status of the soil investigation works taking place in the nature reserve: CC Neo, 'Nature Group Seeks More Information on Impact of Cross Island Line Site Investigations', *Today* (28 June 2018) https://www.todayonline.com/singapore/nature-group-seeks-more-information-impact-cross-island-line-site-investigations.

138 'LTA Gazettes Environmental Impact Assessment (Phase 1) Report for Cross Island Line' (n 133) [4].

139 'Environmental Impact Assessment (Phase 2) Report', LTA website (2 September 2019) https://www.lta.gov.sg/content/ltagov/en/newsroom/2019/9/2/environmental-impact-assessment-phase-2-report.html, accessed 28 January 2020.

140 Ibid.

141 'Cross Island Line to Run 70 metres Under Central Catchment Nature Reserve', Ministry of Transport website (4 December 2019) https://www.mot.gov.sg/news-centre/news/Detail/cross-island-line-to-run-70-metres-under-central-catchment-nature-reserve/, accessed 28 January 2020; K Cheng, 'Cross Island Line: Govt Decides on Direct Alignment, Running 70m under Nature Reserve instead of Skirting It', *Today* (4 December 2019, updated 5 December 2019) https://www.todayonline.com/singapore/cross-island-line-govt-decides-direct-alignment-running-70m-under-nature-reserve-instead, accessed 28 January 2020.

142 PA (n 1) s 15(1).

and that certain areas within the land must be maintained and kept open and accessible for public use as paths or open spaces.[143]

In addition, section 15(1)(f) of the Act provides that the Authority can require 'that the title of any part of the land shall be transferred free from encumbrances to the State or any public authority'. During the debate in Parliament on the bill which introduced this provision, the Minister for National Development explained that the provision merely formalized an established practice of the URA when land was required to be vested in the State 'for public purposes like road widening or drainage reserves […]. [T]he owner of the land does not suffer any loss as he is allowed to transfer the development rights of the land vested to the remaining part of his land, subject to the planning requirements of the site. The condition to vest land to the State will only be limited to requirements of public purposes.'[144] Although a Nominated Member of Parliament felt that the provision gave the URA 'enormous power' and suggested the provision should state specifically the purposes for which the land can be required to be vested in the State,[145] the Minister said that '[w]e have found this current practice of vesting of land to be effective, efficient and has not led to abuse'.[146] It may be that the Minister's comments can be relied on by the court to interpret the proper scope of section 15(1)(f).[147]

Where conservation permission is concerned, the URA is empowered to impose, among other things, a condition that the applicant comply with any conservation guidelines or other requirements relating to conservation.[148] The Master Plan's written statement states that the URA can impose development control, conservation or preservation requirements and requirements with regard to

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143 Ibid, ss 15(1)(a), (b) and (g).
144 Lim Hng Kiang (Minister for National Development), speech during the Second Reading of the Planning Bill, *Singapore Parliamentary Debates, Official Report* (14 January 1998), vol 68, col 52.
145 Chuang Shaw Peng (Nominated Member of Parliament), ibid, col 62.
146 Lim Hng Kiang, *id,* col 68.
147 See R *v Secretary of State for the Environment, Transport and the Regions, ex parte Spath Holme Ltd* [2001] 2 AC 349, 393, HL, *per* Lord Bingham of Cornhill: 'Only if a minister were, improbably, to give a categorical assurance to Parliament that a power would not be used in a given situation, does it seem to me that a parliamentary statement on the scope of a power would be properly admissible.' See also the view of Lord Hope of Craighead at 409.
148 PA (n 1) s 15(2)(a).

nature reserves and national parks as the Authority deems expedient or necessary.[149]

4. *Appeals and Purchase Notices*

If an application for written permission is turned down by the URA or the applicant is aggrieved by any conditions that have been imposed, the applicant may appeal the matter to the Minister,[150] whose decision is expressed to be final and not capable of being challenged or questioned in any court.[151] In the course of the parliamentary debate on the Planning Bill referred to earlier, Non-constituency Member of Parliament J B Jeyaretnam asked why such appeals could not be heard by a planning tribunal, which would then 'give the citizen a greater sense of fairness or feeling that his complaints will be considered fairly and by an independent body. There is much to be said for not entrenching the Executive with all the powers and making them the final judges of whether they are right or wrong.'[152] The Minister's response was:[153]

> We are not in favour of independent tribunals. We do not want to refer every appeal to the court because the experience in many countries with such a mechanism is that planning applications get bogged down and it takes a very long time for any sensible development to take place. It becomes a mechanism by which different vested interests will use that to block future developments.

However, he gave the assurance that the Ministry treats the URA 'at arm's length' and that Ministry officials evaluate complaints or representations 'separately'. Moreover, in situations 'where the issue is very important', the Ministry will set up a panel of planning appeal inspectors to make recommendations to the Minister on the merits of an appeal. Such a panel comprises planners drawn from

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149 *Written Statement 2014* (n 9) [10.1(ii)].
150 PA (n 1) s 22(1). Instead of dealing with an appeal personally, the Minister is also entitled to designate that it be heard and determined by a Minister of State, Senior Minister of State, Parliamentary Secretary or Senior Parliamentary Secretary for the MND, or any public officer of the MND not subordinate to the CEO of the URA: s 22A.
151 Ibid, s 22(4).
152 J B Jeyaretnam (Non-constituency Member of Parliament) (n 144) col 66.
153 Lim Hng Kiang, ibid*,* col 68.

universities, the private sector or other statutory boards, and not from the Ministry.[154]

Where land has been allocated in the Master Plan for development for a public purpose[155] and the owner has either been refused permission to develop the land or has completed the development of any contiguous land owned by him or her in accordance with written permission granted by the URA, the owner may serve on the Authority a purchase notice requiring the land to be acquired by the State.[156] The Minister may reject the notice in whole or in part where, in their opinion, the land is capable of reasonably beneficial use in its existing state, or will not be required for development for a public purpose within five years from the date of service of the purchase notice.[157] To the extent that the Minister does not reject a purchase notice, they must declare that the land is needed for a public purpose and may order that proceedings be taken to obtain possession of the land for the State, the URA or any public authority, and that the compensation to be paid be determined.[158]

II. Other Legal Rules Relevant to Planning Law

While this chapter focuses on planning law, there are other legal rules that have a significant impact on the urban milieu in Singapore. Two of them will be described briefly here: the compulsory acquisition of land for public purposes, and the collective or *en bloc* sale of property subdivided into strata titles.

A. Compulsory Acquisition of Land

Pursuant to the Land Acquisition Act,[159] if a particular land is needed for any public purpose; by any person, corporation or statutory board for any work or undertaking which, in the opinion of the Minister for Law,[160] is of public benefit or public utility, or in the public interest; or for residential, commercial or

[154] Ibid.
[155] Allocation of land in the Master Plan as a green belt or conservation area does not constitute allocation of the land for a public purpose: PA (n 1) s 24(7).
[156] Ibid, s 24(1). See, generally, Grant (n 17) 118–122.
[157] Ibid, s 24(4).
[158] Ibid, s 24(5). The compensation is to be determined in the manner and according to the principles laid down in the Land Acquisition Act 1966: PA, *id*, s 24(6).
[159] Land Acquisition Act 1966 ('LAA').
[160] Constitution of the Republic of Singapore (Ministerial Responsibility) Notification 2025 (n 2), para 2(1) read with the 1st and 11th Schedules.

industrial purposes,[161] the President may declare by a notification published in the *Government Gazette* that the land is required for such a purpose.[162] Such a notification is conclusive evidence that the land is needed for the specified purpose,[163] which means there are very limited grounds on which an acquisition can be challenged.[164]

Persons who have interests in the land acquired are entitled to claim for compensation.[165] Formerly, the main rationale for the Act was to enable the Government to acquire privately held land at rates lower than the market rate so that large-scale infrastructural works such as public housing and the MRT and road networks could be carried out without overly impacting public finances. For that reason, the Act provided that the Government had to pay compensation based on the value of the land on the date it was gazetted for acquisition or as at a date specified in the Act, whichever was lower. As the statutory date was only revised every few years, this generally meant that landowners were not compensated with the market value of the land. The widest disparity was between 1973 and 1986, when the statutory date remained unchanged for 13 years. Recognizing the hardship that this sometimes caused, on occasion the Government gave additional *ex gratia* payments and covered removal and relocation expenses.[166]

With effect from 12 February 2007,[167] the Government updated the Act to provide that compensation for land acquisition would generally be paid at the

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161 During a parliamentary debate on 11 April 2007 on a bill to amend the Act, the Deputy Prime Minister and Minister for Law was asked if the meaning of terms like *public purpose*, *public benefit*, *public utility* and *public interest* could be clarified. The Law Minister said that 'it is generally accepted by the courts that such expressions are not capable of precise definition', and that '[s]ociety needs will change over time and it is impossible to enumerate all the situations that would fall within the terms of 'public use', 'public benefit' and 'public utility'. But one thing I want to make clear is that the term 'public purpose', 'public utility', and so on, cannot be allowed to be used for compulsory acquisition for the personal interest of a particular person.': S Jayakumar (Deputy Prime Minister and Minister for Law), speech during the Second Reading of the Land Acquisition (Amendment) Bill, *Singapore Parliamentary Debates, Official Report* (11 April 2007), vol 83, cols 527–528.
162 Ibid, s 5(1). In this instance, the President is required to act on the advice of the Cabinet or a Minister acting under the general authority of the Cabinet: Constitution of the Republic of Singapore (2020 Rev Ed), Art 21(1).
163 LAA (n 159) s 5(3).
164 On the possibility that an acquisition can be challenged if it is carried out in bad faith, see Tan, Tang and Low (n 14) 762–763, [23.34]–[23.37]; Lee, 'We Built This City' (n 16) 226.
165 LAA (n 159) s 8.
166 Lee, 'We Built This City' (n 16) 226–227.
167 By the Land Acquisition (Amendment) Act 2007 (No 19 of 2007).

market value on the date when the land was declared to be required for public purposes.[168] The market value is:[169]

> […] deemed not to exceed the price which a bona fide purchaser might reasonably be willing to pay, after taking into account the zoning and density requirements and any other restrictions imposed by or under the Planning Act (Cap. 232) as at the date of acquisition and any restrictive covenants in the title of the acquired land, and no account shall be taken of any potential value of the land for any other use more intensive than that permitted by or under the Planning Act as at the date of acquisition.

Moreover, due to the repeal of certain provisions in the Act,[170] the quantum of compensation may now take into account any increase in the land value arising from improvements to the land and infrastructural developments in the vicinity of the land.[171] Speaking in Parliament during the Second Reading of the bill that led to the change, the Deputy Prime Minister and Minister for Law, S Jayakumar, said that the former provisions in the Act were 'no longer appropriate in the current context', as land acquisitions now affected many more people than in the 1970s and 1980s, and private landowners often spent a major portion of their life savings and future earnings to purchase real property.[172] In 2014, the so-called 'betterment levy' was removed,[173] again entitling landowners to receive higher compensation. The levy was a requirement for any increase in the value of part of a person's land due to another part being compulsorily acquired to be set off from the compensation to be awarded.[174]

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[168] LAA (n 159) s 33(1)(a)(ii). If, pursuant to s 3(1), a notification by the President that land in a locality is likely to be needed for public purposes was published in the *Government Gazette* so that a survey of the land can be carried out, and within six months the notification is followed by a declaration under s 5 that the land is required for public purposes, the compensation to be awarded for the land acquisition will be calculated from the date of publication of the s 3(1) notification: s 33(1)(a)(i).
[169] Ibid, s 33(5)(e).
[170] Ibid, ss 33(5)(a) and (c), repealed by the Land Acquisition (Amendment) Act 2007 (n 167).
[171] Tan, Tang and Low (n 14) 764–765, [23.41].
[172] S Jayakumar, speech during the Second Reading of the Land Acquisition (Amendment) Bill (n 161) col 501.
[173] By the Land Acquisition (Amendment) Act 2014 (No 26 of 2014), s 33(2).
[174] See Indranee Rajah (Senior Minister of State for Law), speech during the Second Reading of the Land Acquisition (Amendment) Bill, *Singapore Parliamentary Debates, Official Report* (5 August

The Land Acquisition Act no longer tends to be used on a large scale, but continues to be employed when it is necessary to acquire private land for, as an example, expansion of the rail and road networks in Singapore.[175]

B. Collective Sale of Strata Title Developments

Given the scarcity of land in Singapore, multi-storey buildings are a necessity. With effect from 1968, the Land Titles (Strata) Act 1967[176] introduced a scheme for the better administration of such buildings. Under the Act, a strata title plan is a plan of registered land that, among other things, 'shows the whole or any part of the land comprised therein as being divided into 2 or more strata, whether or not any stratum is divided into 2 or more lots'.[177] A *stratum* is 'any part of land consisting of a space of any shape below, on or above the surface of the land, or partly below and partly above the surface of the land, the dimensions of which are delineated'.[178] Essentially, the owner (or 'subsidiary proprietor')[179] of a lot has an interest in a piece of airspace or subterranean space in a strata title development, as well as a share in the common property (comprising building parts like columns, walls and roofs; and common facilities such as car parks, common corridors and lobbies, lifts and gardens) as a tenant in common with other subsidiary proprietors.[180] The common property is managed by a

2014), vol 92 (no column numbers assigned). Now, such an increase in value will only be set off against any damage sustained due to the severance of the acquired land from other land owned by the person, or due to the acquisition injuriously affecting the person's other movable or immovable property: see the LAA (n 159) s 33(2) read with ss 33(1)(c) and (d), and 33(1A)(c) and (d).

175 See, for instance, 'Full Alignment of North–South Expressway Unveiled', LTA website (15 November 2011) https://www.lta.gov.sg/apps/news/page.aspx?c=2&id=mjtut44y69ma2c6354z6ob21shwo5gewr7tj44yhiqvkx240r0, accessed 5 March 2016; 'More than 500 Homes to Make Way for Highway', *The Straits Times* (16 November 2016) 1 https://www.straitstimes.com/singapore/transport/more-than-500-homes-to-make-way-for-highway, accessed 20 December 2018.

176 No 41 of 1967, in force on 15 May 1968; now the Land Titles (Strata) Act 1967 ('LTSA').

177 Ibid, s 3(1) (definition of *strata title plan*). A *lot* is 'a stratum which is shown as a lot on a strata title plan, and includes a lot specified as an accessory lot on any such plan': *ibid.*

178 Ibid. According also to s 3(1), *land* is defined as having the same meaning in the Land Titles Act (n 24, that is, including 'any parcel of airspace or any subterranean space whether or not held apart from the surface of the earth and described with certainty by reference to a plan approved by the Chief Surveyor and filed with the Authority, and includes any estate or interest therein and all vegetation growing thereon and structures affixed thereto': Land Titles Act, s 4(1).

179 Defined in the LTSA (n 176) s 3(1).

180 Tan, Tang and Low, 'Strata Titles' in *Tan Sook Yee's Principles of Singapore Land Law* (n 14) 701, 702.

management corporation which is made up of the subsidiary proprietors from time to time of all the lots in a strata title plan.[181]

In 1999, the Act was amended to provide for the collective sale – or, colloquially, the *en bloc* sale – of strata title developments.[182] At present, if a specified majority percentage of the subsidiary proprietors of the lots in a development enter into a written agreement to sell their lots and common property to a purchaser, an application can be made to a Strata Titles Board, and thereafter the High Court, for an order that all the lots and property in the development be sold to that purchaser, even those belonging to subsidiary proprietors who declined to enter into the sale and purchase agreement.[183] In other words, it is possible that the subsidiary proprietors in the minority can be legally compelled to sell their interests in the development. The specified percentages are as follows:[184]

i. Not less than 90% of the share values and not less than 90% of the total area of all the lots, where less than ten years have passed since the date of issue of the latest temporary occupation permit ('TOP') on completion of any building comprised in the strata title plan, or if no TOP was issued, the date of issue of the latest certificate of statutory completion ('CSC') for any such building, whichever is the later.

ii. Not less than 80% of the share values and not less than 80% of the total area of all the lots, where ten years or more have passed since the date of issue of the latest TOP on completion of any building comprised in the strata title plan, or if no TOP was issued, the date of issue of the latest CSC for any such building, whichever is the later.

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181 LTSA (n 176) s 10A.
182 By the Land Titles (Strata) (Amendment) Act 1999 (No 21 of 1999), in force on 11 October 1999.
183 LTSA (n 176) s 84A. If some subsidiary proprietors object to the *en bloc* sale and the Strata Titles Board has not been able to mediate a resolution of the matters in dispute, it may issue a stop order discontinuing the proceedings before it: s 84A(6A). An application to the High Court for the *en bloc* sale may then be made: s 84A(2A)(b).
184 Ibid, s 84A(1).

Speaking in Parliament during the Second Reading of the bill that introduced the scheme, the Minister of State for Law justified the scheme by noting it was undesirable that:[185]

> […] a single owner, for whatever reason, can oppose and thwart the sale [of a strata title development]. […] As a result, these buildings cannot take advantage of enhanced plot ratios to realise their full development potential, which would have created many more housing units in prime 999-year leasehold or freehold areas for Singaporeans. A secondary benefit is that these developments, especially the older ones, could have been rejuvenated through the en-bloc process.

Thus, as the Court of Appeal noted in *Ng Swee Lang v Sassoon Samuel Bernard*, the scheme 'is a statutory construct to give effect to the Government's policy to facilitate urban renewal by enabling old apartment blocks to be redeveloped by the private sector'.[186]

Nonetheless, at the time the scheme was introduced it was – and arguably remains – controversial. During the parliamentary debate several reasons why some subsidiary proprietors might be unwilling to agree to an *en bloc* sale were pointed out. As Nominated Member of Parliament Simon Tay put it:[187]

> [T]here is an emotional attachment to a home and this is very difficult to translate purely to monetary terms. As such, I share the concern many Members have expressed that the conditions of a bona fide sale at arm's length transaction are simply not enough. The attachment which an older member may feel for his or her home of 20 years would be considered irrelevant in this

185 Ho Peng Kee (Minister of State for Law), speech during the Second Reading of the Land Titles (Strata) (Amendment) Bill, *Singapore Parliamentary Debates, Official Report* (31 July 1998), vol 69, col 601, quoted in *Ng Swee Lang v Sassoon Samuel Bernard* [2008] 2 SLR 597, 601, [5], CA.
186 *Ng Swee Lang*, *ibid.*
187 Simon SC Tay (Nominated Member of Parliament), speech during the Second Reading of the Land Titles (Strata) (Amendment) Bill (n 185) col 626. See also the remarks of JB Jeyaretnam (Non-constituency Member of Parliament) and Chiam See Tong (Potong Pasir Single Member Constituency), who voiced the concern that the scheme would result in homeowners being coerced into relinquishing their private property: *id,* cols 629–631; and HW Tang, 'The Legal Representation of the Singaporean Home and the Influence of the Common Law' (2007) 37 HKLJ 81.

> equation. This is a monetarisation of emotional attachment and that idea is contrary to the idea of Singapore as home.
>
> There are many personal reasons for preferring not to sell. It includes circumstances like the owner, such as an elderly or ill person, who may not be able to stomach the idea of having to pack everything and move. There is a convenience factor of being near to other family members or the school or amenities, or to simply a neighbourhood with which you are familiar. Additionally, there are hard economic reasons for some preferring not to sell. The purchase price paid by different owners at different times may vary considerably.

The *en bloc* sale scheme is therefore another reflection of the tendency for government policy to prioritize economic development and efficiency over less tangible factors such as emotional attachment and rootedness.

The scheme also leads to inconsistent results in some situations. This is typified by an unsuccessful bid for Pearl Bank Apartments to be voluntarily conserved by its subsidiary proprietors. Completed in 1976, Pearl Bank was a largely residential development with a distinctive C-shaped cross-section. At 113 metres with 41 storeys, at the time it was built it was Southeast Asia's tallest apartment block, and had the largest number of apartments in a single block in Singapore.[188] It has been hailed as an early example of an effective balance between the intensive use of limited urban space and a high-quality living environment,[189] and as one of Singapore's 'modernist icons'.[190] In 2013, following three failed attempts for the development to be sold *en bloc* between 2007 and 2011, the development's management committee, working together with one of the building's original architects, Tan Cheng Siong, unveiled a plan for Pearl Bank to be voluntarily

[188] J Zhuang, 'Saving Pearl Bank Apartments', *Biblioasia* (3 September 2016), vol 12, no 3 http://www.nlb.gov.sg/biblioasia/2016/09/03/saving-pearl-bank-apartments, accessed 24 April 2018; Chua Ai Lin, 'Pearl Bank Apartments (1976)' in *Too Young to Die: Giving New Lease of Life to Singapore's Modernist Icons: A Position Paper by Singapore Heritage Society* (August 2018), 16, 18–19 http://www.singaporeheritage.org/wp-content/uploads/2018/08/SHS-Position-Paper-Too-Young-To-Die-Aug-2018.pdf, accessed 26 December 2018.
[189] Chua, 'Pearl Bank Apartments (1976)' in *Too Young to Die*, *ibid.*
[190] WH Ho and JH Chang, 'Adding Value without Demolition, Rebuilding: Regenerating Singapore's Modernist Icons', *The Business Times* (7 April 2018).

offered for conservation by its subsidiary proprietors under a scheme established by the URA in 1991.[191]

The regeneration plan proposed requesting that the URA increase the gross floor area for the land on which the development stands. This would enable the proprietors to sell the new development rights to a property developer, to enable a 27-storey residential block to be built on top of an existing five-storey car park. The intention was for the capital raised from the sale to then be used to conserve and renovate the existing apartment block, and to pay the Singapore Land Authority for a top-up of the lease of the land to 99 years.[192]

The main obstacle faced by the regeneration plan was that the proposal to construct a new residential block meant adding new subsidiary proprietors to the development, thus altering the aggregate share value of the lots in the development. The law generally does not permit the share value of any lot to be altered on or after the date of registration of the strata title application comprising that lot.[193] Thus, the subsidiary proprietors have to agree to terminate the existing strata scheme and to apply for a new scheme. The termination of a strata scheme requires the management corporation to pass a 'resolution by consensus',[194] that is, 100% of the subsidiary proprietors must support the resolution.[195] In the case

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[191] R Whang, 'Pearl Bank Owners Bank on Conservation Order: Aim is to Raise Gross Floor Area, Get Lease Top-up and Higher Psf Price', *The Straits Times* (23 April 2014) 8; Chua, 'Box Story: The Pearl Bank Regeneration Plan' in *Too Young to Die*, *id*, at 31–33.

[192] Ibid. The land was held under a 99-year leasehold from June 1970: S Luo, 'Pearl Bank Apartments in Outram Sold En Bloc to CapitaLand for S$728m', *The Straits Times* (13 February 2018) https://www.straitstimes.com/business/companies-markets/capitaland-acquires-pearl-bank-apartments-for-s728m-q4-profit-falls-38, accessed 23 April 2018; L Tang, 'Pearl Bank Apartments Sold for S$728 Million, CapitaLand to Launch New Project in 2019', *Today* (23 February 2018) https://www.todayonline.com/singapore/pearl-bank-sold, accessed 26 December 2018).

[193] LTSA (n 176) s 11(1); Building (Strata Management) Act 2004 ('BSMA'), s 12(1). The BSMA, ss 12(1) and (4), allow the Commissioner of Buildings to accept an amended schedule of strata units which varies share values in the schedule only upon application by the original owner developer of the strata title development and in limited situations not applicable to the Pearl Bank Apartments regeneration plan. Moreover, the Commissioner must be 'satisfied that the proposed share values or range of share values allotted to all the lots or proposed lots […] are allocated in a just and equitable manner': *id*, s 11(5).

[194] BSMA, *id*, s 84(1).

[195] Ibid, s 2(7). See M Chou (Group Director, Conservation and Urban Design, URA), '100 Per Cent Owners' Consent Not Needed for Building Conservation', *The Straits Times* (16 March 2018) A28 https://www.straitstimes.com/forum/letters-in-print/100-per-cent-owners-consent-not-needed-for-building-conservation, accessed 25 March 2018; the URA sent a similar letter to *The Business Times*: see M Chou, 'Pearl Bank Apartments: What Sort of Consent was Needed', *The Business Times* (15 March 2018) https://www.ura.gov.sg/Corporate/Media-Room/Forum-Replies/forum18-03, accessed 26 December 2018).

of Pearl Bank Apartments, in October 2015 a liaison committee of the proprietors disclosed that about 90% of proprietors favoured the regeneration plan, but that it was impossible to obtain unanimous approval. For instance, some elderly proprietors no longer had legal capacity to signify their consent and had not executed lasting powers of attorney authorizing other persons to consent on their behalf.[196]

If the regeneration plan had not involved any change to the existing share values of the lots, with a level of support of about 90% of the proprietors the plan might have succeeded. The URA runs a Voluntary Conservation Scheme which does not require any particular threshold of support from proprietors. If a large majority of proprietors had approached the Authority to request that the development be declared a conservation area, the Authority might have acceded, taking into account the conservation merits of the site and the longer-term development plans for the area.[197]

Unfortunately, because the regeneration plan on the table required unanimity from the proprietors, it did not go through. Yet, for a building of Pearl Bank's age, only a minimum of 80% of the share values and the total area of all the lots is required for it to be sold *en bloc*, most likely with the consequence that it will be demolished. At least in some cases, therefore, the present rules 'tend to prioritize demolition over conservation',[198] arguably a dissatisfactory state of affairs. In February 2018, it was announced that a fourth attempt to sell the development *en bloc* to a property developer had succeeded.[199] The original apartment block was torn down in 2019 and 2020 to make way for a new condominium.[200]

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[196] R Whang, 'Pearl Bank Owners Appeal for Change in Conservation Criterion', *The Straits Times* (23 October 2015) https://www.straitstimes.com/business/property/pearl-bank-owners-appeal-for-change-in-conservation-criterion, accessed 13 February 2018; YN Lee, 'Six More Months for Pearl Bank to Get Owners' Nod for Conservation', *Today* (23 October 2015) 51 https://www.todayonline.com/singapore/pearl-bank-apartments-gets-another-6-months-get-resident-consent-conservation-project, accessed 26 December 2018.
[197] Chou, '100 Per Cent Owners' Consent Not Needed for Building Conservation' (n 195).
[198] Chua, 'Current Obstacles to Voluntary Conservation' in *Too Young to Die* (n 188) 34, 37.
[199] Luo, 'Pearl Bank Apartments in Outram Sold En Bloc to CapitaLand for S$728m', and Tang, 'Pearl Bank Apartments Sold for S$728 Million' (n 192).
[200] Tang, *ibid*; J Tai, 'Pearl Bank Apartments Likely to be Demolished despite Calls to Conserve Building', *The Straits Times* (17 February 2018) https://www.straitstimes.com/singapore/housing/pearl-bank-apartments-likely-to-be-demolished, accessed 2 April 2018; 'CapitaLand Unveils Design for One Pearl Bank', *Today* (14 May 2019) https://www.todayonline.com/singapore/capitaland-unveils-design-one-pearl-bank, accessed 28 January 2020; M Zaccheus, 'Demolition Work to Start for Dakota Crescent and

Concluding Thoughts

Singapore's planning law regime has, in the main, successfully achieved the purposes of providing for the orderly urban development of a nation with a large population yet constrained by limited land area. In the decades immediately following the nation's independence in 1965, the Government gave precedence to promoting economic growth and providing for the housing and transportation needs of the people. This meant, among other things, using the Land Acquisition Act[201] to compulsorily acquire privately owned land at below-market prices so that public finances were not overly stretched. The needs of the wider public were placed above the interests of landowners. Indeed, to ensure that the constitutionality of the Land Acquisition Act and compensation paid pursuant to it were not challenged in court, while at the time of independence the Government imported into the Singapore Constitution [202] most of the fundamental liberties guaranteed to the people by the Federal Constitution of Malaysia, it specifically declined to adopt the right to property set out in Article 13 of the Malaysian Constitution.[203]

From the 1970s and 1980s, perhaps with the completion of many large-scale infrastructure projects, the Government began to turn its attention to conserving aspects of built heritage and the environment, introducing schemes for the designation of national monuments (with effect from 1971)[204] and conservation areas (1989);[205] and the creation of national parks (1990),[206] and tree conservation

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Pearl Bank Apartments', *The Straits Times* (7 October 2019) https://www.straitstimes.com/singapore/demolition-work-to-start-for-dakota-crescent-and-pearl-bank-apartments, accessed 28 January 2020.

201 Above, n 159.

202 Above, n 162.

203 Republic of Singapore Independence Act 1965 (No 9 of 1965, 2020 Rev Ed), ss 6(1) and (3) ('(1) The provisions of the Constitution of Malaysia, other than those set out in subsection (3), shall continue in force in Singapore subject to such modifications, adaptations and qualifications and exceptions as may be necessary to bring them into conformity with the independent status of Singapore upon separation from Malaysia. […] (3) The following provisions of the Constitution of Malaysia shall cease to have effect in Singapore: […] Article 13 […]'); Lee Kuan Yew (Prime Minister), speech during the Second Reading of the Constitution (Amendment) Bill, *Singapore Parliamentary Debates, Official Report* (22 December 1965), vol 24, cols 435–436: see Lee, 'We Built This City' (n 16) 226. The Malaysian Constitution, Art 13(1) states: '(1) No person shall be deprived of property save in accordance with law. (2) No law shall provide for the compulsory acquisition or use of property without adequate compensation.'

204 Preservation of Monuments Act 1970 (No 45 of 1970), in force on 29 January 1971.

205 Planning (Amendment) Act 1989 (No 12 of 1989), in force on 31 March 1989.

206 National Parks Act 1990 (n 44).

areas and heritage road green buffers (2005).[207] As noted above, 2007 saw the end of compulsory acquisition of land at prices below market value.[208]

The overall approach of the planning regime is largely top-down.[209] This is evident from the way in which the legal framework usually grants government agencies broad powers to take decisions that have planning implications with few express guidelines. Agencies' policies thus play a more significant role in decisions than the legal framework. Moreover, the law usually does not provide for public consultation. For example, this is the case where the designation of national monuments, nature reserves, national parks, tree conservation areas and heritage road green buffers are concerned. As the Bukit Brown Cemetery example demonstrates, even where a process of public consultation has been made legally mandatory before the Master Plan can be amended, the Government has interpreted the legislation in a way that obviates the need for a hearing or public inquiry to be held in some situations. Applications for written permission to carry out development of land involve only the applicants and the authorities – the applications are neither required to be publicized, nor is any procedure prescribed for other interested parties such as owners of adjacent land and non-governmental organizations to provide their views.

This approach was probably adopted because the authorities regarded public consultation prior to the taking of planning and development decisions as administratively inefficient.[210] It is submitted that the approach needs rethinking at a time when the ubiquity of the Internet and social media have made it easy for like-minded people to contact each other and organize informal campaigns on environmental and heritage issues that they care about. As the Bukit Brown and Cross Island Line cases show, members of the public are more willing to speak out on these matters. There is likely to be dissatisfaction with governmental policy- and decision-making if the authorities are perceived to be refusing to hear

[207] Parks and Trees Act 2005 (n 63).
[208] See the text accompanying nn 167–174.
[209] This point has also made in the context of the lack of regular environmental impact assessments in Singapore: see C Briffett and J Mackee, 'Environmental Assessment in Singapore: An Enigma Wrapped Up in a Mystery!' (2002) 20(2) Impact Assessment & Project Appraisal 113, 122; and S Tan, 'Strategy for Environmental Sustainability for Island-state Singapore – Engaging the Public' (2017) 9(2) Asian J Pub Affairs e3, 1 and 11.
[210] Lee, 'We Built This City' (n 16) 225. Recall also the Government's reasons for not providing that appeals against refusal by the URA to grant development permission be heard by an independent planning tribunal: see the text accompanying nn 152–154 above.

these views or giving them short shrift. The Government is aware of this, and its willingness to publish the results of environmental impact assessments and to engage with non-governmental organizations and members of the public over the Cross Island Line matter is certainly a positive development.

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