



Planning Rights: A Review and Discussion

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Abstract

Non-dialectical treatment of different planning rights particularly and society in general is the major problem of planning rights explicated by Ernest Alexander. Planning rights discourse of Alexander treats planning system made up of producers (the state and professional planners). Private initiators are excluded from specific mention because their obligations are mediated by the state and property rights are generally honored. All others who are impacted by plan policies and programs are regarded as consumers. From a Marxian perspective this kind of analysis, although valuable, leaves out crucial, perhaps the most important actors, such as private enterprises and developers, from the discussion planning rights.

1. INTRODUCTION

Campbell and Marshall view that “choices planners make are fundamentally about questions of right and wrong and good and bad” (Campbell and Marshall, 1998: 117). Planning rights discourse addresses these questions of rights and wrongs. But before I explicate planning rights and their relevance to just planning practice and theory, it is imperative that the term ‘right’ is defined. According to the Concise Oxford Dictionary ‘right’ is “a thing one may legally or morally claim; the state of being entitled to a privilege or immunity or authority to act.” Right also means freedom to pursue certain things and freedom from not being interfered with or subjected to actions of others. Rights therefore “can be seen as being both ‘positive’, requiring others to take action to benefit the rights holder, or ‘negative’, protecting the rights holder from arbitrary interference” (Goodin, 1985 quoted in Ellis, 2004: 1551). Rights in this sense signify what is morally good and just and is in accordance with law. Ernest Alexander regards planning rights as institutional rights as these are embedded in “a country’s planning system --- the laws, organizations and roles-related norms that frame its planning process --- is an institution, PRs are a form of planning rights” (Alexander, 2002: 194). Planning rights are claims made by various individuals and institutions over the development and use of land or property.

In this paper I take some preliminary steps towards framing an outline of just planning practice by examining planning rights. The next section focuses on the forms of planning rights and their critical relationship with one another. An inventory of planning rights has been prepared in the Indian context in the third section. Here I also explore the role of planning rights in contributing to

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the establishment of just planning practice. Primarily the paper is based on the writings of Ernest Alexander who has written many articles on planning rights (Alexander, 2002, 2007a, 2007b) and then supplemented by other writers and contextualized in the urban planning practice of India.

2. FORMS OF PLANNING RIGHTS

Planning rights could be used in three different senses. “Its oldest and most widespread usage is in the context of land-use planning and law, where ‘planning rights’ mean development rights, i.e. land owners’ rights to develop their property in certain ways. It is also (mis)used in another sense, when its real meaning is planning powers. This happened in discussions of governmental centralization or devolution, when ‘planning rights’ meant the right of a particular unit of government to plan. Most recently, planning rights (PRs) have come to mean institutional rights in a planning system, in particular those rights held by parties affected by plans and planning decisions” (Alexander, 2007a: 5). Alexander uses planning rights only in the third sense that is the rights held by parties affected by plans and planning decisions. Although Alexander excludes certain perspectives from planning rights’ discussion for the ease of manageability, it makes a huge hole in his analysis because all three forms of planning rights are closely related with one another and do have concrete implications for the realization of institutional rights.

In the Indian context urban planning is largely carried out by means of master plans or some such other instruments like town planning schemes, and building byelaws. While the master plan contains policies and development control regulations and are meant for seeking planning permissions or land use changes, building byelaws exclusively deal with building permissions of all kinds.

Through statutory development plans, land and property owners are permitted to use their properties in accordance with the provisions of master plans. These rights mean legally permissible land and property developments could be carried out by property owners. Along with development plan, sometimes these rights are enforced by courts by interpreting the statutes in case planning authorities fail to secure legally permitted developments and implementation of planning policies. Second, planning rights could also include rights of planning authorities such as the Delhi Development Authority to plan for a specific planning area. This right is routinely exercised by the planning authorities in India. Third, apart from property owners’ right to development and planning agencies’ right to plan, planning rights are also held by parties affected by plans and planning decisions. Planning rights in this sense are held by property owners, planning agencies, and other parties affected by plans and planning decisions. In the U.K. these rights are known as third party rights of appeal (Ellis, 2006), developer being the first party and local planning authority being the second party. According to Geraint Ellis, one of the compelling reasons for having the third party right to appeal brings



“natural justice and equity between those proposing development and those that may be affected by it. To many it appears inherently unjust if applicants are given a right to challenge a decision that appears to unreasonably constrain their rights in land, but deny this to those who believe that their interests may be compromised by a proposed development” (Ellis, 2004: 337).

While the rights held by the third parties are specific to individuals, communities and groups in close proximity to the development under consideration, planning rights of the public at large could be added to Alexander’s classification of planning rights. Like other three types of planning rights mentioned by Alexander, planning rights of the public in general are concrete and context specific. For example, when a statutory development plan is being prepared, citizens have the right to participate in the various stages of plan formulation on an equal footing along with other stakeholders in an environment of ‘ontological security’ (Giddens, 1984). Fifth, many times new developments are carried out on agriculture land in the peripheries of cities and towns. This land is acquired from farmers, and landless laborers who own houses in villages and also have livelihood concerns. This means planning rights are held by not only land and property owners, government agencies and the third parties (in a restricted sense) but also by the public at large and the owners of land and houses whose land is being acquired by the planning agencies for carrying out development projects in the city peripheries.

On the positive side, planning rights include legitimate concerns of property owners, third parties, and governments. Even when broadened to include the public at large for specific purposes such as public participation, and those of the farmers and landless laborers when their land and houses are compulsorily acquired, scope of the planning rights remains highly constrained as it does not recognize rights of those individuals and families who have legitimate needs but do not hold legal titles to land or property. Slum and squatters and venders form a large part of such a group, whose planning rights do not find any mention in the formal discourse of planning rights initiated by Ernest Alexander. Non-recognition of the planning rights of slums and squatter dwellers and venders is part of the discourse where the only rights that have legitimacy are the legitimate property rights. Right to life with decent access to housing and basic services is not recognized with the same force as property rights.

3. INVENTORY OF PLANNING RIGHTS IN INDIA

Ernest Alexander develops a comprehensive list of planning rights in the context of Israeli planning context, which could be also adapted for the Indian context (Alexander, 2007a: 8-9). Each normative principle yields planning rights: positive planning rights and potential planning rights. Based on the normative principles of fairness/due process/sound administration, public participation, equality, human dignity, property, reasonableness, and social and distributional justice,



Alexander outlines a number of positive planning rights and potential planning rights. Distinction between the positive and potential planning rights is explained:

Positive PRs are recognized and their claims are proven in the relevant planning system through laws, regulations, and court decisions that have set the norms of institutional practice. Conformance with positive PRs is either a matter of routine practice, or effective enforcement. Potential PRs are real too. A potential PR is more concrete than a general abstract PR: it does claim some authority relevant to its specific context. But in that particular institutional setting it has not been finally recognized or proven through legal confirmation, enforcement or practical effectuation. Nevertheless, political, legal, or institutional changes in the relevant context are always possible, which can transform potential PRs into positive ones (Alexander, 2007b: 114).

Positive planning rights include the right to due-process, the right to be informed, the right to be heard, the right to know, the right to alternative planning for parties with standing, the right to substantive/procedural non-discrimination, the right to land expropriation/compensation according to law, and the right to a plan/planning decision that is not patently unreasonable. Social positive planning rights include the right to housing, the right to standard/accessible health care facilities/services, the right to standard/accessible education facilities/services, the right to handicapped access, the right to standard elderly nursing home facilities/services, and the right to a safe workplace. The positive distributional rights entail the right to resource (e.g. land) allocation that does not flagrantly violate distributional equity. The potential planning rights (also see Parker, 2001: 6 for UK case) include the right to alternative planning for parties without standing, the right to minimal living conditions consistent with human dignity, the right to free enjoyment of property, the right to essential housing, health, education, employment, welfare, personal safety, etc. An inventory of planning rights in Israel is shown in Table 1.

In the India, the planning system is fairly well established and positive and potential planning rights could be identified by using and adapting the framework outlined by Ernest Alexander (2007a). India has a federal government system whereby state governments along with central government have the right to pass legislation on land and property. In case central government has passed legislation, state governments are required to conform to such legislation admitting state specific changes in statutes. In Table 2, I intend to show that there are specific land and planning laws and other laws, which specifically create positive and potential planning rights for the people living in Indian cities. However, many of these statutes are not fully enforced due to various reasons.

Constitution of India, land laws and urban planning laws, as mentioned in Table 1, paint a very reassuring picture to analysts unaware of the concrete social,



Table 1: Planning Rights in Israel: Inventory and Status

Normative Principle	Planning Right (Positive Right, potential PR)	Authority Source
Fairness/ due process/ sound administration	The right to due-process in planning-related decision making	Planning and Building Law (P&BL) (1969 and amendments) administrative law and legal practice
Public Participation	The right to be informed The right to participate in the planning process: The right to be heard The right to know/access to information The right to alternative planning	P&BL (provisions for notice) P&BL - for identified public organizations P&BL - for parties with standing (provisions for objections and appeals) Freedom of Information Law P&BL P&BL (parties with standing)
Equality	The right to alternative planning The right to substantive ^b / procedural non-discrimination	(parties without standing) ^a Basic Law Human Dignity & Freedom (BLHD&F), special legislation/regulation administrative law, legal practice
Human Dignity	The right to minimal living conditions consistent with human dignity <ul style="list-style-type: none"> • The right to minimal access • The right to minimal infrastructure • The right to essential services 	BLHD&F Recognized norms: regulations, institutional standards etc. Recognized norms: regulations, institutional standards etc.
Property	(conventional) property rights The right to land expropriation/compensation according to law Unconventional (e.g. traditional/ aboriginal) property rights The right to free enjoyment of property(freedom from confiscation, relocation, environmental hazards, etc.)	Land law, title, register of deeds, P&BL Historic records, oral traditions etc. BLHD&F Human rights in ratified treaties, International conventions etc.
Reasonableness	The right to a reasonable plan/ planning decision The right to a plan/planning decision that is not patently unreasonable	Administrative law, Case law
Social/distributive justice	Social Rights (in planning): The right to essential housing, health, education, employment, welfare, personal safety, etc. Sectoral/functional social rights e.g. <ul style="list-style-type: none"> • The right to housing • The right to standard/accessible health care facilities/services • The right to standard/accessible education facilities/services • The right to handicapped access • The right to standard elderly nursing home facilities/services • The right to a safe workplace The right to distributive justice: The right to resource (e.g. land)allocation that does not flagrantly violate distributive equity	UN/international treaties, conventions, BLHD&F (court decisions, interpretations) (for designated beneficiaries) Public Housing Law National Health Insurance Law, Ministry of Health regulations/standards National Public Education Law, Ministry of Education regulations Handicapped Access Law National Welfare Law; Labour / Welfare Ministry regulations/ standards Work-safety Law, Labour/Welfare Ministry regulations/ standards BLHD&F (court decisions/ interpretations)

Source: Alexander (2007a: 8-9).

^a Under prevailing court interpretations of the P&BL; however, these have recently expanded this PR and future decisions could expand it further. Expansion is also possible through amendment of the P&BL.

^b An example of a specific PR derived from this more general one is handicapped persons' access rights with its authority in special legislation and regulations.



Table 2: Planning Rights in Delhi and India

Planning Right (Positive Right, potential PR)	Authority Source
The right to due-process in planning-related decision making	Delhi Development Act, 1957 along with amendments; Administrative rules, Court verdicts and interpretations
The right to be informed The right to participate in the planning process: The right to be heard in building permission applications The right to know/access to information The right to alternative planning	Delhi Development Act (provisions for notice and participation in master plan and zonal plans); Administrative rules Development control rules and regulations - for parties with standing (provisions for objections and appeals) Right to Information Act, 2005 Non-existent at present
The right to alternative planning The right to alternative planning The right to substantive/ procedural non-discrimination	Non-existent at present Non-existent at present Constitution of India, special legislation/regulations, administrative law, legal practice, etc.
The right to minimal living conditions consistent with human dignity <ul style="list-style-type: none"> • The right to minimal access • The right to minimal infrastructure • The right to essential services 	Constitution of India (Right to Life article 21) Recognized development norms: regulations, institutional standards, etc.
Conventional property rights: The right to land expropriation/compensation according to law Unconventional (e.g. traditional/aboriginal) property rights: The right to free enjoyment of property (freedom from confiscation, relocation, environmental hazards, etc.)	Land Acquisition Act, 1894 with amendments of 1984 and beyond; Special Economic Zones, Act 2005 and Rules, 2006; Land Acquisition (Amendment) Act, 2007; Land Titling Bill, 2010; Model Real Estate (Regulation of Development) Act 2009 Rehabilitation and Resettlement Bill, 2007 and various state acts The Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006; The Environment (Protection) Act, 1986, amended 1991; The Environment (Protection) Rules, 1986; Environment (Siting for Industrial Projects) Rules, 1999; Human rights in ratified treaties, International conventions etc.
The right to a reasonable plan/ planning decision The right to a plan/planning decision that is not patently unreasonable	Urban planning laws such as Delhi Development Act, Administrative law, Case law, Court verdicts and interpretations



<p>Social Rights (in planning): The right to essential housing, health, education, employment, welfare, personal safety, etc. Sectoral/functional social rights e.g.</p> <ul style="list-style-type: none"> • The right to housing • The right to standard/accessible health care facilities/services • The right to standard/accessible education facilities/services • The right to handicapped access • The right to standard elderly nursing home facilities/services • The right to a safe workplace <p>The right to distributional justice: The right to resource (e.g. land) allocation that does not flagrantly violate distributional equity</p>	<p>UN/international treaties, conventions, The International Covenant on Economic, Social and Cultural Rights (court decisions, interpretations); Constitution of India (Right to Life article 21) Constitution of India (Right to Life article 21); Master Plans The National Health Bill, 2009; Constitution of India (Articles 14, 15 and 21 (rights to equality, nondiscrimination and life); Mental Health Act, 1987 Right to Education Act, 2009 Persons With Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995; The Metro Railway (Amendment) Act, 2009; State government rules and regulations and acts Ministry of Commerce and Industry statutes and rules on safe workplace Street Vendors (Protection of Livelihood and Regulation of Vending) Bill, 2009; Land Acquisition Act, 1894 with amendments of 1984 and beyond; Special Economic Zones, Act 2005 and Rules, 2006; Land Acquisition (Amendment) Act, 2007; Land Titling Bill, 2010; Model Real Estate (Regulation of Development) Act 2009 Rehabilitation and Resettlement Bill, 2007 and various state acts</p>
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economic and political situation on the ground. Highly entrenched housing shortage and lack of access to critical basic services such as water, sanitation and education along with lack of decent employment opportunities for the urban poor alone shatters the myth of statutory planning rights. To focus on rights may be right and moral but something appears to be missing; something more is required in order to obtain these planning rights (also see Table 2).

4. WHAT TO DO WITH PLANNING RIGHTS?

Enhanced and integrated understanding of planning processes and institutions, overcoming the opposition between planning rights and property rights, and achieving balanced view of planning ethics and practices including plan and project evaluation, the public interest, meta ethics of planning, and enacted ethics of planning practice (Alexander, 2007b) are some of the main benefits that could be obtained by 'planning rights' orientation in planning.

According to Ernest Alexander, planning rights orientation helps us in enhancing our understanding of planning processes and their contexts. Three stages in the planning process are identified: micro level ('interaction between individual actors'), macro level ('socio-cultural and political-economic processes and



institutions’) and judicial discourse (‘quasi-judicial administrative decisions and adjudication in the courts’. Alexander asserts that planning rights orientation “can shed new light on planning systems and processes, enabling a more comprehensive appreciation that links the micro and macro levels of social analysis” (Alexander, 2007b: 116). Planning rights orientation also allows us to explore the interdependence of structure and agency. “Under structure, PRs are defined as part of planning systems and their institutional contexts, enabling some planning practices and constraining others. Agency includes the discourses and practices creating and transforming PRs, and the interactions in the planning process involved in their application” (Alexander, 2007b: 116). Finally, planning rights perspective facilitates integration of diverse disciplines concerned with planning and thereby a multiplicity of actors and arenas.

Secondly, planning rights and property rights are generally discussed in opposition to each other in the planning literature including the libertarians. Since planning rights perspective treats property rights as one of the planning rights, it is able to transcend this erroneous opposition between planning rights and property rights. Other planning rights and property rights could be in conflict with one another, which could be resolved in specific social, economic and political context and time in specific ways by planning agencies or courts.

Thirdly, planning rights perspective has implications for planning ethics and practice. Under the planning rights perspective, plans and projects could be evaluated by a combination of utilitarian considerations (costs and benefits analysis) as well as deontic considerations (proposal’s appropriateness in the light of espoused values or stated goals and objectives) or “whether an action is in itself right or wrong, and not with its consequences. This results in focus being placed in individual rights, fairness in approach and justice” (Campbell and Marshal, 1999: 467). Blending of utilitarian and deontic considerations through planning rights orientation broadens the reach of planning practice in delivering justice to citizens. Another aspect is that planning rights orientation helps “in enabling a more balanced image of the PI [public interest] that can reinvigorate it as a foundational concept for planning theory, ethics, and practice” (Alexander, 2007b: 119). Here public interest is not a singular concept but have multiple meanings combining “diverse conceptual approaches (from utilitarianism through liberal individualism and Madisonian democracy to contemporary communicative practice) with a variety of actual applications, ranging from utilitarian plan evaluation through dialogic assessment in political-administrative arenas to deontic testing in judicial review” (Alexander, 2007b: 119). Planning rights perspective could correct the heavy reliance on consequentialist-utilitarian ethics and help move planning towards a balanced deontic consequentialist ethics. However, this should require less reliance on Economics and more on Law. We should be able to seek clarifications on issues such as relationships between rights and planning rights. Further, planning rights perspective can significantly



improve the ethics of planning practice by shifting emphasis from utilitarian considerations. “This can take many forms, enhancing public participation, increasing transparency of the planning process, and making better plans and planning decisions” (Alexander, 2007b: 120). “Finally, planners can cooperate with legal and political activists to turn potential PRs into positive ones, to realize normative values (especially for underprivileged and deprived communities) of democratic participation, social justice, and human dignity” (Alexander, 2007b: 121).

No doubt, planning rights pave the way for justice based planning by specifically identifying their normative bases, forms, and sources of authority. In spite of the fact that positive and potential planning rights are real and are embedded in planning and other institutions, they do not take us far enough so that these rights could be realized in concrete planning practices. For example, how an urban poor family in a city in a developing country takes up the issue of securing access to housing, which is mandated through various policy instruments, plans and even the constitution. Take for example, the case of housing in India. Right to shelter is recognized in India under the Right to Life through article 21 of the Constitution of India. Statutory master plans (as in the case of Delhi Master Plan) repeatedly acknowledge the right of the homeless who migrate or have migrated to the city. Yet staggering number of urban poor remain homeless as pointed out by government’s own newly framed National Urban Housing and Habitat Policy, 2007. How to move from mere identification of real planning rights to their concrete realization in planning practice is a daunting task. I hope to resolve this issue at some point in time through my writings.

5. CONCLUSIONS

Non-dialectical treatment of different planning rights particularly and society in general is the major problem of planning rights explicated by Alexander. Planning rights discourse of Ernest Alexander treats planning system made up of producers (the state and professional planners). Private initiators are excluded from specific mention because their obligations are mediated by the state and property rights are generally honored. All others who are impacted by plan policies and programs are regarded as consumers. From a Marxian perspective this kind of analysis, although valuable, leaves out crucial, perhaps the most important actors (private enterprises and developers), from the rights discussion (Alexander, 2002: 203). Influence of the private sector or capital may produce acts and policies which could create restricted set of positive rights or under neoliberal privatization regime completely eliminate certain rights of people (urban poor) as it has happened through the Special Economic Zones, Act 2005 and create enhanced property rights of the capitalist industrialists who could then acquire land without having to face the legitimate due process of law. Ernest Alexander’s division of the planning system into producers and consumers



obscures our understanding of the structure of capitalist urbanization in which the capital is the most powerful agent in comparison to the state and the labor. This kind of classification overlooks capital and with that all what the capital does to organize and reorganize land and property under the capitalist mode of production.

Perhaps that is why in spite of the existence of positive planning rights; urban poor both in developed and developing countries are unable to secure their rights. Lack of funds, non-availability of trained professionals and slow implementation does not appear to be the real reasons for housing shortages and access to quality services or exclusion of the urban poor in general. It seems probable that whatever is not beneficial in the long run to the capital does not get provided.

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