



## Planning Rights in Theory and Practice: The Case of Israel

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# Planning Rights in Theory and Practice: The Case of Israel

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**ABSTRACT** *Planning rights in theory means the abstract concept of planning rights (PRs): here this concept is defined and the status of real PRs—positive or potential—is explained. Real PRs are always related to a particular context; thus any discussion must be context-specific. A pilot study researched the Israeli planning system: this paper presents the resulting inventory and status of PRs in Israel. A selective review details positive and potential PRs under participation, non-discrimination, human dignity and social justice, and evaluates their effectuation in Israel, compared to some other planning systems. The conclusions summarize the pilot study's findings and recommendations, and develop its implications for research methodology, planning theory and practice.*

## Introduction

### *Background*

Some years ago I encountered an Israeli advocacy planning organization, *Bimkom*—Planners for Planning Rights. When I joined *Bimkom* I asked: What are these ‘planning rights’ we are ‘for’?

My first answer addressed this question at the conceptual level (Alexander, 2002a). It concluded that general discussion of planning rights can only be in the abstract: real planning rights only exist in a particular real-world setting. Since real (as distinct from abstract or conceptual) planning rights can only be context-specific, any constructive discussion of actual planning rights must be related to a particular context that is clearly defined in space and time. Israel and its planning system is the subject of the pilot study of real planning rights presented here.<sup>1</sup>

This paper is based on a project that aimed to identify the planning rights (PRs) that exist in the Israeli planning system and determine their status (*Bimkom*, 2005: 17–41; *Bimkom*, 2007).<sup>2</sup>

To complete the background on the project, this Introduction describes its methodology before answering the obvious question our topic implies—what are planning rights?—at the conceptual level under ‘Theory’.<sup>3</sup> Under ‘Practice’ the paper’s central section presents the inventory of PRs in Israel and discusses their status, followed by a selective review of

some PRs associated with public participation, non-discrimination, human dignity and social justice. The review presents the study's empirical findings on the status of these PRs and evaluates their effectuation. The paper closes with a discussion of the implications of the study's findings, for the specific case of Israel and for planning in general.

### *Methodology*

Based on the definition of PRs (below) a set of hypothetical PRs was deduced from a set of universal normative-political principles, which included human dignity, equality, social justice, democratic participation, fairness and due process. A shorter list of PRs was selected from this set for study in depth.

The selection was based on the intrinsic interest and relevance of each hypothetical PR and the feasibility of researching its status and effectuation. Thus, for example, property rights were omitted based on their relatively low interest: they are generally acknowledged as PRs<sup>4</sup> and planning systems routinely take them into consideration. The feasibility criterion dictated deferring systematic research of social-rights-related PRs that are conferred by special legislation.<sup>5</sup>

The main empirical component of the study is detailed legal research and analysis identifying the authoritative sources for each listed PR in legislation, administrative regulations and court decisions confirming its application. This analysis was the basis for the inventory of real PRs in Israel and the determination of the current status of each as a positive or only potential PR.

Two other elements provided some insight into the effectuation of the identified PRs, as preliminaries to the more systematic field research on PR implementation that makes up the second part of the project report. The first of these is an assessment of implementation status based on available secondary sources and anecdotal evidence, which also discusses systemic constraints and problems that limit conformance or enforcement of each PR. The second is a comparison between the experience in Israel (for some of the identified PRs<sup>6</sup>) and three other planning systems: the Netherlands, the UK and the USA.<sup>7</sup> These two elements contribute to the findings on the status and effectuation of PRs in Israel and the report's recommendations.

### *Theory: What are Planning Rights?*

A right is 'a justifiable claim . . . to have . . . something, . . . to act in a certain way' (OED, 1971: 2546): 'freedom to' (and not to be subject to certain actions of others); 'freedom from' (Jones, 1994: 12–25). Rights are individuated claims based on political-normative principles: they may be absolute, or they may be relative, to be weighted in competition with other principles or policies.

There are various kinds of rights: universal rights, natural rights, human rights, civil rights etc. Among these kinds of rights are institutional rights: rights that follow from the norms and rules of a particular relatively autonomous institution. Examples of institutional rights range from a player's right to points under the rules of a game, through patients' rights in a particular health care system, to civil rights in a democratic state (Dworkin, 1978: 90–3, 101–5). Since a polity's planning system is an institution, PRs are a form of institutional right.

'Planning rights' is no neologism, but it is not a very common term either. Its exact meaning may also not be obvious, because (depending on the association and intention) it has been used in three different senses. Its oldest and most widespread usage is in the context of land-use planning and law,<sup>8</sup> 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.<sup>9</sup> 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.<sup>10</sup> This is the sense in which the term planning rights is used here.

By this definition, PRs can be deduced from a set of socially agreed upon political-normative principles such as fairness and equity, due process, reasonableness, human dignity or the public interest. When these are articulated in a source of authority that is acknowledged in the specific relevant institution (e.g. a particular polity's planning system) they become the political-normative principles that imply actual concrete PRs as positive institutional rights (as defined above) in that particular society, polity or community.

What are the sources of authority that validate PRs as positive institutional rights? They are statements and actions that provide evidence of agreement on a PR or the relevant political-normative principles on which it is based. To the extent that PRs are derived from basic human rights, for example, their authority could be based on canonical documents or statements such as the UN Declaration of Human Rights or the European Convention on Human Rights. To the extent that PRs are vested in the 'consumers' of a planning system, a PR's authority is based on the political-normative principles prescribing the producers' (the state's and professional planners') obligations towards them, i.e. towards all the parties affected by approved plans and their impacts.

The sources of authority for PRs include constitutions and quasi-constitutional legislation (such as basic laws), which confer constitutional rights, and relevant laws, statutes, codes and regulations that prescribe permitted and prohibited behaviour and outcomes in the planning process. For example, the acknowledged political-normative principles of fairness and due process are incorporated in generally recognized administrative law and practice, which are the sources of authority for widely applied procedural PRs such as the right to object to or appeal against harmful planning decisions. Legislation, policy statements and planning documents defining a plan's or planning decision's legitimate purpose are other sources of authority for PRs, which are also validated by case law and precedent-setting court decisions that confirm their concrete application.

*Conceptual PRs* can exist in the abstract for the purpose of discussion (Alexander, 2002a). In this way, much of the discourse on public participation in planning has invoked the (democratic) PR of affected parties to participate in making plans and planning decisions, and discussion of environmental justice is premised on the abstract PR of equality for minority and disadvantaged communities and non-discrimination. But real PRs can only exist in a specific context – an existing planning system that is embedded in a particular society, polity or community. Therefore, in identifying real specific PRs, as distinct from general abstract ones, more definition is necessary. Real PRs are based on some identifiable authority; depending on the nature and acceptance of their authority base, they may be positive or potential PRs.

*Positive PRs* are mandatory: their authority is recognized and their claims are proven in the relevant planning system. This applies to PRs that are supported by laws, regulations and court decisions, which have set the norms of institutional practice. Conformance with positive PRs is either a matter of routine practice or effective enforcement. For example, non-discrimination is a positive PR in Israel and in the US, derived from universal political-normative principles of equality and justice, but its application is different in each country and it is supported by different constitutional, legal and institutional authorities.<sup>11</sup>

Shortfalls in effectuating a positive PR (and there are) are not due to failure to acknowledge the PR or recognize its authority, but are usually the results of systemic flaws: ineffective implementation or enforcement, inadequate sanctions or incentives or underdeveloped ‘consumer’ consciousness. One Israeli example of such flaws is the weak implementation of the right to be informed, the result of ineffective statutory prescription (e.g. the format of announcements in the daily press – a problem in other countries too) and weak incentives for compliance, e.g. developers’ duty to post on-site notices.

Other examples involve the right to know, which is a positive PR based on the freedom of information law and some provisions of the planning and building law. Effectuation of this PR is inhibited by lack of transparency of the planning process, which includes plans that are illegible for non-professionals, limited awareness of the public’s rights under the relatively new freedom of information law and complexity of the process for obtaining information under the law, and the lack of effective sanctions (short of court-ordered enforcement) on public officials for obstruction or noncompliance.<sup>12</sup>

*Potential PRs* are real too: some source of authority can be identified to support the claim to a potential PR in the relevant institutional context. This may be in the form of international covenants that have not been applied or tested in the relevant country – e.g. the ECHR in the UK before passing of the 1998 Human Rights Act (Parker, 2001) – policy statements that precede mandating legislation, or more general legislation (constitutional laws, statutes and regulations), the applicability of which as PRs is still untested.

But, unlike positive PRs, the legitimacy of the authority is not uncontested or affirmed. So, for example, the implications of Israel’s Basic Law Human Dignity and Freedom for positive PRs are still being explored, and general social rights asserted in international covenants that Israel has ratified are not recognized, except some particular ones that have become positive PRs through special-purpose legislation.<sup>13</sup> A potential PR, then, is more concrete than a general abstract PR, since (like a positive PR) it does have some relevant authority, but it is not recognized or proven through legal confirmation, actual enforcement or practical effectuation. Nevertheless, political, legal or institutional changes in the relevant context are possible at any time, which can transform potential PRs into positive ones.<sup>14</sup>

## **Planning Rights in Israel**

### *Background: The Israeli Planning System*

Israel has a well-developed planning system that most resembles the British one, as indeed do many of Israel’s political and legal institutions. The basic enabling legislation for statutory planning and development control, the Planning and Building Law (1969), is modelled on the British town and country planning acts, though later amendments in both countries have increased the divergence between their planning systems and practices.<sup>15</sup>

A hierarchical statutory planning system regulates land use and settlement planning, with planning and building commissions and statutory plans at the national, district and local levels providing the framework for review and approval of development proposals and projects. Israel's spatial planning and development control is much more 'plan-led' and (formally) less discretionary-negotiated than planning in the UK: all finally approved statutory plans (at the national, district and local levels) are legally binding. In practice this difference is less than it seems, because adopting detailed amendments to statutory plans is common practice to make the system more flexible and allow (originally non-conforming) development.

Sectoral ministries (housing and construction, national infrastructures, transportation, health, education etc.) are the lead agencies for planning in their domains, but the statutory planning system also encompasses the land-use-related aspects of other sectors such as transportation, tourism, energy and environment (e.g. solid waste disposal, national parks) each of which has its national statutory plan. The planning system includes several other actors, some in roles that are unique to Israel.

One of these is the Israel Lands Administration (ILA), a government agency entrusted with the management of all state-owned land: since this comprises about 93 per cent of Israel's land area (though a much smaller proportion of urban-developed land) the ILA is a significant player. Other such actors are powerful quangos, survivals of pre-state agencies, such as the Jewish Agency (responsible for rural settlement planning) and the Jewish National Fund that owns, plans and manages open agricultural areas and forests. Finally, the (rather weak) Ministry for Environmental Quality engages the planning system (and is represented on statutory planning bodies) on the interface between land use and environmental planning and policy.<sup>16</sup>

### *Summary Inventory and Status*

The inventory of actual PRs in Israel and their current status – positive or potential – is shown in Table 1, citing the relevant authorities for each. Given our research approach, this list does not claim to be exhaustive, nor do all PRs feature at the same level of detail.

### *Selective Review*<sup>17</sup>

Below, a few of the PRs identified above are reviewed in more detail. These are associated with several political-normative principles, which are of particular interest in the Israeli context where they have recently been the subjects of political-legal debate and some progress. The principles are: public participation in planning; equality and equity (non-discrimination); human dignity (living conditions that are not subhuman); justice (social rights and distributional justice).

*Participation.* Participation in planning can take many forms, ranging from planning by referendum to 'user control' of planning institutions. This study focuses on the following aspects of public participation: organization and institutionalization; representation; consultation; objections and appeals; and alternative planning. Review of the authority-base for PRs deduced from the principle of democratic participation – the relevant clauses of the planning and building law, administrative law and practice – reveals little real effectuation of participation in planning in these ways, either as positive PRs or in routine practice.



Table 1. Continued

Normative principle	Planning right (Positive PR; potential PR)	Authority source
	<ul style="list-style-type: none"> <li>• <b>The right to standard/ accessible health care facilities/services</b></li> <li>• <b>The right to std./accessible education facilities/services</b></li> <li>• <b>The right to handicapped access</b></li> <li>• <b>The right to standard elderly nursing home facilities/ services</b></li> <li>• <b>The right to a safe workplace</b></li> </ul>	<p>National Health Insurance Law, Ministry of Health regulations/stds.</p> <p>National Public Education Law, Min.of Education regulations</p> <p>Handicapped Access Law</p> <p>National Welfare Law; Labour/ Welfare Ministry regulations/stds.</p> <p>Work-safety Law, Labour/Welfare Ministry regulations/stds.</p>
	<p>The right to distributional justice:  <b>The right to resource</b> (e.g. land) <b>allocation that does not flagrantly violate distributional equity</b></p>	<p>BLHD&amp;F (court decisions/ interpretations)</p>

<sup>a</sup> 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.

<sup>b</sup>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.

There is no significant 'user' representation – let alone control – of planning or development organizations, and very few citizen-governed community or neighbourhood representative organizations.<sup>18</sup> This contrasts with the other planning systems that were chosen for comparison. In the US this aspect of public participation is probably the best developed: 'user-controlled' organizations range from the (now defunct) Model Cities Agencies to the still flourishing Community Development Corporations. These, and the many community and neighbourhood organizations that are actively engaged in the planning process there, represent the institutionalization of the 'maximum feasible participation' requirement associated with federally funded neighbourhood and urban revitalization programmes (Brody *et al.*, 2001).

In Britain and the Netherlands, as in Israel, there are no user-controlled community planning and development organizations like the ones in the US.<sup>19</sup> But there, unlike Israel, citizen-governed community organizations and neighbourhood associations are widespread, and their active participation in planning is welcomed and often supported by establishment planning agencies.<sup>20</sup>

Mandated public representation on statutory planning bodies (the National Planning and Building Council, district planning and building commissions) is limited, though standard practice has provided for public and 'user' representatives (not required by law) on other statutory bodies such as steering committees for statutory plans. The public representation on these is in fact one of the most effective channels of public participation in planning, as the 'user' members of the steering committees often significantly influence planning decisions.

In terms of public representation on statutory planning bodies there is not much to choose between Israel and our comparison planning systems. But in the US accepted

planning practice prescribes intensive and institutionalized public and stakeholder involvement in the development of important plans (e.g. city, metropolitan and regional plans) and the planning of major strategic projects, such as metropolitan transit systems and highway corridors, regional park systems and watershed management. This takes the form of complex planning teams, which often include user and stakeholder participation in the work of technical subcommittees and task forces, user and stakeholder representation on governing directorates and citizen/stakeholder advisory committees.<sup>21</sup> In the Netherlands this form of planning-project team organization is less widespread than in the US, but there public and stakeholder participation is assured through that culture's highly developed formal and informal consultation (see below).

In Israel's planning system legally prescribed consultation is confined to interaction between identified public agencies (most often the minister) with the exception of a few professional organizations and planning-environmental NGOs listed by the Interior Ministry. The virtual absence of consultation on plans and strategic projects prior to their deposit for formal objections contrasts sharply with the planning cultures of our comparison countries.

Among them the Netherlands probably has the most highly developed system of formal and informal consultation. Its networks embrace the country's multiple levels of government, its functional government agencies, sectoral interests (e.g. industry, agriculture, labour), its interest groups (e.g. 'greens', financial institutions) and all relevant stakeholders (corporations, NGOs, regional and local associations) in a complex and often protracted process of formal consultation and informal interaction that is an integral part of developing every major plan and strategic project (Alexander, 2002b: 36–8).

In the UK informal consultation with relevant stakeholders and local interests prior to completing plans for formal deposit is also accepted planning practice. This complements the formal consultation with selected public bodies and interests that is mandated in the statutory planning process. In the US, planning consultation is not mandated as such, but it is extensive nevertheless, taking three forms. One is the organization and institutionalization of public and stakeholder participation in planning teams (see above). Another form is the consultation with extra-establishment interests and stakeholders that is subsumed under the participation requirements of federal and state programmes. Finally, consultation is sometimes integrated into planning in the form of collaborative planning frameworks (Innes & Booher, 1999, 2004).

One participation-related positive PR is *the right to alternative planning*, i.e. the right to draw up plans for an area and standing to present them for consideration and adoption by the relevant statutory planning bodies. Beside the legal planning powers of government, Israel's Planning and Building Law gives this right to anyone 'with an interest in the (relevant) land', but courts have always interpreted this as a direct property interest, and any other interests (which are asserted from time to time, e.g. a public interest or 'general planning interests') have been explicitly denied. However, the courts have now extended this right to residents' associations whose members have only partial or indirect property interests in the area concerned; these and other legal developments hold out the promise of further expansion.<sup>22</sup>

As noted, in Israel there was no legal standing for alternative planning until recently, and it is still very limited. In practice, agency-sponsored alternative planning and oppositional counter-planning are rare, though they exist.<sup>23</sup> The Netherlands seems to resemble Israel most in the relative absence of alternative planning, both as of right and as prevailing practice. In the UK there is no legal standing either for alternative planning, but it is widely

practised (often as state-sponsored advocacy planning) as an integral part of public participation in plan and project development.

The US differs most from Israel and the other European planning systems in its embrace of alternative planning. The American planning and legal systems do not limit legal standing to submit plans for approval, so alternative planning is practised there as of right. Indeed, the implementation there of the 'maximum feasible participation' requirement for many federally-funded undertakings has stimulated widespread advocacy planning, which often has taken the form of developing alternative proposals to unwanted government- and developer-initiated plans and projects. As a result, alternative and advocacy planning continues to be an important part of public participation in the USA.

The primary channel in Israel for public participation in planning, as a positive PR, is *the right to be heard*. This means the right of entitled parties to lodge objections to deposited statutory plans and other plans under consideration for approval, and to appeal against statutory planning bodies' decisions. This PR is limited to parties with legal standing, i.e. those directly affected by planned actions or impacts or with a direct property interest, though 'standing' has been liberally interpreted by the courts. It does not extend to 'public, general or planning interests', with the exception of particular listed public organizations and NGOs.

The right to be heard is essentially similar in Israeli, British and Netherlands planning law, in spite of some differences in the way their respective planning systems are structured and operate.<sup>24</sup> In all these systems, this right is fully and effectively utilized. However, our impression is that in Britain and the Netherlands third parties and affected interests lodge fewer objections to plans and submitted proposals than they do in Israel.<sup>25</sup> If this is true, it is easy to explain this difference. In the first two countries, other channels for participation in planning are much better developed, and the affected public takes advantage of them to pre-empt the need to object to plans once they are deposited. In Israel, by contrast, the statutory course of objections and appeals is almost the only way of getting a hearing.

The US, in the absence of a national hierarchical statutory planning system like those of the other three countries referred to here, has a different way of providing a due-process hearing to parties affected by plans and planning decisions. State enabling laws have given local governments jurisdiction over the planning process, providing for the hearing of objections to plans and consideration of appeals against planning decisions by local-level planning institutions. This applies to the first level of objections and appeals, which addresses local plans and approved development proposals. For more advanced appeals, and to object to extra-local plans and projects (such as metropolitan or regional plans and state- and federally-initiated/funded strategic projects) the affected parties turn to the appropriate courts. As a result, judicial intervention in all levels of the planning process (even judicial 'activism' as elaborated below) is much more frequent in the US than elsewhere.

As noted above, in Israel legal appeals against planning decisions are common, as one of the few available channels for public participation in planning. Britain, Israel and the Netherlands are broadly similar in the formal structure of and interaction between their planning systems and their legal-judicial systems, but our impressions of the differences between Israel and the others in their resort to statutory objections and appeals apply to their respective judicial involvement in planning as well. Again, the lower frequency of planning-related litigation in Britain and the Netherlands than in Israel can be explained by the existence of other channels of public access to the planning process. In the US

the courts are not only the ultimate forum of appeal against planning decisions; they also take the place of the other countries' higher-order planning institutions. Consequently, judicial 'activism' is an important supplement to other channels of public participation, and the US planning system has been shaped by court decisions<sup>26</sup> no less than Israel's. Indeed, judicial intervention in planning processes is pervasive at all levels, to the extent that in some cases planning functions are literally taken over by courts.<sup>27</sup>

As almost its only available outlet, the Israeli public takes extensive advantage of its right to object and appeal, with destructive effect on the image of citizen participation in planning. Rather than appearing in a positive light, as a welcome complement to governmental and public agency planning, public participation is (correctly) perceived as adversarial, with the establishment planning system on the one hand and affected parties on the other taking opposite sides in recurring conflicts. One direct result is the avoidance by public agencies of statutory planning, with its mandated participation element that generates all those nuisance objections, in favour of substitutes (such as master plans, policy documents etc.) and any available short cuts.<sup>28</sup>

*Non-discrimination.* The political-normative principle of equality has been relatively narrowly interpreted in Israel, limiting it to freedom from objectionable discrimination. Procedural equality, then, can be applied as *the right to a planning process without objectionable discrimination*. This is a positive PR, anchored in administrative law and in the Basic Law Human Dignity and Freedom (BLHD&F), as confirmed in many court decisions. Usually this PR is effectuated through the non-discrimination requirements of due process and sound administration or standards of reasonableness.

In Israel, as in the other planning systems we chose for comparison, procedural non-discrimination in the statutory planning process has been standard practice, which, when not observed, has been enforced by the courts. There are some exceptions, which all involve systemic discrimination against Arab and other minority communities. One concerns their inadequate representation on planning commissions, particularly noticeable in areas where they are a majority or a substantial minority of the population.<sup>29</sup> Another is a long-standing planning policy (which the government is now slowly dismantling) of denying the existence of many Bedouin settlements (usually on contested land) for the purposes of statutory planning, and refusing to plan for Bedouin rural agricultural settlement; this is coordinated with regional planning for the Negev, which promotes the concentration and urbanization of the Bedouin. The intended result of these policies is the delegitimization of these settlements, denying them minimal infrastructure and services and making them vulnerable to eviction and demolition orders.<sup>30</sup>

Substantive equality has been the subject of considerable political-philosophical debate and its practical implications are still contested. In Israel its accepted meaning is equality of opportunity, and in legal terms this approach is again expressed through the concept of objectionable discrimination. The PR deduced from the norm of substantive equality is *the right to plans and planning decisions that are devoid of objectionable substantive discrimination*. Objectionable substantive discrimination occurs when a plan's provisions, or the results of a planning decision erode equality of opportunity, by depriving affected parties of developmental resources or critical services that are allocated to others, or with which other more favoured individuals or groups are already well endowed.

This should clearly be a positive PR; it is well backed by recognized authorities: administrative law and practice, the BLHD&F and court decisions that have recently affirmed a positive right to distributive justice. But unlike procedural equality, which has been openly upheld in the planning context, the application of the right to substantive non-discrimination in plans and planning decisions has not yet been as well tested. However, recent High Court of Justice decisions reversing substantive discrimination in cases ranging from settlement policy to allocation of the profits from land-use changes<sup>31</sup> reinforce the conclusion that this is a positive PR, even if its implementation is not yet a routinized norm.

Blatant violations of this norm are widespread. Many involve what are primarily budgetary and resource allocation decisions that discriminate against poor, minority and peripheral communities (e.g. the unequal provision of health and education services and facilities) and which, while not primarily in the domain of the planning system, obviously have spatial and planning-related implications. In the planning context in particular, substantive discrimination against Arab and other minority local governments takes several forms. One is boundary-setting: these jurisdictions have much smaller areas (in proportion to their populations) than similar Jewish ones have. Others are the allocation of built-up areas and reserve land for residential construction, which prescribe much higher densities than parallel types of jurisdictions in the Jewish sector (*Bimkom*, 2007: Part II).

*Human dignity.* Applying this normative-political principle through the authority of the BLHD&F, the courts have affirmed the basic right to living conditions that do not violate human dignity. In the context of the Israeli planning system, this can be read as *the right to a plan that ensures minimal living conditions consistent with human dignity*. Effectuating this right and the court decisions that have applied the basic law to specific cases has left the status of this PR uncertain: whether it is still a potential PR, or whether the precedents have made this a positive PR that can readily be enforced.

This PR can be expressed in more specific terms, which are associated with concrete factors responsible for creating a minimal living environment: infrastructure, access and services. In this way the following PRs are deduced from the normative principle of human dignity, but just as for the more general PR (above), their status is also doubtful.

*The right to minimal infrastructure to ensure living conditions that do not violate human dignity* implies the obligation for a plan to provide for minimal infrastructure: water supply, sewerage and drainage, roads, electricity and communications. *The right to minimal access* requires a plan to provide minimal access to essential services and employment destinations, to the more distant environment and from outside the planning area to destinations within it. Minimal access means travel between origins and destinations within reasonable times, considering the traveller's identity, trip purposes and transportation modes. *The right to minimal services* implies that a plan must provide for facilities to house the minimal services to which residents of the planning area are entitled.<sup>32</sup>

In normal developed societies these rights are taken for granted, and the standards for living conditions compatible with human dignity are self-evident. The latter are more problematic in poor countries with various cultures and populations at different stages of development. That is not the problem in Israel, but systemic discrimination against non-Jewish minorities has made articulation and enforcement of these PRs contested.

*Social justice.* In theory, a series of PRs could be identified that are associated with general social rights, which are in turn deduced from the normative-political principle of social justice. Among such social rights are *the rights to health, to housing, to education, to employment and income* etc. These could be viewed as potential PRs at best, based as they are on authorities that are relatively weak in the Israeli context (because they have not been incorporated in its legislation) such as international statements and covenants. In fact, to date the courts have upheld no claims based on any of these social rights.

Nevertheless, there is a set of positive PRs associated with social rights. But these are social rights in very specific contexts, and are usually vested in a group of well-defined beneficiaries. They are positive PRs because they are well-supported by recognized authorities: sectoral legislation (usually for a defined special purpose) and regulation that implements monitoring and control authority assigned to the responsible state agency by enabling statute. Their effectuation is usually a matter of routine practice, and their enforcement is entrusted to the relevant bureaucracies. A systematic research effort would be needed to draw up an exhaustive list of these PRs, but a few examples follow:

- *The right to a safe workplace and safe working practices* (work safety legislation and regulations);
- *The right to access and obtain health services* (National Health Insurance Law);
- *The right of handicapped to access public places and services* (Handicapped Accessibility Law);
- *The right to health facilities* (hospitals, clinics etc.) *that conform to minimum standards* (Health Ministry regulations and authorising legislation);
- *The right of elderly to nursing homes that conform to minimum standards* (Welfare Ministry regulations and authorising legislation);
- *The right of eligible households to housing* (Public Housing Law);
- *The right of children and parents to schools that conform to minimum standards* (National Education Law, Education Ministry regulations).

This kind of PR is important as an incremental recognition of social rights, which has been more effective in Israel than the unsuccessful assertion of broad claims. Therefore, enhancing these rights' effectuation and enforcement and adding more such specific socially-oriented PRs may be the most promising path available to social justice.

## **Discussion**

### *Practice*

It is clear that discussion of PRs in practice is only possible in relation to a specific institutional context. Consequently, practice here refers to PRs in the Israeli planning system. The project report's review of PRs in Israel closes with its findings and recommendations (*Bimkom*, 2005: 37–42; *Bimkom*, 2007). The findings identify gaps in the inventory of positive PRs and deficits in implementation and enforcement. Problems include systemic violations of PRs related to human dignity (the unrecognized 'illegal' Bedouin settlements), systemic discrimination (e.g. under-allocation of development land reserves to minority local authorities), systemic failures in implementing the right to be informed and deficiencies in participation rights and practices.

The recommendations list specific actions in the political-institutional arena: amendments to the Planning and Building Law (e.g. increasing public representation on planning commissions, providing sanctions for failure to give due notice, broadening standing for alternative planning) and changes in the standard practices of planning authorities (e.g. pre-deposit consultation on plans in progress, utilizing media and communicative tools to stimulate public participation). Actions are proposed in the legal arena (e.g. bringing appropriate cases to attack discrimination in representation on planning commissions) and through education and public information, such as workshops to raise awareness of the Freedom of Information Law and improve its utilization. Additional research is recommended to develop minimal access norms and to complete the inventory of positive PRs related to specific social rights.

### *Methodology*

This pilot study tested and validated an empirical method for defining real PRs and ascertaining their status. Applying legal research supplemented with policy analysis to establish the authority-base of a set of hypothetical PRs deduced from accepted universal political-normative principles, our method essentially puts Dworkin's definition of rights into practice.

This opens the door to constructive discussion and analysis of actual PRs in real-world planning systems. One potential research topic is evaluating the effectuation of PRs (routine conformance or violation and enforcement), which was the ultimate purpose of the report behind this paper.<sup>33</sup> Naturally, a necessary (though not sufficient) condition for any audit of rights is to know what the rights are that are being investigated. This method provides the answer to that question.

Another promising research area is the comparative study of PRs in different societies, polities and planning systems, which goes beyond anecdotal evidence or cross-societal case study. Once the inventory and status of PRs for each setting can be systematically determined using a universally applicable method that is context-independent, the exploration of contextual factors linked to the recognition and implementation of PRs in different institutional settings becomes possible.

An empirically well-founded inventory of PRs is also a useful, perhaps even essential, aid for normative social action. If such action aims to enhance the status of human rights in general and PRs in particular in a specific society, an effective strategy should distinguish between potential rights (which demand a campaign to obtain the social acknowledgement – through legislation or policy changes – that will turn them into enforceable rights) and positive rights, where the focus would be on enhancing awareness, exposing violations and improving utilization and enforcement. An inventory of PRs can also be a consciousness-raising tool to enable more effective utilization by target publics: 'Know your planning rights'.

### *Theory and Praxis*

A focus on PRs raises several interesting issues in planning theory and praxis.<sup>34</sup> One is the role of PRs in the institutional environment of planning: how would what we understand about the planning process and the way we expect planning to be institutionalized differ from the conceptions prevailing today? Considering and studying PRs in planning systems and practices (which was not possible before) may modify some popular

models of planning as a communicative or political process to incorporate higher levels of complexity.

Another issue is the relation between planning and property rights. These two are conventionally seen as opposed: planning is often presented as violating property rights, and libertarian and neo-liberal ideologies are against public planning. How does the integration between planning and rights-based approaches that PRs imply affect this juxtaposition?

A third issue concerns evaluation in planning. Taking current evaluation theory and practice as our point of departure, we can examine the implications for planning of supplementing conventional evaluations, which are primarily based on utilitarian premises, with a deontic (i.e. rights and rule-based) assessment of plan alternatives and planning decisions.

Until now, this has largely been the subject of abstract speculation and discussion (Alexander, 2002c). In future, the empirical identification of PRs in real-life contexts will let us observe their application in substantive plan evaluation at various stages of the planning process (preliminary evaluation of alternatives, final administrative adoption or approval, judicial review) and learn how (if at all) they complement or replace discursive informal assessment and formal utilitarian analytic methods.

This issue raises some questions that touch on foundational concepts in planning (for example, how we define the public interest), the enacted ethics of daily planning practice and the meta-ethics of planning as a discipline and profession. Planning has been accused of a utilitarian bias, and criticized for its narrow consequentialist meta-ethic (Moroni, 2004, 2006). To the extent that PRs, reflecting a rights-based deontic ethic, play a significant role in planning practice, this critique loses some of its credibility—another reason why real PRs and their role in planning should be of interest.

## Notes

1. An earlier report on this project was presented in Alexander (2005).
2. This project has two parts; the first is the study that is the basis for this paper, the second presents empirical research on the implementation status (conformance, enforcement, or violation) of selected PRs in the Israeli planning system.
3. This is a condensed version of Alexander (2002a).
4. Such acknowledgement is of course implicit but it is no less significant for that; this refutes property rights advocates' claims that planning is opposed to property rights (Alexander, 2007a).
5. An example is the PR giving designated beneficiaries a right to public housing, derived from the (unrecognized) general social right to shelter, but acknowledged through the authority of the Public Housing Law; see discussion under 'Social justice' later in this paper.
6. The comparison was limited to normative principles closely linked to planning practices: fairness/due-process, public participation (including freedom of information—the right to be notified and the right to know), and reasonableness. It was omitted for those principles and PRs (human dignity, equality/non-discrimination and social justice) that mainly required comparative legal research, which is outside the author's primary area of competence.
7. These countries' planning systems were chosen based on two considerations: (1) As relatively well respected and documented planning systems they are suitable as a normative basis of comparison: (2) The author is familiar with them and had easy access to needed sources of additional information.
8. In particular, in British-derived land-use law (Fairlie, 2000; Upton, 2006).
9. Examples include devolution in Scotland (Miers, 2006), privatization of planning rights (Pennington, 2000), 'sovereign planning rights' in the EU (EMS, 2000), and Australian state-local and Canadian province-municipal conflicts (Verity & Davies, 2003; Gillespie, 2002).

10. In the context of the UK planning system such PRs are called 'third party rights' (Ellis, 2000); the term PRs has been used to raise public awareness in England (Friends of the Earth, 2004) and to advocate third-party appeal rights in Scotland and Ireland (Scottish Environment Link, 2003; Friends of the Irish Environment, 2003). Other users of PRs in this sense include Kasaegae *et al.* (2000), Nederveen (2001) on Netherlands infrastructure planning and Garcia-Zamor (2001) on Frankfurt airport planning
11. In Israel non-discrimination is a positive PR enforced by the courts; in the US it is a constitutional right and its PR impacts range from court-enforced 'fair share' housing in New Jersey to EPA-adjudicated 'environmental justice' (Alexander, 2007b).
12. See also below under 'Public participation'; for more cases and detailed analysis, see *Bimkom* (2007).
13. See under 'Human dignity' and 'Social justice' later in this paper.
14. This is part of a constant and ongoing dynamic process involving political engagement and legal action—see e.g. 'Human dignity' and 'Social justice'.
15. For a more detailed comparison, see Alterman (2001).
16. See also Alexander (2004a) for a more detailed description and critical analysis of the Israeli planning system.
17. The full report of the pilot study (*Bimkom*, 2007) contains a detailed review and analysis of each of the PRs inventoried in Table 1. This section is a condensed extract from that report, which is limited to the selected PRs to respect the space constraints of a journal article.
18. These include the municipally-sponsored 'quarter administrations' in Jerusalem, and city-supported neighbourhood associations in Tel-Aviv and Haifa.
19. The Netherlands' cooperative housing associations, which are powerful actors and planning participants in the housing market, are an exception to this generalization.
20. In Israel the role of residents' associations and special interest (e.g. environmental) citizens' groups is usually oppositional and takes the form of objecting to deposited plans and proposed projects (see later in this paper). A recent exception is the planning establishment encouraged public participation in planning Issawiya, an East Jerusalem neighbourhood, with the engagement of *Bimkom* as advocacy planner-facilitator.
21. Our informal information sources did not cover this aspect of participation in planning in the UK.
22. Some High Court of Justice (HCJ) decisions related to standing before courts and administrative bodies, and the recent HCJ decision on *Ain Karem Residents' Association vs. Jerusalem District Planning & Building Commission* (*Bimkom*, 2007).
23. An example of the former is the current detailed town planning scheme for the village of Issawiya (see note 19 above). A case of the latter is the Bedouin 'counterplan' for Bedouin settlement in the Negev, in opposition to Israel government plans for the region (Alexander, 2004b).
24. In the Netherlands, objections are raised at hearings, and the appropriate planning body considers objections and appeals; in Israel for large or complex statutory plans the law enables appointment of an ad hoc examiner to hear objections and recommend their disposition; the UK has a standing institution, the Planning Inspectorate, for this purpose, and the inspector's recommendations are binding on the planning authority unless it provides a reasoned dissent.
25. This impression is anecdotal and unsupported by any systematic research or scientific evidence; it is based solely on the shared experiences of the author and others familiar with the three countries' planning systems.
26. The 'takings issue' (Strong *et al.*, 1996) is a case in point, where court decisions have determined planning processes and decisions in areas ranging from development control to coastal zone management.
27. For example, the New Jersey Supreme Court's role in the long-running fair-share housing allocation issue (Coyle, 1993: 65–83).
28. 'Israel 2020', a major national development plan that served as the platform for the most recent statutory National Outline Plan 35, is an example of the former; the National Infrastructure Commission, which was set up in 2002 to review and approve major strategic infrastructure projects and pre-empts the statutory planning system, is a case of the latter.
29. This was addressed in several court decisions, but has still not been remedied.
30. Popularly known as the problem of 'the unrecognized Bedouin villages', this has been the subject of a decades-long conflict (partly over land property rights) which has played itself out in the planning system and the courts; see *Bimkom* (2007), Swirsky & Hasson (2006) and Alexander (2004b).
31. The *Kadan* decision, and the *Keshet Hamizrachi* decision (*Bimkom*, 2007).
32. The uncertain status of these PRs is a matter of generalization from specific cases, e.g. under infrastructure the basic right to water supply has been upheld, while (under minimal services) the courts have affirmed the obligation to provide accessible basic health services (*Bimkom*, 2007).

33. The inspiration for this status report on PRs in Israel was Amnesty International's human rights reports.  
 34. For a more extended exposition of these issues, see Alexander (2007b).

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