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A BASELINE STUDY OF LOCAL GOVERNMENT IN WEST MALAYSIA

Andrew Harding*

Abstract:

This baseline study looks at the local government system in West Malaysia, focusing on the interrelated issues of its structure and powers, its governance conditions, finance, and inter-governmental relations. In its concluding part, the study investigates the extent of public participation in local government decision-making, especially in view of the controversial absence of local elections.

The main conclusions reached are that local government lacks sufficient autonomy to improve its performance, and that local democracy needs to be restored as part of a general and overdue revamping of the local government system.

This paper is adapted from a study prepared for the European Union project, ‘Local Government and the Changing Urban-Rural Interplay’.¹ The paper is not, however, designed to discuss urban-rural relations in any depth, but is rather designed to present Malaysian local government’s history and current condition in a conspectus, albeit with some reference, where appropriate, to differences between urban and rural local government. It includes case-studies of particularly problematic areas of local government, such as autonomy and governance. It is hoped that the study will provide useful background and food for thought as the issue of decentralization surfaces once again in Malaysian politics.² This paper provides an introduction to the structure, operation, and financing of local government, discussing also the extent of democratic participation in local government decision-making, especially in view of the continued absence of local elections. It also aims to link consideration of local government to broader political developments, and provides case studies designed to illustrate some of the issues of concern.

The study finds a number of difficulties with the existing system, leading to the conclusion that the local government system is in need of thorough reform. In fact, no extensive reform of the

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¹ H2020-MSCA-RISE-2018 Grant Agreement no. 823961; see <<https://cordis.europa.eu/project/id/823961>>.

² See below at p.43 of this paper; and Phang Siew Nooi, *Decentralisation or Recentralisation? Trends in Local Government in Malaysia* (Kuala Lumpur, University of Malaya 2008).

system has been undertaken since 1976, and there have also been repeated demands for the reintroduction of local government elections.³

The paper demonstrates that there are deficits in public financing in relation to local government, as well as a democratic deficit and a lack of real autonomy. This is in spite of the fact that local authorities perform functions of great importance that impact heavily on the daily lives of citizens – in housing, planning, transport, the environment, amenities, and business licensing, to name just a few examples. In addition, the role of local authorities in protecting public health was highlighted during the Covid-19 pandemic, commencing in 2020.⁴

The study is divided into three parts. The first deals with structure and powers; the second with inter-governmental relations; and the third with public participation.

Part 1: Structure and Powers

1.1 Historical Evolution of Local Government

Malaysian local government along its present lines can be traced back to the British occupation of Penang, which later formed, with Malacca and Singapore, the colony of the Straits Settlements. From 1801 local authorities were established gradually in the colony, and later in the states of peninsular Malaya, but only as and when it appeared necessary to the colonial authorities for a particular area. As independence loomed after 1945, experimentation with democracy was undertaken at the level of urban local government. By the time of the Federation of Malaya's independence in 1957 there were, however, no fewer than 289 local authorities, mainly district councils, major city councils alone being elected.

³ See below at p.8 of this paper; and AJ Harding, 'Local democracy in a multi-layered constitutional system: Malaysian local government reconsidered' in AJ Harding and M Sidel (eds), *Central-Local Relations in Asian Constitutional Systems* (Oxford, Hart Publishing 2015) ch 8.

⁴ Azmil Tayeb and Por Heong Hong, 'Malaysia: Improvised Pandemic Policies and Democratic Regression' in Victor Ramraj (ed), *Covid-19 in Asia: Law and Policy Contexts* (Oxford, Oxford University Press 2020) ch 22.

Two major changes have been made to local government in West Malaysia since 1957.⁵

First, in 1965, local government elections were suspended as an emergency measure, and have not since been reinstated.⁶ At the same time, a Royal Commission of Inquiry on Local Authorities was established, which recommended in 1968 (the 'Nahappan Report') the reinstatement of local elections and a reduction in the number of local authorities. Unfortunately, the proposed reforms were overtaken by an episode of inter-ethnic violence in May 1969. In 1971 the Development Administration Unit (DAU) of the Prime Minister's Department rejected the Nahappan Report's recommendation for reinstating local elections, arguing that elected local government, which facilitated 'the domination of the haves over the have-nots' and provided for 'over-democratised over-government at the local level', was no longer consonant with the objectives of a developmental state.⁷

The passing of the Local Government Act 1976 ('LGA') was the second major reform, designed to implement the other main recommendation of the Nahappan Report.⁸ The LGA, preceded in this by the Local Government (Temporary Provisions) Act 1973, regularised local authorities in West Malaysia, which by 1973 had grown in number from 289 to an unwieldy 373, in five different categories. With implementation of this legislation during 1973–1988, and an equivalent exercise in Sabah and Sarawak, the total number of local authorities in the whole of Malaysia was eventually reduced to 138, and the categories to three: municipal councils, city councils, and district councils.⁹ All categories of local government perform the same functions, and there are no intermediate bodies between state and local government.

⁵ For the reforms of the 1970s, see MW Norris, *Local Government in Peninsular Malaysia* (London, Gower 1980). The East Malaysian states of Sabah and Sarawak on the island of Borneo have their own systems of local government, and their own statute law governing it: see, further, below.

⁶ Elections were suspended by the Emergency (Suspension of Local Government Elections) Regulations 1965. The Local Government (Temporary Provisions) Act 1973 abolished all elected local authorities and gave the power to appoint local authorities to the State Governments; see now Local Government Act 1976, s 15; and see P Tennant, 'The decline of elective local government in Malaysia' (1973) 13 *Asian Survey* 347. The issue of reintroducing local government elections is discussed further below at p.8 of this paper.

⁷ Johan Saravanamuttu, 'Act of betrayal: The snuffing out of local democracy in Malaysia', *Aliran Monthly* 2000, <<https://aliran.com/archives/monthly/2000/04h.html>>.

⁸ JH Beaglehole, 'Local government in West Malaysia – the Royal Commission Report' (1974) 13:2 *P Admin & Dev* 348.

⁹ JH Beaglehole, *The District: A Study in Decentralization in West Malaysia* (Hull Monographs on Southeast Asia, No 6, London, Oxford University Press 1976).

1.2 *Constitutional and Legal Status of Local Government*

Under the Federal Constitution of Malaysia 1957, there are three levels of government: federal, state and local.

Local government is designated under Schedule 9 as a state matter. Nonetheless, local government is governed by uniform legislation in the form of the LGA and other statutes such as the Street, Drainage and Building Act 1974, and the Town and Country Planning Act 1976 ('TCPA'). It should be noted that this uniformity only applies to the eleven states of West Malaysia, and not to the East Malaysian states of Sabah and Sarawak on the Island of Borneo, which have different legal systems from that of West Malaysia, as well as different legal and administrative history, statute laws generally, and extent of state autonomy compared to the states of West Malaysia.¹⁰ Accordingly, to avoid laborious double-takes and potentially confusing coverage of the issues discussed, this paper is confined to West Malaysia, although federal statistics necessarily apply to Malaysia as a whole, and cannot usually be broken down, due to a lack of comprehensive information published by the Treasury.

As we have seen, the 1976 reforms resulted in Malaysia having three types of local governments, namely, City Councils (18), Municipal Councils (38), and District Councils (94). Apart from these three types of local council, there are six special-purpose local governments designated as 'development authorities'. The special-purpose development authorities are focused on development in specific areas at the local level, and are under federal, not state, control. These are the Federal Territories of Putrajaya and Labuan, Pengeran and Johor Tenggara Local Authorities in Johor, the Tioman Development Authority in Pahang, and the Kulim Hi-Tech Industrial Park Local Authority in Kedah. The Iskandar Regional Development Authority in Johor is also discussed below, but this authority acts only in a facilitative way and does not exercise statutory powers over specific local government functions in its area.

List II of the Federal Constitution's Ninth Schedule recognises local government as a function of the state governments, but, acting under a provision in the Constitution for effecting

¹⁰ Local government in Sabah is governed by the Local Government Ordinance 1961, and the equivalent legislation in Sarawak is the Local Authority Ordinance 1948, the Kuching Municipal Ordinances 1988, and the City of Kuching North Ordinance 1988.

uniformity amongst the states,¹¹ Parliament passed the LGA in 1976, and this statute governs local government in West Malaysia. Accordingly, the local government system is legally and constitutionally entrenched, even if, in the absence of local elections, there is no right to local *self-government*. Indeed, as shall see, local government is very much constrained by the exercise of power by both state and federal governments.

Local government authorities are legal persons in the form of bodies corporate and may sue or be sued in their own rights,¹² as well as being subject to judicial review under administrative law with respect to their acts and decisions. Powers not specifically allocated to the federal power under the Constitution lie with the states; however, local government powers have to be specifically granted by statute and they are subject to the overriding principle that local authorities cannot act *ultra vires*, that is, beyond the powers they are given by statute. Local government powers nonetheless include any powers that are *reasonably incidental* to the statutory powers they enjoy. This is specified in the LGA, but is also a well-known principle in common law systems.¹³ In a recent example of application of the *ultra vires* principle, a district council was held to have exceeded its powers by amending a valuation list and as a result charging rates to a company not included in the original list.¹⁴

The three types of council are somewhat differently structured but perform the same functions, albeit in relation to different sizes of population. District councils, which cover mainly rural areas, are the most recently created, and it is only since the 1976 reforms that all rural areas in West Malaysia have become areas governed by local authorities. District Councils will be seen in this paper to be under-privileged compared to the two kinds of urban council, being relatively poorly endowed in practice compared to the other two types of local government. This is in spite of the fact that their functions are, as we have seen, exactly the same. The urban-rural divide in terms of comparative treatment is a deep and historic one in Malaysian local government, and is of course very much symptomatic of local government conditions in countries like Malaysia that have been in the throes of rapid development and the intense

¹¹ Art 76.

¹² For the juristic nature of local authorities, see LGA, s 13.

¹³ LGA, s 101(hh); Beaglehole, "Royal Commission Report" (n 9); AJ Harding, 'Planning, environment and development: A comparison of planning law in Malaysia and England' (2003) 5(4) *Environmental L Rev* 231.

¹⁴ See also *Majlis Daerah Hulu Selangor v United Plantations Bhd* [2021] MLJU 1205 (Federal Court). For a striking recent example of judicial review, see *Perbadanan Pengurusan Trellises v Datuk Bandar Kuala Lumpur* [2021] 2 CLJ 808 (Court of Appeal). This case is discussed in detail below.

urbanization that goes with it. Despite the fact that, as we shall see, local governments exercise a wide range of powers, a number of factors inhibit the autonomy of local governments. These factors will be examined further in the section on inter-governmental relations ('IGR') below.

1.3 Political and Social Context of Local Government

Currently more than two thirds of Malaysians live in urban areas, and these (municipal and city councils) correspond to most of Malaysia's 'local government areas'; that is, those areas (now encompassing all of Malaysia's territory) that have local authorities as defined by the LGA, section 3. Over the last four decades, Malaysia's developmental state under the 'Vision 2020' policy has instrumentally recreated the country as an industrialized one, transforming it from a largely agricultural society into an urban and suburban one.¹⁵

Rural areas are under the authority of district councils, which are still administered with respect to local functions by something resembling the colonial system of district officers.¹⁶ The District Officers are chairs of the District Councils, which are advised by various committees of specialists. The districts, that is, rural areas, have never at any point had representative local government. Nonetheless, the District Councils perform equivalent functions to those of Municipal and City Councils. They are also under-funded compared to urban authorities. This is typical facet of uneven development in many countries. As Singaravelloo reports,

Financial strength is proportional to the size of the local authority. Larger local authorities have a larger population and economic base that provides the revenue needed to finance their activities. Smaller local authorities, however, especially district councils, have smaller populations and economic activities that can only contribute a small amount to their revenue. Examples of local authorities with a critical population size in 2010 were Majlis Daerah Lenggong (13,378), Majlis Daerah Pakan (Sarawak) (15,139), Majlis Daerah Pengkalan Hulu (15,878), Majlis Daerah Kuala Penyu (Sabah) (18,958), Majlis Daerah Jelebu (26,608), Majlis Daerah Labis (32,540), Majlis Daerah Cameron Highlands (34,510). The smaller revenue base is not even sufficient to provide the basic services that local authorities are assigned to deliver.¹⁷

¹⁵ AJ Harding, 'Law and development in Malaysia: A vision beyond 2020?' in Salim Ali Farrar and Paul Subramaniam (eds), *Law and Justice in Malaysia: 2020 and Beyond* (Kuala Lumpur, Thomson Reuters 2021).

¹⁶ Jagdish Sidhu, *Administration in the Federated Malay States* (Kuala Lumpur, Oxford University Press 1980).

¹⁷ Kuppaswamy Singaravelloo, 'Local government and intergovernmental relations' in Noor Alam Siddiquee (ed), *Public Management and Governance in Malaysia: Trends and Transformations* (Abingdon, Routledge 2013) ch 11, 211.

The National Physical Plan and the National Urbanization Plan¹⁸ emphasize urbanization, which is seen as Malaysia's major priority. This indicates that rural areas are of low political concern. It is suggested that any reintroduction of local government elections and any revisiting of state and local government powers should embrace district as well as urban councils, and address squarely the needs of rural communities.¹⁹

Local councils consist of between eight and 24 persons who are appointed for terms of three years by the state governments from amongst prominent citizens resident in the locality.²⁰ Councillors have therefore tended to reflect the interests of the political party or parties in power at the state level; in West Malaysia at least, political parties operate at the national level and there are no purely local parties, although obviously some parties are perceived as being stronger in some specific areas, or originated therefrom (e.g., Parti Gerakan is associated with Penang). With regard to Kuala Lumpur, since it is a Federal Territory, the *Datuk Bandar* ('Mayor') is appointed by the Federal Government for a period of five years, and the Dewan Bandaraya Kuala Lumpur (Kuala Lumpur City Council) is placed under the Prime Minister's Department.²¹

Reforms to the local government system, especially regarding elections in some urban areas, were promised by the Pakatan Harapan ('PH') government, which was in power from May 2018 to March 2020.. The Perikatan Nasional ('PN') government that succeeded the PH government has not stated any intention in this regard, but the country was under emergency rule from 12 January to 1 August 2021) due to the Covid-19 pandemic. Under the Emergency (Essential Powers) Act 2021, all elections were suspended; although this Ordinance was revoked in August 2021.²²

Despite the stability created by the Malaysian government's largely successful efforts to improve the economic standing and opportunities of the majority Malay/ Muslim population

¹⁸ *ibid*, 214.

¹⁹ The most recent proposals in this regard, by the PH government in July 2018, mentioned only reintroducing local elections in some densely-populated urban areas; in any event these were not acted upon. See further, Danesh Prakash Chacko, *Reintroduction of Local Government Elections in Malaysia* (Petaling Jaya, Bersih and Adil Network Sdn Bhd 2021).

²⁰ LGA, ss 3 and 13.

²¹ Federal Capital Act 1960, ss 4 and 7.

²² Emergency (Essential Powers) Ordinance 2021, ss 12 and 13.

(around 60% of the population of 32 million), there still exists a strong ethnic social division which in recent years has tended increasingly to be expressed via religious affiliation (Muslim and non-Muslim).²³ Under the Constitution, Article 160, a Malay is defined in terms of adherence to Islam as well as use of the Malay language and Malay customs. This ethnic factor has had a considerable impact on local government, as successive governments have declined to reintroduce local elections in spite of strong demands for local democracy, especially in mixed urban areas.²⁴ The often-stated reason is that local democracy is likely to inflame inter-ethnic tensions.²⁵ Nonetheless, the 14th general election in May 2018 was conducted entirely without violent incident anywhere in Malaysia, indicating a level of political maturity that belies the fear of reemergence of ethnic violence, most evident in the tragic events of 13 May 1969 referred to above.

Since significant changes in the law and socio-economic policy in 1971, spurred by the 13 May incident, the majority community (styled '*bumiputera*'), comprising Malays and natives of Sabah and Sarawak, have benefited from special quotas in certain areas such as education and employment opportunities.²⁶ This system has impacted local government in various ways, discussed below (Section 1.5).

1.4 *Local Government and Public Services*

Local authorities play a very important part in public life in Malaysia. Their responsibilities include planning and development control (discussed in some detail below), public housing, parks and public places, public nuisances, garbage collection and disposal, a wide range of other environmental functions, business licensing, markets, local transport, including bus routes and taxi licensing, and roads other than highways.²⁷ As is discussed below, some

²³ Dian AH Shah, *Constitutions, Politics and Religion in Asia: Indonesia, Malaysia and Sri Lanka* (Cambridge, Cambridge University Press 2017) 10.

²⁴ Lim Mah Hui, *Local Democracy Denied? A Personal Journey into Local Government in Malaysia* (Petaling Jaya, SIRDC 2020).

²⁵ This issue is discussed in more detail below at p.10 ff of this paper.

²⁶ There is vast literature on this issue but see for eg, Lee Hwok-Aun, *Affirmative Action in Malaysia and South Africa: Preference for Parity* (London and New York, Routledge 2021); AJ Harding, *The Constitution of Malaysia: A Contextual Analysis* (2nd edn, Oxford, Hart Publishing 2022) ch 3 (forthcoming).

²⁷ This is a brief summation. For a full list, see LGA, s 101, containing 34 extensive subsections setting out all of these powers.

services are provided via public-private partnerships, many of which are policy-orchestrated by the federal government.

Housing and planning are closely interrelated and form the most significant area of government activity that local governments control. In a rapidly developing and rapidly urbanizing country these functions are some of the most important that are carried out at *any level* of government. They are counter-balanced by the environmental powers of local authorities, which attempt to minimize the adverse effects of rapid development.²⁸

As has been noted above, Malaysia is an ethnically divided country, and, while Malays are in a large majority in rural areas, urban areas are generally more evenly divided demographically between members of Malay and non-Malay (mainly Chinese and Indian) communities. Allocation of housing and profit-making opportunities (in respect of development projects and public contracts²⁹) are sensitive issues, and one reason for the continuing refusal to reintroduce local elections is the possibility of political exploitation of inter-ethnic issues at the local level. For one example of potential conflict of this kind, local authorities are responsible for business licensing and allocation of permits for establishing places of worship.³⁰ The role of local authorities in the period of the pandemic (March 2020 to date) has proved to be critical in terms of the coordination of local government with state and federal government powers and local powers over infectious diseases and business licensing. However, such coordination has often proved to be defective in practice.³¹

Under the dominance of the Barisan Nasional ('BN') government (1957-2018) demands for reintroducing local government elections were easily suppressed. Since 2018, political fragmentation,³² accompanied by the need to deal with the pandemic, has hampered deep attention to policy questions such as the future of local government. As of September 2022 the PN government of Datuk Seri Ismail Sabri Yaakob, appointed in August 2021, has a small parliamentary majority. The system of local government is undoubtedly in need of reform, but

²⁸ Maizatun Mustafa, *Environmental Law in Malaysia* (2nd edn, Alphen-aan-den-Rijn, The Netherlands, Kluwer Law International 2013).

²⁹ See, generally, E Terence Gomez and Kwame S Jomo, *Malaysia's Political Economy: Politics, Patronage and Profits* (2nd edn, Cambridge, Cambridge University Press 1999).

³⁰ Shah (n 23) 93.

³¹ Tayeb and Por (n 4).

³² Harding, *The Constitution of Malaysia 2nd edn* (n 26), at xxviii.

any concerted reform process seems a very remote possibility at the present time, given the political fragmentation of the post-PH period.

1.5 Ethnic Preference and Housing Development: A Case Study

In this section, in order to illustrate the impact of national politics on local government, we examine the impact of development policy on housing and planning, which are local government functions.

As has been discussed above, ethnic differences are a driver of much policy in Malaysia. From 1971, Malaysia implemented an ethnic-preference policy in favour of the economically disadvantaged majority Malay and also Sabah-Sarawak native (indigenous) population, commonly referred to as '*bumiputera*' (sons of the soil). This policy was designed to redistribute wealth and opportunity to these communities.³³ Part of the policy was to ensure adequate housing for *bumiputera* citizens, and accordingly it became usual for new housing developments to offer discounts to *bumiputera* purchasers. It is expected that *bumiputera* citizens will generally support Malay parties, especially and traditionally the United Malays National Organisation (UMNO) in elections, on the basis of their delivery of redistributive policies.

The legal basis for this policy of affirmative action is as follows. Article 153 of the Constitution, as amended in 1971, allows an exception to the principle of equality before the law (Article 8) in the form of quota systems in favour of *bumiputera* citizens in various areas (scholarships, trade licences, university admission and public service positions). These do not, however, include housing opportunities as such. Nonetheless there is a strong policy favouring provision of modern, low-cost public housing for the poor, especially poor *bumiputera*. While such housing projects, normally initiated by state governments, to which land issues are constitutionally allocated, are designed to benefit poor citizens, a system of discounts operates

³³ Harding, *ibid.*, ch 3; Terence Gomez and Johan Saravanamuttu (eds), *The New Economic Policy in Malaysia: Affirmative Action, Ethnic Inequalities, and Social Justice* (Singapore, NUS Press 2013); Lee Hwok-Aun, 'Affirmative action: Hefty action, mixed outcomes, muddled thinking' in M Weiss (ed), *The Routledge Handbook of Contemporary Malaysia* (Abingdon, Routledge 2016) ch 13; AJ Harding, 'Constitutional trajectory in Malaysia: Constitutionalism without consensus?' in Michael Dowdle and Michael Wilkinson (eds), *Constitutionalism Beyond Liberalism* (Cambridge, Cambridge University Press 2017) ch 10; Lee, *Affirmative Action* (n 26).

also at the middle-class socio-economic level. These discounts involve the cooperation of local authorities, who are empowered under planning and land laws to impose conditions on housing developers as part of the approval-granting process for development, or land alienation, as the case may be.³⁴ Such conditions are within the broad discretion granted to local planning authorities in handing development control, and normally include a requirement to reserve a number of lots at a discounted price for *bumiputera* purchasers. These conditions typically involve a 30% *bumiputera* quota in respect of lots (the quota varies somewhat between 20% and 40%, depending on the state) in all housing developments, with developers also being required to give discounts of between 5% and 15% to *bumiputera* applicants. The quota system also applies to commercial units.³⁵ Apart from this, there are Malay Reservation Lands, which have a constitutional basis³⁶ and involve all property built on designated Malay Reservations being allocated to Malays only.³⁷ This latter policy applies in rural areas, whereas new developments are in newly built-up suburban, ‘red-earth’ suburban, or formerly rural areas.

There have been calls from the civil society for the planning impositions to be reviewed, particularly in the case of high-end properties where there seems to be no rationale for granting such discounts.³⁸ The ethnic-preference policy seems somewhat irrelevant in an urban middle-class environment, given that for the last 50 years, *bumiputera* citizens have had substantial, privileged access to educational, public service, and business opportunities. The continuance or modification of this system is nonetheless a large and sensitive political issue, on which many votes depend, and despite increasing discussion of the ethnic-preference policy in public fora, it seems unlikely there will be major changes in the foreseeable future.³⁹ For present purposes, the impact of these policies and the strong trajectory of Malaysian development is to convert many rural areas into suburban areas, bringing more residents under the control of urban local authorities. This has the unfortunate effect of reducing the resource base of district

³⁴ TCPA, s 22(3); National Land Code, s 120.

³⁵ See <<http://static.loanstreet.com.my.s3.amazonaws.com/assets/bumi-status.jpg>> accessed 16 June 2021.

³⁶ Federal Constitution, Article 160.

³⁷ Basharan Begum Mobarak Ali, ‘Red ink grant: Tracing legitimacy in history’ (2007) 34 J Malaysian & Comp L 159.

³⁸ Lim Teck Ghee, ‘Time to do away with housing quotas’ *Malaysiakini* (30 October 2007) <<http://www.malaysiakini.com/letters/74176>>; Fauwaz Abdul Aziz, ‘Housing industry: Bumi quota a pressing issue’ *Malaysiakini* (30 October 2007) <<http://www.malaysiakini.com/news/74138>>.

³⁹ See Lee, *Affirmative Action* (n 27).

councils, as we have seen, thus depriving of facilities those very rural areas where most poor *bumiputera* citizens live.

1.6 Financial Arrangements for Local Government

Sources of accurate and up-to-date information on local government finance are very sparse indeed. In general terms, Malaysian local authorities derive their revenue from three main sources:

- * local taxation in the form of property assessments or the equivalent (about 51%);
- * rents and fees for services, and licences (about 32%); and
- * fiscal transfers from state and federal governments, for example for road maintenance or specific development projects (about 17%).

These sources will be examined in more detail in what follows.

The general provision for the revenue of Malaysia's local government is the LGA, section 39. The Ministry of Housing and Local Government ('MHLG') has classified local government's sources of revenue (i.e., those falling under i and ii above) into six categories as follows:

- a) assessment rates;
- b) fees for licences and permits;
- c) rentals;
- d) government grants;
- e) car parking charges, planning fees, compounds, fines and interest;
- f) loans (from higher levels of government/ financial institutions).⁴⁰

Taxes can only be levied under federal law and so the federal government collects most types of tax receipts, such as income tax, export tax and road tax. Thus, the proportion of total government revenue collected by local governments is relatively small, at 3.4% in 2013.⁴¹

⁴⁰ Ahmad Yunus, 'United Cities and Local Governments (UCLG) Country Profile: Malaysia' (2016) 8-9. See also Nur Faezah Mohd Talib et al, 'Transparency in Malaysia Local Government administration. The overview of internally generated revenue (IGR)' (2017) 1(1) Intl JB & Management 22.

⁴¹ 'UCLG: Malaysia', *ibid.*

Nevertheless, tax revenues still represent the greatest share of income for local authorities. Assessment tax, which is a property tax collected on the basis of the annual assessment of rental value or the value-added (selling price) of the property, is an important source of revenue for local authorities. The LGA sets a ceiling on the tax of 35% of annual value or 5% of value-added of a holding. Taxation rates can be varied according to the use and location of the property. Thus, the amount of revenue that can be collected from the assessment tax depends on the property's level of physical development. Assessment Tax revenue, therefore, varies with the taxation rate, annual value (or value-added), and number and type of holdings.⁴²

However, due to the over-reliance of most councils on these assessment taxes, weaker local authorities, and especially rural ones, where property values are naturally lower, are often still strapped for financial resources in carrying out their operations.⁴³ As a result, these authorities rely heavily on grants from the federal government or the state.⁴⁴ In this regard, a good relationship between the local government and the federal and state government is necessary for local authorities to obtain funding on a consistent basis. It is at this point that the political patronage system becomes very important for local government, and there are instances of deliberate political partisanship in funding allocations.

Financial grants from federal and state governments include, but are not limited to, the following types, listed here together with other sources of revenue.⁴⁵

(a) Annual equalisation grants, available to all Peninsular Malaysian states, serve to compensate the difference between a local authority's fiscal capacities and fiscal needs. These grants are channeled by the federation to local authorities through the state, in accordance with the State Grant (Maintenance of Local Authorities) Act 1981. The formula used is set by the MHLG. This goes some way towards compensating rural councils whose property assessments will tend to be rather lower than urban ones.⁴⁶

⁴² *ibid.*

⁴³ *ibid.*

⁴⁴ *ibid.*; and Talib et al (n 38).

⁴⁵ *ibid.*

⁴⁶ *ibid.*

(b) **Launching grants** are provided by the state to local authorities for restructuring purposes: to purchase new equipment for service extensions or to undertake infrastructure development projects. Like the others, these grants have to be approved by the MHLG. The size of the grants to a particular local authority depends on factors such as land area, population and expected revenue.

(c) **Development project grants** are funds made available to all local authorities for the implementation of socio-economic projects, encompassing infrastructure projects, social facilities, cleanliness, beautification, purchase of equipment and machinery, recreational parks and sanitary projects.

(d) **Balancing grants** are offered by the state to cover rising operational expenditure costs, such as from the increase of pay levels negotiated by the federal government for the public sector. Smaller local councils can also choose to utilise these grants to aid in minor development projects.

(e) **Licence fees** are a major source of income for local authorities, and are levied by local authorities to regulate trading activities within their jurisdictional areas. The LGA gives wide powers to local authorities to register, license and regulate trade, commerce and industry. The charges imposed by local governments vary according to the category of licence.⁴⁷

(f) **Fees and Service Charges** are levied when local authorities carry out various activities and provide facilities for the local community. They can also impose charges for services rendered. In general, these sources produce no less than 10% of the total revenue of local authorities. Examples include fees and charges for planning processing under the TCPA, car parking, and use of tools and recreational facilities such as swimming pools.⁴⁸

(g) **Federal funding** for local government also targets needy areas, which are invariably rural. For example, in April 2021 the MHLG allocated RM6.3m for tourism and economic development in Kuala Langat, a rural area in Southwest Selangor.⁴⁹

⁴⁷ *ibid.*

⁴⁸ *ibid.* See also the case study on SPICE, below at p.xx of this paper.

⁴⁹ 'Housing and local government ministry approves RM6.3m fund to Kuala Langat' *Malay Mail* (15 April 2021) <<https://www.malaymail.com/news/malaysia/2021/04/15/housing-and-local-government-ministry-approves-rm6.3m-fund-to-kuala-langat/1966752>>.

Based on figures from FY 2016/17, subnational governments raised in total approximately US\$676 PPP per capita, of which state and local governments, respectively, accounted for 65% and 35%. The total revenues correspond to about 2.5% of the country's GDP, which is relatively low compared to both federal and unitary countries in Southeast Asia (only Cambodia reports lower figures).

In FY 2016, local government revenues amounted to RM10.42 billion (about Euro 2.1bn, or US\$235 PPP per capita), of which 10.5% corresponded to transfers made to local governments and the remaining 89.5% was locally-raised revenue, as discussed above. Details of local revenues are available only at an aggregate level, which does not allow discernment between taxes/ tariffs and fees, as sources of revenue. In practice states as well as local governments have financial difficulties, and do not have the capacity at any significant level to financially support local governments, which mainly rely on federal funding to supply shortfall and mount special projects.

All subnational government are allowed to borrow for a period not exceeding five years. In FY 2016, subnational debt corresponded to 0.4% of the country's GDP and 0.6% of the general government outstanding debt. Local government debt remains low, corresponding to 0.2% of total subnational debt in FY 2016. According to Article 111 of the Constitution, state governments, except those of Sabah and Sarawak, are only allowed to borrow from the federal government, with its prior approval. According to the Local Government Act 2006, local governments may, with the approval and under conditions agreed by the state government, contract loans. Within the powers of local governments, such loans may be used for the acquisition of land, the construction of public buildings, for carrying out permanent works, for providing or maintaining plant equipment and vehicles, and to pay off existing loans.

Statistics reported by Lim Mah Hui for Penang council (MPIP) during 2007-17⁵⁰ indicate that over this period the proportion of tax revenue decreased from 62% to 54%, while non-tax revenue increased from 28% to 41%, and non-tax receipts (federal and state government transfers) decreased from 10% to 5%. Average annual revenue growth over the period was

⁵⁰ Lim (n 25) 70-71; more generally, see Phang Siew Noi, *Financing Local Government in Malaysia* (Kuala Lumpur, University of Malaya Press 1998).

5.9% and the total revenue for 2017 was RM359m (Euro 72m). Penang is one of the wealthiest local authorities. There are no equivalent figures available for municipal or district councils.

The result of a lack of adequate resourcing has been an understandable emphasis on maintaining services rather than on development and response to changing needs. This affects rural areas more than urban areas. Little has been done, despite much rhetoric, to improve provision of services at similar or lower cost by privatizing local government services.⁵¹ There is consequently a deficit in effective enforcement of relevant laws, with authorities seemingly unable in many ways to fully utilize their powers. This is especially the case for collection of local rates.

One particular problem that seems capable of being easily addressed is that, since local government employees (about 7% of all public employees – a strikingly low figure) do not form part of the public service as such but are simply employees of the local authority in question, and cannot simply be transferred to other local authorities. Thus, meritorious employees can get stuck at middle levels of promotion for years, there being few opportunities for promotion, and may leave the service for better prospects elsewhere; mediocre employees on the other hand tend to remain where they are.

Problems of enforcement of local government laws are widespread and are attributable to a lack of enforcement officers, itself a function of local government finances.

1.7. The National Finance Council

In a federal system, and in connection with local government finance, mention needs to be made next of the National Finance Council ('NFC'), which impacts on local government in that in large measure it affects state finance and therefore in part determines available funding to be transferred to local authorities. Large development projects are also usually funded by cooperation between the state and local, as well as federal, government.

⁵¹ AT Hussain and M Brahim, 'Administrative modernization in the Malaysian local government: A study in promoting efficiency, effectiveness and productivity' (2006) 14 *Pertanika J Social Sciences & Humanities* 51; see further, Kwame S Jomo, 'Privatization in Malaysia: For what and for whom?' in T Clark and C Pitelis (eds), *The Political Economy of Privatisation* (London, Routledge 1993); Ahmad Atory Hussain, *Local Government: Theory and Practice in Malaysia* (Kuala Lumpur, Dewan Bahasa dan Pustaka 2002).

The role of the NFC is to look into the various aspects of financial management of the states and to coordinate federal-state finance. The Federal Constitution (Article 108(4)) stipulates that it shall be the duty of the federal government to consult the NFC in respect of, inter alia: the making of federal grants to the states; the assignment of the whole or any portion of the proceeds of the federal government to the states; the annual loan requirements of the federation and the states and the exercise by the federation and the states of their borrowing powers; and the making of loans to any of the states.⁵² This consultation is non-binding.⁵³ The NFC comprises the Prime Minister (PM) as chairman, one other federal minister designated by the PM; and one representative from each of the states, appointed by the Ruler/ Governor. The NFC meets at least once a year, or when called by the PM or requested by at least three states.⁵⁴

As a result of the limited revenue base of state governments, many states are dependent on federal transfers and loans to finance their expenditure.⁵⁵ Thus the NFC plays a crucial role in facilitating negotiations between the federal and state government concerning federal financial and funding issues i.e. federal sponsored development projects, and transfer of financial resources (grants and loans) to the states.⁵⁶

The NFC will also be consulted in other issues to ensure that both the federal and state governments have influence in these areas. One example is in the establishment of a national development plan⁵⁷ provided for under Article 92 of the Federal Constitution, where the NFC will have to be consulted before Parliament can give effect to the development plan.

In the most recent NFC meeting,⁵⁸ the federal government agreed to implement four enhancements to allocations channeled in various forms of grants and support to the state governments for 2021. During the meeting, the Ministry of Finance said that the federal government was aware that the state governments were experiencing a very drastic reduction

⁵² Abdul Rahim Anuar, "Fiscal decentralization in Malaysia" (2000) 41(2) *Hitotsubashi J Econ* 85.

⁵³ Gary Marks, 'Country profile – Malaysia' <<https://garymarks.web.unc.edu/data/regional-authority-2/>>.

⁵⁴ Above (n 45) 92.

⁵⁵ *ibid* 94.

⁵⁶ *ibid* 85.

⁵⁷ Plan for the development, improvement or conservation of the natural resources of a development area, the exploitation of such resources, or the increase of means of employment in the area.

⁵⁸ Ministry of Finance Malaysia, 'Federal govt implements four enhancements to grants, support for states' *Press Release* (6 May 2021) <<https://www.mof.gov.my/en/news/press-citations/federal-govt-implements-four-enhancements-to-grants-support-for-states>>.

in revenue as a result of the pandemic.. This, in turn, impacts local government finance. Hence, one enhancement provided an allocation of RM260m (Euro 57.1m) to the state governments to help them implement small-scale projects at the grassroots – that is, at local government – level.

1.8 Urban Cleansing: A Case Study on Privatization

This case study, designed to illustrate the resource problems involved in delivering local government services, is based on Singaravelloo's discussion of Malaysian privatization.⁵⁹ Privatization is part of what is known as 'new public management', which in this instance is used in Malaysia to attempt to solve problems of underfunding in local government. Although this function is referred to as 'urban cleansing', it concerns solid waste collection, which is a function of all local councils, not just urban ones, as well as dealing with water pollution, sewage disposal, and public nuisances.

In the context of Malaysian local government, cleansing services are critical. They are the main reason for the development of local government. Furthermore, in a tropical climate cleansing is especially important. For example, in Malaysia garbage is collected at least twice and sometimes three times a week, whereas as once a week is normal in colder climates. Citizens attach great importance to cleansing services. Complaints are frequent with regard to local government neglect and incompetence in this area of activity. These complaints have often reached parliament, even cabinet, and have been the cause of concerted government action at the national level.

Given what has been said above concerning local government finance, from the 1980s privatization has been a major initiative designed to deal with government, especially local government, problems. The Malaysian government took its cue from other governments, such as the UK's, which invested heavily in privatization initiatives during the 1980s.⁶⁰ At the

⁵⁹ K Singaravelloo, 'Fostering Public-Private Partnership in a Win-Win Situation: The Experience of a Malaysian Local Government' in L Montanheiro and M Spiering (eds), *Public and Private Sector Partnerships: The Enterprise Governance* (Sheffield, Sheffield Hallam University Press 2013).

⁶⁰ Abu Bakar Munir, 'Privatization in Malaysia: A case study of the Telecommunications Department', in William Neilson and Euston Quah (eds), *Law and Economic Development: Cases and Materials from South East Asia* (Singapore, Longman 1993) 169. See, more generally, Mitchell Wigdor, *No Miracle: What Asia can Teach all Countries about Growth* (Farnham, Ashgate 2013).

national level, government-linked companies have been important in terms of economic and infrastructural development. At the local level, urban cleansing has featured prominently.

Public-private partnerships, states Singaravelloo:

[H]ave evolved over time in Malaysia, from the context of traditional privatization involving both parties, to the outsourcing of public services to the private partners, through the awarding of contracts, to one that expects strong financial capacity from the private sector (during the Ninth Malaysia Plan), and on to one that shares the risks and burdens and better returns (in the Tenth Malaysia Plan).⁶¹

Some local authorities decided to privatize urban cleansing services by transferring them to private companies under contract with the local authority. The smaller, especially rural local authorities, facing financial difficulties used their own staff to provide urban cleansing. During the first Mahathir administration (1981-2003), the federal government intervened, removing this service from local governments in the Peninsular Malaysia, and repackaging them to three major interim consortia, that is: to Alam Flora Sdn. Bhd. to cover Kuala Lumpur and the states of Selangor, Pahang, Terengganu and Kelantan; to Northern Waste Management Services Sdn. Bhd. (now Environment Idaman Sdn. Bhd.) to cover Perak, Penang, Kedah and Perlis in the north of the peninsula; and to Southern Waste Management Sdn. Bhd. to cover Johor, Melaka and Negri Sembilan.⁶²

The consortia for solid waste disposal claimed that they would perform more efficiently once the solid waste management service was fully and finally privatized. However, the system was found to be problematical, because payment by local authorities to the consortia was affected by their poor financial standing. Local authorities therefore sought financial help from the federal government. Singaravelloo records that a total of RM151.84m (Euro 30.3m) was given as financial aid to 28 local authorities during 1998-2010. By December 2010, local authorities in Peninsular Malaysia owed RM357 million to the consortia.⁶³ The interim solid waste management collection agreement did not support the consortia in their search for commercial financing for investments, which are mostly needed to purchase new machineries and

⁶¹ Ibid., 155.

⁶² *ibid.*

⁶³ *ibid.*

equipment. What was initially an interim measure for five years had by 2010 extended to sixteen years in Johor and about nine years in the neighbouring state of Negeri Sembilan.

With effect from 1 September 2011 the federal government decided to enforce the Solid Waste and Urban Cleansing Management Act 2007, thus taking ultimate control over the delivery of urban cleansing services in eight states and the federal territories, which meant enforced privatisation in most of Peninsular Malaysia. Opposition-controlled states declined to participate, so that in those states urban cleansing services reverted to the local authorities as per the previous system for them to appoint their own contractors, while some local authorities in Selangor started to run the services themselves to cut costs.

A similar process was used for sewerage services, where problems of efficiency had been encountered, which were privatized to Indah Water Consortium Bhd, a federal-government-owned entity. This was ‘due to the fact that the majority of the local authorities were unable to operate sewerage services effectively, let alone manage and maintain sewerage infrastructure effectively’.⁶⁴ As a result, the federal government privatized sewerage services in the whole of Peninsular Malaysia as a federal service, and enacted a law to empower the company to perform its duties and to recoup its expenses from consumers by means of a separate bill using a tariff structure. However, bill collection proved unable to meet Indah’s expenses, and it was repeatedly bailed out by the federal government.

Privatization in the sphere of local government services has not succeeded in solving the problems with these services, while also spawning other problems. The story of urban cleansing does not show that there is a genuine alternative to providing a secure financial basis for local services. As a microcosm of decentralization, local initiative and community commitment seem more likely to improve services than mega-fixes at the federal or even state level. Clean and consistent water supply and waste collection continue to be problems in many parts of the country.

⁶⁴ *ibid.*

1.10 Iskandar Development Region: A Case Study in Localism and Development

This case study looks at a different way of dealing with under-development from a local perspective. It presents an example of collaboration of federal, state and local government, together with the private sector, in creating development conditions at the local level.

Development has been a major preoccupation since independence in 1957. Typically of Asia's developmental states, of which Malaysia is a good example, alternative centres of autonomy have been the object of persistent, although not wholly successful, attempts to subordinate them to the developmental aims of successive federal governments, as well as the marshalling of virtually all branches of the state – as well as private interests – behind the development agenda.⁶⁵ In this process, the federal government has experimented with what one might call the spatial geography element in development by finding ways of using the territory under its ultimate control (noting that land itself is nonetheless a state matter, so that this control will be indirectly exercised) 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, linking with KL International Airport.⁶⁶ These projects, in an exercise of political power at the federal level, in effect overrode both state and local governments' powers. In addition, the federal government has experimented with growth corridors, growth triangles, special economic zones, development authorities, and development regions. This study examines Iskandar Development Region Authority/ 'Iskandar Malaysia' (IDRA-IM) as an example of how new structures might serve development purposes and potentially alter the nature and ultimately the structure of local government.

The Federal government established IDRA-IM in 2007. Its five territories of operation overlap geographically with that of local authorities in the region, mainly the City Councils of Johor Bahru (MPJB) and Iskandar Puteri (MPIP) City Councils. IDRA-IM is located at the very Southernmost tip of the entire Eurasian land mass, with Singapore just 1km away across the strait that separates it from the state of Johor. The location is strategic as part of a growth

⁶⁵ AJ Harding, *The Constitution of Malaysia: A Contextual Analysis* (Oxford, Hart Publishing 2012) ch 2.

⁶⁶ M Likosky, *The Silicon Empire: Law, Culture and Commerce* (Abingdon, Routledge 2005); DBS Asian Insights, 'Iskandar Malaysia, a tale of two cities' (DBS Group Research 2013) <https://www.guppyunip.my/SectorBriefing01_IskandarMalaysia.pdf>.

triangle between Malaysia, Singapore and Indonesia, although the Indonesian element in this project has proved minor. As one researcher has expressed the purposes of IDRA-IM:

[its] main purpose is to attract investment into the region by cooperation both between federal, state and local governments, and with other countries, especially Singapore. As a former Chief Minister of Johor put it, ‘be they local or foreign direct investments from all sources including Singapore, it is the [IM] which will have jurisdiction over issues pertaining to investments’.⁶⁷

Technically this statement is incorrect, as legal jurisdiction still lies with the relevant authorities. The practice developed here is that of defining the powers of IDRA-IM (and it is an acknowledged model not just for Malaysia but for the entire Southeast Asian region) as those of advising the state and local government authorities on investment, not usurping their powers.

Under section 4 of the 2007 act, the objective of IDRA-IM 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 decision-makers. Since it is co-chaired by the Prime Minister and the Chief Minister of Johor, and the Finance Minister is also a member, its influence is obviously very strong, despite its lack of legal powers. The Sultan of Johor has much influence over its activities and takes a keen interest.⁶⁸ The Mayors of the City Councils sit on IDRA-IM’s Advisory Committee, so the local authority too has a strong say in deliberations.

As an official interviewed in one study of IM in 2015 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.⁶⁹

⁶⁷ Datuk Abdul Ghani Othman, quoted in E Nadalutti, ‘To what extent does governance change because of sub-regional cooperation? The analysis of Iskandar Malaysia’ (2016) *Intl Relations of the Asia-Pacific* 1, 19. See also A Rizzo and J Glasson ‘Iskandar Malaysia’ (2012) 29(6) *Cities* 417; E Nadalutti, ‘Regional integration and migration in Southeast Asia: the rise of “Iskandar-Malaysia”’ in S Talani and S McMahon (eds), *The Handbook of the International Political Economy and Migration* (Northampton, USA, Edward Elgar 2015) 399.

⁶⁸ Nadalutti, ‘Sub-regional cooperation’, *ibid* 22-25.

⁶⁹ *ibid* 20.

The structure indicated fulfils the purposes of bringing resources and expertise to bear on galvanizing development in a region of large potential growth, creating a space for policy innovation, for example on climate change,⁷⁰ while leaving undisturbed the normal process of local government decision-making. The local authorities have of course many areas and many functions lying beyond IDRA-IM's interests.

Although there are acknowledged risks and difficulties to be negotiated, the structure adopted departs from the previous developmental strategy of override to engage in dialogue and consultation. The initiative has met with practical success in attracting investment, although this was slower in coming than was anticipated at the outset. Most investment comes from China and Singapore.

Part II: Inter-Governmental Relations

2.1 A Measure of Autonomy

Careful perusal of the text of the Federal Constitution would indicate that the intention of the constitution-makers was to provide only a measure of real autonomy for state governments from the federal government, and that local authorities would also enjoy a measure of autonomy from state and federal governments, albeit less than that enjoyed by state governments. However, such reading would obscure the fact that very little such autonomy exists in practice. The centralized nature of the federation is well established in analyses in the literature (Malaysia is often referred to as a 'quasi-federation' rather than a real federation, or as truly federal only with regard to Sabah and Sarawak, not the states of Peninsular Malaysia).⁷¹ As a result the government system is in practice far more centralised than Southeast Asia's unitary states, such as Thailand, Indonesia and the Philippines. Much the same may be said of local government, which has even less say than state governments in inter-governmental relations (IGR). This situation is due to a number of factors, mentioned earlier, which are now examined in turn in more detail.

⁷⁰ J de Oliveira, 'Intergovernmental relations for environmental governance: Cases of solid waste management and climate change in two Malaysian states' (2019) 233 J Environmental Management 481.

⁷¹ Harding, *The Constitution of Malaysia 2nd edn* (n 26) ch 6.

As might be expected, therefore, there is no enforceable right to local self-government in the Constitution, although it is clear that local government itself is a constitutional topic, and the Constitution provides for a National Local Government Council.

First, **local government elections** are not required by the Constitution, and have been suspended since 1965, so that there is no local *self-government*, and no *right* as such to local self-government.

Secondly, as a consequence of this, **local councillors are appointed** by the state governments, and appointments are usually, although not always, made on the basis of allegiance to the party in power at the state level; this does not seem to depend on whether that party is in government or in opposition at the federal level. Accordingly, local government is stitched into the patronage-based, clientelist system that characterizes Malaysian politics, rendering it especially unlikely that local councillors will decide against the desires of the state government.⁷² This factor is critical.

Thirdly, state governments have powers under the LGA, section 103, to give **directions** of a general character to local governments; this power is expanded even further on occasion in practice to directions of a *specific* character, going beyond the scope of the statutory provision

Fourthly, policy on local government is coordinated amongst the various states by the **National Local Government Council**,⁷³ a federal body set up under Article 95A of the Constitution, which gives much power to the federal government to control the operation of local government despite it being a state matter.

Fifthly, as is the case in most countries, it is universally acknowledged that **local government finance** faces considerable challenges, except in some wealthier areas such as Penang and Selangor.

Taken together, these five factors restrict considerably the freedom of operation of local governments. Under WP4 on IGR the dossier introduced as an example the ‘SPICE’ episode, set out in detail in a recent book by a former Penang councillor, Lim Mah Hui. In this episode

⁷² Lim (n 24).

⁷³ Discussed below at p.27 of this paper.

the state government went beyond its powers, in making decisions regarding a contract to build a new conference centre that were properly within the jurisdiction of the local government.⁷⁴

2.2 Patronage-based Politics

IGR involving local government in Malaysia are rendered more complex than a mere statement of constitutional and administrative law might indicate, due to the operation (historically speaking) of the dominant-party system under the Barisan Nasional (formerly Alliance) ('BN') government (1957-2018). For almost all of this period and in almost all states, at least up until 2008, when the federal opposition coalition won several state governments, appointees at federal, state and local government levels were appointed from within the BN power structure. This meant that state *Menteri Besar* (Chief Ministers) were in effect appointed by the Prime Minister; state executive councils (equivalent of the cabinet at federal level) were appointed by *Menteri Besar*; and local councillors were appointed by the state government almost exclusively from the ranks of party members. In this system, IGR were therefore in large part a matter of intra-party (not even inter-party, except for BN component parties) relations. A good example of the effects of these political processes on local government is provided in the case study below of the SPICE controversy in Penang. This shows that what is described here is not at all confined to the BN and its component parties, but is taken as a norm even by parties that had been in opposition to the BN before 2018, and are now in power in some states.

2.3 The SPICE Controversy: A Case Study in IGR

This section consists of a case study that is by no means untypical. Other similar examples, those of Johor Bahru's 'floating city' project and the Penang Hill controversy, are also referred to below.

Not surprisingly, it is with regard to development that conflict between local and state government is most likely. The general laws set out in the last section appear to indicate a clear if not entirely satisfactory demarcation between general rules and policies, on the one hand, which can be controlled by state governments, and particular decisions, on the other hand, which are entirely within the remit of local governments. Nonetheless, in the SPICE case, as

⁷⁴ *ibid.*

in many other cases, the state government has used its leverage to make decisions that oust local government powers.

In the instant case, there was a joint venture project between MBPP (Penang Island City Council) and a private company, SP Setia, to develop – via co-financing – the Subterranean Penang International Convention and Exhibition (SPICE) Centre, an initiative designed to attract tourism and business to the state of Penang, as well as to provide indoor sports activities. The project was a state government plan but was entrusted to MBPP, on whose land the SPICE was supposed to be built. In 2010 MBPP asked for proposals from the private sector. The project was awarded to a subsidiary of SP Setia. Negotiations were undertaken by state and local government officials without the knowledge of councillors, even those on the Finance Committee; they learned of it only when the RM300 million contract had been signed and was referred to in the press. Councillors complained that the contract was lop-sided in favour of the private partner, and had been negotiated in an untransparent fashion, contrary to the state government's stated 'CAT' policy of 'competence, accountability and transparency'. MBPP was therefore asked to approve a decision that had already been taken. A budget of RM50 million for a BOT (build-own-transfer) arrangement involving MBPP's property contained some troubling features that included a lease of 30 years, twice renewable by the company for 15 years, with concessions regarding both assessments and density of retail outlets. In terms of cost-benefit, MBPP contributed the land and part of the finance but got little in return – the right to use the facilities for 42 days a year, and return of the land after 60 years. Despite these concerns, voiced by two councillors and civil society representatives, the majority of councillors, appointed by the state government, went along with the decision. SPICE opened on the agreed terms in 2015.

In a developmental state such as Malaysia it has been common for developmental concerns to trump governance concerns. There is no better example of this than the SPICE episode, but examples of this phenomenon appear to proliferate all over the country.

At the level of states such as Penang, where federal opposition parties are usually in control of the government, there is a strong political imperative to achieve development, and in this case to attempt to replicate Singapore's vaulting development ambitions as a centre for trade and investment. As we have seen, the resources of state and local governments are not extensive, and the state government will use every resource and leverage it can to gain votes by

demonstrating strong development. Accordingly, governance norms are often overridden by arrangements and negotiations done directly with developers, in which the state government will no doubt have made promises and taken positions that are strictly, as in this case, for the local authority to decide on. While the temptation is strong to ride roughshod over correct processes in the interests of securing an important deal, the lack of process may well result in mistakes, such as lop-sided contracts, where the interests of private corporations are placed above those of the public. There is also of course a distinct danger of corruption in such decision-making.

The SPICE episode compels the conclusion that legal and democratic norms have to be adhered to, rather than traduced by inappropriate decisions taken without proper consultation. The spineless response of most Penang councillors in this matter reveals the political realities that lie behind development at the local level.

2.4 The National Council for Local Government

The National Council for Local Government ('NCLG') is a body established under Article 95A of the Constitution in 1960 that makes national policies for the promotion, development and control of local governments, and in effect controls the kinds of laws and policies that the States can make on local government.⁷⁵ State governments must follow the policies made by the NCLG. For example, when the state governments of Selangor and Penang (then held by federal opposition parties) requested the Election Commission (EC) to conduct local government elections, the EC held (it is suggested, incorrectly) that NCLG's agreement was necessary.⁷⁶

The NCLG consists of a federal minister as chairman (normally the Prime Minister), and one representative from each of the states (normally the Chief Minister) appointed by the Ruler (or Governor, on government advice); and generally no more than 10 representatives of the Federal Government. Given this composition, the NCLG is without doubt highly influential, and the Prime Minister, normally chairing the meetings, determines its agenda and direction.⁷⁷

⁷⁵ See Art 95A, and also Art 76 of the Federal Constitution, which provides for the federal legislature to make laws for the purpose of uniformity between states.

⁷⁶ Chacko (n 19).

⁷⁷ T Yeoh, *Federal-State Relations under the Pakatan Harapan Government* (ISEAS Publishing 2020).

Ultimately, the NCLG's agenda and interests reflect those of the federal government.⁷⁸ For this reason, the NCLG is considered by some to be quite improper in a federal system, as it can be said to trespass on states' rights, which include powers in respect of local government. Since the NCLG is legitimised by a constitutional amendment introducing Article 95A, it can only be argued that it is an unconstitutional body by relying on the 'basic structure' doctrine, which has a hold, but a tenuous hold, in Malaysian case law.⁷⁹

The setting up of the NCLG is considered to be part of the extensive local government reforms that took place between its establishment in 1960 and 1988. It was established under Article 95A to coordinate policies and laws between the federal, state and local spheres of government, such that uniformity of local government laws and policies in Malaysia could be achieved. Article 95A provides that after consultation with state governments the NCLG can 'formulate policies for the promotion, development, control of local government throughout the federation and for the administration of any laws relating thereto'.⁸⁰

A Penang state assemblyman, Mr Gooi Hsiao Leung, reflecting a widely-held opinion, stated that the state governments could become more effective if there were a decentralisation of power from the federal government: 'It will be better for Penang as we are in the best position to know what is needed for our state instead of bureaucrats stationed far away in Putrajaya'. An example he provided was that 'even when the state government wants to reinstate the Penang Voluntary Patrol Team (PPS), it cannot be done without federal approval'. In fact as it turned out, the PPS was held by the Court of Appeal to be constitutionally within state powers.⁸¹ Gooi also pointed out that federal funds were being distributed unfavourably to the States: 'Penang received only 3 per cent of the tax revenue collected from the state between 2001 and 2008'. He reported that the budgets of all 13 states in Malaysia combined were equivalent to only 6% of the federal budget in 2013 and the was figure reduced by 0.2% in 2018.⁸²

⁷⁸ K Ostwald, 'Federalism without Decentralization: Power Consolidation in Malaysia' (2017) J SEA Economies.

⁷⁹ Wilson Tay, 'Basic structure revisited: The case of *Seminyeh Jaya* and the defence of fundamental constitutional principles in Malaysia' (2019) 14 Asian J Comp L 113.

⁸⁰ Phang, *Decentralisation* (n 2).

⁸¹ *Government of the State of Penang v Minister for Home Affairs* [2017] 4 MLJ 770.

⁸² 'Backbencher wants more autonomy for Penang' *Malay Mail* (11 December 2018) <<https://www.malaymail.com/news/malaysia/2018/11/12/backbencher-wants-more-autonomy-for-penang/1692628>>.

Although local government policy is formulated by the NCLG in consultation with federal and state governments, the political system as outlined above means that the federal government gets its way, and local authorities are – astonishingly - not represented at all in a process designed to serve their needs. There is a Malaysian Association of Local Authorities⁸³ which could easily represent them in such policy deliberations.

2.5 The Public Service

The public service (equivalent to the ‘civil service’ in some systems) is organized via the Public Service Commission (‘PSC’) at the federal level. The public service serves both federal and state governments, but not local government, which employs its own staff. This system works to the disadvantage of local government and to IGR in two respects.

First, the PSC provides consistent standards and rules for recruitment, pay, promotion, and transfer between governments. Local government staff do not have these advantages, and tend to get stuck in terms of advancement due to lack of opportunity. This decreases morale and commitment.

Secondly, local government does not, as a result, benefit from integration into the public service, which would render smooth and highly professional the system of IGR across federal, state and local governments.

The argument is often heard that deficiencies in staffing, and especially in technical expertise, make decentralisation at the local government level a risky enterprise. This of course is an outcome of the system of public employment, not a necessary consequence of having local government or subsidiarity per se. Subject to democratic controls, adequately funded, and linked to the PSC, there is no reason to suppose that local authorities would not perform very well, as they did during the first ten years after independence.

⁸³ See the Association’s website at <www.mala.com.my>.

2.6 Powers of State Governments in Relation to Local Government

Under the LGA, section 103, state governments are empowered to give general directions to local governments.⁸⁴ In addition, local council budgets must be submitted to the state government for approval not later than 20 November in each year;⁸⁵ and the raising of loans by local governments is subject to the consent of the state government.⁸⁶ Furthermore, all local government by-laws, rules, and regulations are subject to state government approval;⁸⁷ as are annual assessments, drainage rates and valuation lists.⁸⁸

State governments also exert some control over local governments' exercise of planning powers. States are governed planning-wise by a system of structure plans under the TCPA, while local plans are drawn up by local governments.⁸⁹ The latter are still nonetheless subject to approval by the state government. Oddly enough, though, the TCPA allows local governments to make rules regarding regulation of land development, classes of use, and regulation of height, design, appearance of buildings and density of developments; and these rules *prevail* over state government rules if they conflict. This is one of few areas where local governments can go against the wishes of the state government.

It is therefore not too much of an exaggeration to say that IGR in Malaysia present a highly centralised system of government in which local governments exercise comparatively little discretion as to policy and even sometimes with regard to particular decisions, as seen in the SPICE case study above. In this system, local governments are hard pressed to find any real autonomy from state governments, let alone the federal government.

⁸⁴ s 103.

⁸⁵ LGA, s 55.

⁸⁶ *ibid*, s 40.

⁸⁷ s 103.

⁸⁸ ss 127, 128 and 143.

⁸⁹ For more information on this, see below.

Part III: Public Participation in Local Government Decision-making

3.1 Elections or Appointments?

Obviously, local elections are ordinarily the main form of public participation in local government in that the voters may elect councillors who will represent their views. The abolition of local elections in Malaysia has sparked persistent debate ever since 1965 with regard to their possible reintroduction.⁹⁰ The argument for reintroduction is the argument for local *self*-government: that is, that democracy is fundamental, and that local government, reflecting the principle that local electors know their situation better than metropolitan decision-makers, will answer the needs of local people best if it is accountable to them and represents their interests as paramount. The argument against reintroduction is that Malaysia does not need three levels of elected government, that the cost of holding elections is better expended elsewhere, and that local politics leads to destabilizing ethnic divisions. The cost of holding elections across all local authorities has been estimated at RM308 million (Euro 62m).⁹¹ While this is not a very large sum, many feel that with the shortfall in public finances due to the 1MDB scandal and the pandemic's impact on the economy, now is not the right time to reintroduce local elections, even if it were, in general terms, warranted.

It is also a point of disagreement whether the appointment system or holding elections leads to greater efficiency. One recent councillor argues that, during the period of democratic local government in the 1950s and 1960s, Ipoh City Council was well known for its efficiency; this was noted as a fact by the Nahappan Report.⁹² As we have seen earlier in the case of the SPICE controversy in Penang and will see in the matter of the 'floating city' controversy in Johor Bahru, the appointment system can certainly ensure that decisions are made speedily, but this does not mean the right decisions are being made or are being made in a cost-effective manner.

⁹⁰ Chacko (n 19).

⁹¹ A Annuar, 'Zuraida: Third vote in Malaysia would cost RM2m per local council, RM308m for all' *Malay Mail* (14 July 2020) <<https://www.malaymail.com/news/malaysia/2020/07/14/zuraida-third-vote-in-malaysiawould-cost-rm2m-per-local-council-rm308m-for/1884291>>. The estimate is based on a figure of RM2m per council, ie the estimate now would, one assumes, be RM312m for 156 councils.

⁹² Lim (n 24) 23.

As for the appointment system, although there are cases of councillors appointed for a three-year term because they are persons of experience or distinction, as envisaged by the LGA, section 10(2), and these councillors do act as a public voice of some kind in the council's deliberations,⁹³ the overwhelming majority are appointed because of party affiliation; they are dismissed by one commentator as 'yes-men and apple polishers'.⁹⁴ Moreover, even these 'independent' councillors, it should be noted, were appointed only after opposition wins in some states in 2008.

The fact is that as a result of the appointment system, most Malaysians have no idea who their local councillors are, and tend to raise local government concerns with their federal Member of Parliament or State Assemblyman, who are more familiar to them, but of course have no direct jurisdiction over local government matters.⁹⁵

3.2 Civil Liberties, Freedom of Information, and Local Government

For all this, elections, if reintroduced, would by no means be the only avenue for public participation in local decision-making. Although there are relevant statutory provisions affording opportunities for public participation in specific statutory contexts,⁹⁶ the most important avenue for the expression of views on local government matters is simply exercise of the fundamental political liberties of freedom of speech, assembly, and association, guaranteed, although also in some respects subject to statutory restrictions, by Article 10 of the Federal Constitution.⁹⁷ Civil-society-organized protests relating to local government decisions, especially concerning matters affecting development and the environment, are quite common, and have sometimes been effective. One notable instance of this is the notorious Penang Hill project that would have blighted an environmentally precious and historic area of Penang; this project was suppressed as a result of extensive, well-informed and well-coordinated protests

⁹³ The author benefitted from an interview with one such former Ipoh councillor, Mr Chan Kok Keong, a local lawyer, in April 2021. Mr Chan had questioned the cost-benefit of privatization arrangements by the city council during his three-year term in office.

⁹⁴ Goh Ban Lee, *Counselling the Councillors* (Kuala Lumpur, FOMCA 2007), cited in Lim (n 25) 22.

⁹⁵ Lim, *ibid*.

⁹⁶ See below at p.37 ff of this paper.

⁹⁷ AJ Harding, 'Practical human rights, NGOs and the environment in Malaysia' in M Anderson and A Boyle (eds), *Human Rights Approaches to Environmental Protection* (Oxford, Clarendon Press 1998) ch 11.

by a coalition of civil-society organisations.⁹⁸ The recent case of Kiara Green in Kuala Lumpur is also adverted to below, in the context of a matter in which local residents' associations managed to have a planning decision by the *Datuk Bandar* (Mayor) of Kuala Lumpur quashed by the courts. In this case the issue was an extensive development involving 52-story serviced-apartment blocks, car parks, and low-cost housing in a designated green-lung park and recreational area that is also used by migratory birds, and is the only place in Kuala Lumpur where rare hornbills are to be found. A coalition of residents' associations took concerted action to have the decision struck down. The matter is still before the courts at the time of writing, as the Mayor appealed the Court of Appeal's swingeing and highly critical decision to the Federal Court, which heard arguments on 14 June 2021.

This situation and further progress in public participation depends on the breadth of use of civil liberties, and here the role of the judiciary is critical in protecting those liberties and allowing standing, where appropriate, to bring an action against the relevant authorities.

The real problem, however, is a lack of information about projects until they are well advanced. For example, in the Kiara Green matter, residents only discovered after commencing proceedings that the project involved a joint venture that included the decision-maker (the Mayor) on the planning application; that the development had in fact been approved by the Mayor; and that their objections had never been considered. In Harding and Azmi Sharom's case study on Petaling Jaya referred to in the case study on local structure plans, set out below, it is recorded that 'the residents of Damansara Jaya for example only found out about a massive road-building project which would change the nature of their area when they saw surveyors working by the roadside'.⁹⁹ In another instance, Kampong Kerinchi district in Kuala Lumpur and its thoroughfares were arbitrarily renamed without any public consultation, and, following protests, the local MP was instrumental in getting the authorities to recant and revert to the previous name in a 'renaming ceremony' in 2019.¹⁰⁰

⁹⁸ Ainul Jaria Mydin, 'Access to public participation in the land planning and environmental decision-making process in Malaysia' (2011) 1(3) *Intl J Humanities & Social Science* 148; see also Goh Ban Lee, *Urban Planning in Malaysia History Assumptions and Issues* (Petaling Jaya, Tempo Publishing 1991).

⁹⁹ AJ Harding and Azmi Sharom, 'Access to environmental justice in Malaysia (Kuala Lumpur)' in A Harding (ed), *Access to Environmental Justice: A Comparative Study* (The Hague, Kluwer 2007) ch 5.

¹⁰⁰ "'Bangsar South" officially reverts to Kg Kerinchi in win for identity, tradition' *Malay Mail* (19 January 2019) <<https://www.malaymail.com/news/malaysia/2019/01/19/bangsar-south-officially-reverts-to-kg-kerinchi-in-win-for-identity-traditi/1714191>>.

It may be observed that this kind of ambushing of the public by development proposals is a typical rather than rare occurrence. There is no general freedom of information legislation that would require divulging of local government papers. Meetings of a full council, normally held monthly, are required by the LGA, section 23, to be open to the public and the press ‘unless the local authority by resolution otherwise decides’, and in practice they do so decide. Committee meetings are not subject to this provision unless the committee in question so resolves. Public witnessing of council and committee meetings is therefore unusual rather than the norm. Even where meetings are public, the public is not allowed to speak. Thus, there actually is no regular method for members of the public to ask questions. Without information, citizens’ freedom of expression, even if not restricted, may well come too late to be effective.

The difficulties with information are well illustrated by a series of cases, brought against all three levels of government, that arose in Johor Bahru concerning an ambitious ‘floating city’ project, which was proposed in the early 1990s but virtually abandoned in 2003. A Johor Bahru resident and objector to the project, attempting to flush out information, first of all obtained a declaration that the Ministry of Science, Technology and Environment was obliged to produce to him the environmental impact assessment report on the project.¹⁰¹ However, he failed to establish *locus standi* to compel the state government to produce their agreement with the developers because the state government was not obliged to consult taxpayers before entering into the agreement, and because the plaintiff had suffered no special damage over and above that suffered by other taxpayers and residents.¹⁰² A similar result occurred when he attempted to establish the illegality of the planning permission itself, granted by the city council. It was held that no legal right or interest of his had been affected; he had not suffered any special damage; and was not an adjoining owner.¹⁰³ Commenting that ‘[t]o give locus standi to a ratepayer like the plaintiff would open the floodgate [sic] and this would in turn stifle development in the country’ the Judge described the plaintiff as a ‘trouble-shooter [sc ‘trouble-maker’], a maverick of a sort out to stir

¹⁰¹ *Abdul Razak Ahmad v Ketua Pengarah, Kementerian Sains, Teknologi dan Alam Sekitar*, [1994] 2 CLJ 363 (High Court of Malaya). See, however, *Kajing Tubek v Ekran Bhd* [1996] 2 MLJ 388 and on appeal to Court of Appeal see *Ketua Pengarah Jabatan Alam Sekitar v Kajing Tubek* [1997] 3 MLJ 23, where the opposite result was reached in the well-known ‘Bakun Dam’ controversy.

¹⁰² *Abdul Razak Ahmad v Kerajaan Negeri Johor* [1994] 2 MLJ 297.

¹⁰³ *Abdul Razak Ahmad v Majlis Bandaraya Johor Baru* [1995] 2 MLJ 287.

trouble.’¹⁰⁴ That the project was ultimately found defective and abandoned only highlights the need for accountability for planning decisions, as do the Penang Hill and Kiara Green episodes.¹⁰⁵

Clearly, the resolution of such issues depends greatly on the initiative of the civil society. CSOs’ experiences with local authorities have been varied. When dealing with relatively ‘safe’ issues, like the design of a recreational area, the response has been positive. However, in more contentious matters there have been some serious complaints. Complaints about procedure include very short notice for meetings and bias in favour of the developers. This is obvious in the way complainants are treated compared to the way developers are treated by planning officials.¹⁰⁶

3.3 Planning Process and Public Participation

Planning laws provide some specific avenues for public participation in local-authority plans and development-control decisions. As is typical of most planning systems, Malaysian planning law provides for two levels of plans: structure plans formulated by the state government; and local plans, consistent with the structure plan, formulated by local authorities.¹⁰⁷ The process for these plans is broadly similar, and is discussed in the discussion of local government practice on public participation below. As is recorded there, there are some problems with this process from the aspect of public participation.

Apart from the drafting of plans, another method of securing public participation through planning law lies in the process of applications for planning permission. No development can take place without planning permission,¹⁰⁸ and in considering applications the local planning authority (LPA) must take into account structure and local plans as well as any objections raised by owners of adjoining land.¹⁰⁹ There is scope therefore for the LPA to reject a planning application on the basis of public concerns. The conditions that may be placed on the planning

¹⁰⁴ *ibid* at 1186.

¹⁰⁵ ‘JB waterfront city project to be scaled down’ *The Star* (9 January 2003) <<https://www.thestar.com.my/news/nation/2003/01/09/jb-waterfront-city-project--to-be--scaled-down>>.

¹⁰⁶ This passage is based on Harding and Sharom (n 97).

¹⁰⁷ Under the TCPA, s 6B, there is also a provision for a ‘national physical plan’, designed to embody ‘strategic policies for the purpose of determining the general directions and trends of the physical development of the nation’. This plan must be revisited every five years.

¹⁰⁸ TCPA, s 20.

¹⁰⁹ s 21(6). See immediately above and below for a discussion of standing to object.

permission can also be used to satisfy objections; furthermore, the LPA may regulate the manner with which the development is to be carried out, limiting any adverse impacts of the construction works, for example.¹¹⁰ The LPA also has powers to revoke or modify permission that has already been granted, if it is felt that it is in the public interest to do so and if the state planning committee approves.¹¹¹

However, the most important way of participating directly in official decisions is via the right of local residents and adjoining neighbours to voice their complaints over projects that affect them. Strictly speaking, rights of objection are legally vested only in adjoining owners, but, as we shall see, local communities do nonetheless find ways of voicing their concerns.

The TCPA, section 21, although providing for a right of objection by adjoining owners, does so only where ‘the proposed development is located in an area in respect of which no local plan exists for the time being’. The LPA is required to serve notice in writing on the owners of the neighbouring lands, informing them of their right to object to the application and to state their grounds of objection within 21 days of the date of service of the notice. Such owners complying with section 21 can then also demand a hearing of their objections. Given that much of Peninsular Malaysia is in fact covered by a local plan, the section has no effect in such areas, severely limiting even this already narrow right of public participation. In the Federal Territory of Kuala Lumpur no notice whatsoever of a planning application to adjoining owners is required.¹¹² This was, however, not recognised by the courts in the case of *Datin Azizah bte Abdul Ghani*,¹¹³ and the duty to inform adjoining owners remained in spite of the statutory silence on the matter. Under the Federal Territory Planning Act 1982, section 22, the Mayor must take into account ‘material considerations’ in making his decision on a planning application. The case holds that such considerations include objections to the proposed development. (Under the TCPA, section 22, the LPA must consider any objections as part of its duty to ‘take into consideration such matters as are in its opinion expedient or necessary for proper planning’.) Thus public participation is in effect either provided for by, or implied into, the statute. This has become even more significant following the *Kiara Green* case in the Court of Appeal in 2021.¹¹⁴

¹¹⁰ s 22(5)(b)(ii). See also *Tropiland Sdn Bhd v Majlis Perbandaran Seberang Perai* [1996] 4 MLJ 16.

¹¹¹ s 25(1)(2).

¹¹² Federal Territory (Planning) Act 1982, ss 21 and 22.

¹¹³ *Datin Azizah bte Abdul Ghani v Dewan Bandaraya Kuala Lumpur* [1992] 2 MLJ 393.

¹¹⁴ *Perbadangan Pengurusan Trellises v Datuk Bandar Kuala Lumpur* [2021] 2 CLJ 808. A further appeal was heard in the Federal court on 14 June 2021.

In that case the court struck down the Mayor's decision on the ground that the decision involved a conflict of interest, the Mayor himself being a party to the relevant joint-venture contract, and that there was no evidence that the residents' concerns had in fact been taken into account. For good measure, the court added that the Mayor was also in breach of his implied duty to give reasons, at the relevant time, for his decision.

The legal position set out in the *Kiara Green* case changes at a stroke the entire situation of public participation in several respects. It is to be hoped that the Federal Court will affirm this very important decision.

Finally, it should be noted that this expansion of public participation is much needed when the definition of a 'neighbour' under the TCPA 1976, section 21, is very limited, meaning ultimately that very few individuals or groups have standing to attend the hearing. The definition of neighbour under the TCPA includes only:

- (a) registered owners of lands adjoining the land to which the application relates;
- (b) the registered owners of land which would be adjoining but for being separated by any road, lane, drain, or reserve land not wider than twenty meters; and
- (c) registered owners of land inside a cul-de-sac, within 200 metres from a proposed development within the same cul-de-sac and sharing the same access road.

These limited rights of objection have made it difficult for people to protest against projects which have environmental repercussions wider than the immediate neighbourhood. *Kiara Green* broadens the scope of participation considerably, while also, correspondingly, defining the scope of exercise of discretionary planning powers and rendering them in effect accountable to the public. If affirmed, this case has potential far beyond planning matters to other local government functions, and to render restrictive standing rules and rules as to notice of decisions essentially irrelevant.

Finally, we may note that the extent of public participation is ultimately dependent on the civil society, which is an urban phenomenon. It is no accident that the major instances discussed have been in the Kuala Lumpur conurbation, Johor Bahru and Penang, which are Malaysia's three largest conurbations. Residents of rural areas do not benefit from advantages that are, in reality, enjoyed by middle-class urbanites. Even at the point where the PH government in 2018 appeared

to be intending to reintroduce local government elections, they planned to do so only for some urban areas, where there is most resentment at the lack of real democracy. Rural dwellers are generally left out of consideration when it comes to virtually every aspect of local government. They do not have developed political participation compared to urbanites, and have no choice but to fall back on the old but persistent system of patronage and clientelism to preserve their interests.

3.4 Structure Plans: A Case Study on Public Participation

There are three inter-connected levels of decision-making concerning development coming within the TCPA. State governments draw up structure plans; local authorities draw up local plans consistent therewith;¹¹⁵ and local authorities decide on particular planning applications, which should also be consistent with the structure and local plans.¹¹⁶ The issue considered here is, to what extent is public participation possible in the second of these stages, given the importance of development decisions to the public? The process for drawing up local plans is identical to that for drawing up structure plans, as far as public participation is concerned, and is prescribed in the TCPA and the Town and Country Planning (Structure and Local Plans) Rules 1985.¹¹⁷ The structure plan forms the policy basis for development in the local authorities' areas. The local authorities are also empowered to (and usually in practice do) prepare a more detailed local plan for their areas, or parts thereof.

This case study of local government practice on local plans¹¹⁸ relates to the drafting of the structure plan for the large, mainly middle-class Kuala Lumpur suburb of Petaling Jaya. Field-work on this case study was undertaken in the mid-1990s, but, revisiting the subject in 2007, the authors concluded that their findings were still valid.¹¹⁹

The process is governed by the TCPA, section 9, which requires the state planning director, when preparing the draft structure plan, to take such steps as will in his opinion: secure that publicity is given in the state to the report of the survey which he is required to conduct (under the TCPA

¹¹⁵ TCPA 1976, s 10.

¹¹⁶ *ibid*, s 2291.

¹¹⁷ Made under the TCPA 1976, ss 17 and 58; and see s 9.

¹¹⁸ Harding and Sharom (n 97).

¹¹⁹ Mydin's study (n 96), published in 2011, also confirms the continued validity of the findings.

1976, section 7), and to the matters that he proposes to include in the plan; and that persons who may be expected to desire an opportunity of making representations to him are made aware that they are entitled to, and are given, an opportunity of doing so. The planning director is also required to consider every representation made within the prescribed period of one month. Further, as soon as practicable after the draft structure plan has been submitted to the planning committee, he is required to publish, in three issues of at least two local newspapers, one of which is in the national language (Malay), a notice stating that copies of the plan are available for inspection at his office and at such other places as he may determine and the time within which objections to the plan may be made to the Committee.

As illustrated by the experience of the Petaling Jaya (PJ) Residents' Associations during the process for drafting the PJ structure plan, the public-participation process leaves much to be desired. There is a lack of efficacious publicity. As we have seen, advertisements are placed in newspapers, but these are small and easily missed. There is a shortage of time given to the public to prepare their objections and queries. In the PJ example, there were only 30 days to prepare. Furthermore, there was very little useful information about the plan that was provided for public scrutiny before a public meeting with the State Government and the MPPJ. Thus it was difficult to participate constructively and in an informed manner.

On the surface there does seem to be some effort by local authorities to ensure fair play. For example, the public is allowed to scrutinise any new development plans and there are public exhibitions whenever changes are to be made. However, these complex plans can only be viewed and not copied, making careful scrutiny extremely difficult. And there have been reports that the public exhibitions are ineffective because there is little cooperation by the officials there, who tend to be reticent in answering questions.

Although the TCPA and the Rules made thereunder require public consultation, they are silent as to the extent to which the views of the public should be considered. It would appear that, although there is a right to object to a plan, there is no guarantee that input from the public will be absorbed into the final plan. This is the constant source of frustration in public participation exercises, which can appear to be a box-checking process rather than an exercise in democracy. At least, however, based on the *Kiara Green* case, discussed above, there must henceforth be evidence of genuine consideration of the view expressed by the public. Of course, the process cannot be bound by public inputs, which might in any case contradict each other, but the only

protection against unreasonable rejection of public views, apart from litigation, is that the state planning director is obliged to state his consideration of the representations and the state planning committee is empowered under the TCPA to reject the plan and require further action to be taken. Give the knock-on effect of structure plans on local plans and planning decisions, any mistakes made at this stage will be binding on the other two processes, and cannot be corrected.

The suggestion here is that there are two keys to successful public participation. The first is freedom of information (this is not so much a problem in the case of plans, but as we have seen it is a problem elsewhere). The solution would be to pass freedom of information legislation applying to all public authorities. The second key is the giving of articulated reasons for decisions, which is also required by the *Kiara Green* decision. This principle is within the power of the judiciary to enforce as a general principle of administrative law.

General Conclusions

This baseline study has indicated some systemic issues with West Malaysian local government. While the general condition of the system as it has evolved is by no means dire, it is nonetheless capable of the kind of dramatic improvement that would result in a system that corresponds more generously with Malaysia's status as a middle-income country than is presently the case.

Principal points of concern are the lack of local democracy, which it is suggested cannot be substituted with the occasional judicial intervention that assists citizens and citizen groups to make a case against a particular decision, a factor which has some impact but depends too much on the incidence of concerted action and judicial sympathy. What is needed is a return to elected local authorities, for which there is considerable and well-argued advocacy, although there is little evidence that this is a demand in rural areas. It is suggested that the dangers of local corruption and inter-ethnic hostility are no greater in this area than in any other area of Malaysian life. Indeed, making local councillors accountable to the electorate is likely to reduce rather than afford an occasion for corruption.

There seems little wrong with the allocation of local government powers as such, but rather the issue is the autonomy they are able to exercise when carrying them out. If and when state

governments are empowered to undertake more tasks than is presently the case, local government can be an extremely helpful partner.

Of course, it will be objected that Malaysian citizens have little interest in local government, that policies are best formulated at the national or at least at the state level, and that local governments have too few resources. These arguments are specious. Citizens show great interest when local government performs badly, and its performance is capable of improvement. Policies are best implemented at the local level with the benefit of local knowledge and a local sense of priorities. Such a system can only work if elections are restored. It seems clear that the time has come for such reform to take place. But it should be accompanied by a more holistic look at local government finance and a reinvigoration of state powers under a Federal Constitution that often seems federal only in name. There is much wisdom in the Nahappan Report that would, if implemented now, be of great benefit. It is time to respond to citizens' demand for a better system of local government and more local democracy, which is its unavoidable accompaniment.