

Developing Effective Procedures for Public Participation in Spatial Planning Regulation in Indonesia: Lesson Learned from Australia

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Abstract

Public participation is a crucial aspect of spatial planning, serving to achieve sustainable development objectives. The Indonesian government has recognized this fact and incorporated public participation in its spatial planning laws and regulations. However, procedures for involving the public have been criticized for lacking genuine participation, highlighting opportunities for public input only being offered formally. Meanwhile, public participation is considered a significant component of spatial planning regulation in Australia, particularly in Victoria. The government has involved the public in various stages of the planning process, including creating a planning scheme, issuing planning permits, and completing planning agreements. Based on the established procedures under current Australian legislation, this study aims to provide a practical solution by examining and contrasting the role of public participation in spatial planning regulation between Indonesia and Australia. This study concluded that Indonesia might consider adopting Australia's strategy and setting up planning panels to regulate spatial planning. Planning agreements can also be advantageous, particularly for large-scale or mega projects that significantly negatively impact the environment and local communities.

Keywords: developing effective procedure, public participation, spatial planning.

A. Introduction

Spatial planning regulation is critical to effectively use finite spatial resources by balancing industrial growth with available resources, such as soil, water, and other natural resources.¹ This role is vital for developing countries prioritizing the economic

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¹ Alister J Scott (et al.), "Disintegrated Development at the Rural–Urban Fringe: Re-connecting Spatial Planning Theory and Practice," *Progress in Planning* 83 (2013): 4, <https://doi.org/10.1016/j.progress.2012.09.001>. See also Ashley Bowes, *A Practical Approach to Planning Law* (Oxford: Oxford University Press, 2019), 78.

growth aspects of human development.² Guiding the growth of commercial, residential, industrial, and tourism zones, spatial planning regulations need to be followed to ensure that they are not built at high-risk locations.³ This is important especially for certain developing countries, such as Indonesia, an archipelago and sensitive to natural calamities.⁴

Public participation is essential in achieving sustainable development within the current regional autonomy.⁵ By setting high standards for regulation, this phenomenon also embodies democratic principles. Moreover, a regulation that represents the demands of society is a crucial goal, particularly in spatial planning.⁶ For example, the Planning Act of South Africa requires public involvement in decisions related to land uses, specifically those concerning public spaces, amenities, commercial, residential, and industrial structures.⁷ Similarly, Singapore's Planning Act allows for extensive public engagement, as evidenced by its mechanism for soliciting feedback from the public regarding proposed revisions to the Master Plan.⁸

The Indonesian government has recognized the value of public participation, particularly in spatial planning. The Law Number 26 of 2007 on Spatial Planning (SPL 2007) acknowledges the public's key role in helping spatial planning achieve its goals, such as creating hospitable, secure, beneficial, and sustainable settings.⁹ The Law Number 6 of 2023 on Job Creation (JCL 2023) also addresses the importance of public participation in spatial planning. According to the regulation, the public has to be involved in every stage of spatial planning, including its design, use, and oversight, while having easy access to the detailed plan in digital formats.¹⁰ The Minister of

² Jean-David Gerber and Gabriela Debrunner, "Planning with Power: Implementing Urban Densification Policies in Zurich, Switzerland," *Land Use Policy* 123, no. 106400 (2022): 1-13, <https://doi.org/10.1016/j.landusepol.2022.106400>. See also The United Nations Conference on Trade and Development, *Investment Policy Framework for Sustainable Development* (Geneva: United Nations, 2015), 134.

³ Adam Sheppard (et al.), *The Essential Guide to Planning Law: Decision-Making and Practice in the UK* (Bristol: Bristol University Press, 2017), 96.

⁴ Małgorzata Krajewska, Sabina Żróbek and Maruška Šubic Kovač, "The Role of Spatial Planning in the Investment Process in Poland and Slovenia," *Real Estate Management and Valuation* 22, no. 2 (2014): 53, <https://doi.org/10.2478/remav-2014-0017>. See also Ana Beatriz Pierri Daunt, Luis Inostroza, and Anna M. Hersperger, "The Role of Spatial Planning in Land Change: An Assessment of Urban Planning and Nature Conservation Efficiency at the Southeastern Coast of Brazil," *Land Use Policy* 111 (2021): 105771, <https://doi.org/10.1016/j.landusepol.2021.105771>. See also Dian Ekawaty Ismail, *Hukum Tata Ruang: Rekonstruksi Menuju Pemukiman Indonesia Bebas Kumuh* (Yogyakarta: UII Press, 2019), 49.

⁵ Joko Riskiyono, "Partisipasi Masyarakat Dalam Pembentukan Perundang-undangan untuk Mewujudkan Kesejahteraan," *Aspirasi* 6, no. 2 (2015): 160, <https://doi.org/10.46807/aspirasi.v6i2.511>.

⁶ Mahda Foroughi (et al.), "Public Participation and Consensus-Building in Urban Planning from the Lens of Heritage Planning: A Systematic Literature Review," *Cities* 135, no. 104235 (2023): 1-12, <https://doi.org/10.1016/j.cities.2023.104235>.

⁷ France Khutso Lavhelani Kgobe and John Mamokhere, "The Value of Public Participation in Land-Use Planning for Redeeming Congestion in South Africa Municipalities," *Technium Social Sciences Journal* 26 (2021): 17, <https://doi.org/10.47577/tssj.v26i1.5020>.

⁸ Jack Tsen-Ta Lee, "We Built This City: Public Participation in Land Use Decisions in Singapore," *Asian Journal of Comparative Law* 10, no.2 (2016): 213, <https://doi.org/10.1017/asjcl.2015.15>.

⁹ Article 3 Law Number 26 of 2007 on Spatial Management (SPL 2007). See also AM Yunus Wahid, *Pengantar Hukum Tata Ruang* (Jakarta: Prenada Media, 2016), 69.

¹⁰ Article 17 point 31 Law Number 6 of 2023 on Job Creation (JCL 2023).

Domestic Affairs Regulation Number 4 of 2019 on Procedures of Public Participation in Spatial Planning in the Region (MDAR 2019) states that regional governments should involve the public in applying spatial planning within their regions through providing input and cooperation in spatial planning.¹¹

Public participation has been criticized for lacking actual involvement, with some arguing that opportunities for the public input are only offered formally.¹² Additionally, the government has been criticized for treating public participation as a symbolic activity by including a small number of individuals from underrepresented populations, which only serves to create the illusion of impartiality.¹³ When the public expresses dissatisfaction with a particular project, there is no guarantee that the government can halt the work and conduct a transparent investigation to ensure compliance with spatial planning.¹⁴

In Australia, public participation plays a crucial role in spatial planning, and some states enact unique regulations to address the spatial planning issue.¹⁵ For example, the New South Wales Environmental Planning and Assessment Act of 1979 (EPPA NSW 1979) was the first planning statute in the country to explicitly mandate that environmental, social, and economic objectives need to be balanced.¹⁶ The act also made it easier for the public to participate in all levels of planning and land-related decisions.¹⁷ Similarly, in Victoria, Planning and Environment Act 1987 (EPA VIC 1987)¹⁸ required the government to involve the public in various aspects of planning, such as

¹¹ Article 2 and 3 The Regulation of the Minister of Domestic Affairs No. 4 of 2019 on Procedures of Public Participation in Spatial Planning in the Region (MDAR 2019).

¹² Robert Stokes, "Defining the Ideology of Public Participation: Democracy, Devolution, Deliberation, Dispute Resolution and a New System for Identifying Public Participation in Planning Law," *Macquarie Journal of International and Comparative Environmental Law* 8, no. 2 (2012): 3, <http://classic.austlii.edu.au/au/journals/MqJICEEnvLaw/2012/6.html>.

¹³ Anak Agung Istri Ari Atu Dewi, "Partisipasi Desa Pakraman dalam Pembentukan Peraturan Daerah," (Ph.D. Dissertation University of Udayana, 2017), 24.

¹⁴ I Gusti Ngurah Parikesit Widiatedja, "The Regulatory Failure of Spatial Planning in Bali and its Environmental and Social Impact: A Case Study of Hotel Projects" (Ph.D. Dissertation the University of Melbourne, 2020), 109.

¹⁵ Peter John Williams and Angelique Mary Williams, "Sustainability and Planning Law in Australia: Achievements and Challenges," *International Journal of Law in the Built Environment* 8, no. 3 (2016): 226, <https://doi.org/10.1108/IJLBE-06-2016-0008>, See also Michael Lu and Ehab Diab, "Understanding the Determinants of X-Minute City Policies: A Review of the North American and Australian Cities' Planning Documents," *Journal of Urban Mobility* 3, no. 100040 (2023): 1-13, <https://doi.org/10.1016/j.urbmob.2022.100040>.

¹⁶ NSW Legislation No. 23, "Environmental Planning and Assessment Act 1979," accessed on October 21, 2022, <https://legislation.nsw.gov.au/view/whole/html/inforce/current/act-1979-203> (EPPA NSW 1979) See also Stephen Willey, *Planning & Environmental Law in Western Australia* (Melbourne: Thomson Reuters, 2021), 219.

¹⁷ Paul McFarland, "The Best Planning System in Australia or a System in Need of Review? An Analysis of the New South Wales Planning System," *Planning Perspectives* 26, no. 3 (2011): 404, <https://doi.org/10.1080/02665433.2011.575557>.

¹⁸ The Government of Victoria, "Planning and Environment Act 1987," accessed on November 7, 2022, <https://www.legislation.vic.gov.au/in-force/acts/planning-and-environment-act-1987/153> (EPA VIC 1987).

creating planning schemes, issuing planning permits, establishing planning panels, and completing planning agreements.¹⁹

Previous studies have proposed strategies to improve spatial planning in Indonesia. For example, Faxon, in 2022 discussed the significance of the One Map Project in creating a government-managed online spatial data platform. However, this study did not examine the issue of insufficient public participation in spatial planning.²⁰ In contrast, Kuller's study conducted in 2022 identified a fundamental issue in Indonesia related to the lack of effective implementation of spatial planning legislation. This problem was primarily attributed to the failure to incorporate all relevant stakeholders in participatory planning processes.²¹ While the study recognized the shortcomings in the procedures for public participation, it did not explore the extent to which spatial planning regulations themselves might be contributing to the limited engagement of the public. Furthermore, there was no comparative analysis conducted to address this specific concern. Lastly, Hadi, Hamdani and Roziqin, in 2023 criticized the Job Creation Law, particularly Article 7, which exempted commercial projects from submitting an Environmental Impact Assessment (EIA) provided that they adhered to the land usage policy and zoning plan, and they are not high-risk business activities.²² While this study focused on environmental regulation rather than spatial planning, it argued against the presence of the Job Creation Law.

Due to the current legislation and the lack of public participation, it is essential to find a solution that effectively addresses the issue of spatial planning in Indonesia. One of the approaches is to examine and compare the role of the public in spatial planning between Indonesia and Australia. By analyzing the legislation and practices in Australia, effective procedures for involving the public in spatial planning in Indonesia can be identified, including the likelihood of establishing a planning and land-use court to handle planning-related issues. This study begins by outlining regulations regarding public participation in spatial planning in Indonesia, specifically before and after the implementation of the Job Creation Law. It then examines how the public has been involved in the process and identifies any current obstacles impeding public engagement. The following section focuses on the practice of public participation in spatial planning regulation in Australia. The last section compares the similarities and differences between the roles of public participation in Indonesia and

¹⁹ See Rebecca Leshinsky, "Use of Planning Agreements to Support Sustainability and Environmental Preservation: A Case Study from Victoria, Australia," *International Journal of Law in the Built Environment* 4, no. 2 (2012): 177, <https://doi.org/10.1108/17561451211242521>.

²⁰ Hilary Oliva Faxon (et al.), "Territorializing Spatial Data: Controlling Land Through One Map Projects in Indonesia and Myanmar," *Political Geography* 98 (2022): 1, <https://doi.org/10.1016/j.polgeo.2022.102651>.

²¹ Martijn Kuller (et al.), "Planning Support Systems for Strategic Implementation of Nature-Based Solutions in the Global South: Current Role and Future Potential in Indonesia," *Cities* 126, no. 103693 (2022): 1-11, <https://doi.org/10.1016/j.cities.2022.103693>.

²² Sudharto P. Hadi (et al.), "A Sustainability Review on the Indonesian Job Creation Law," *Heliyon*, 9, no. 2 (2023): 1-7, <https://doi.org/10.1016/j.heliyon.2023.e13431>.

Australia, with the aim of proposing Australia's approach as a potential solution to improve the role of the public in spatial planning in Indonesia.

B. Regulation of Public Participation in Spatial Planning in Indonesia

Public participation plays a crucial role in ensuring the success of development goals during this period of regional autonomy, as it enhances regulatory standards and promotes democratic values.²³ In spatial planning, effective public participation enables the expression of societal expectations, which is a primary goal of the regulation.²⁴ Regarding sustainable development goals (SDGs), public participation encourages openness, accountability, and legitimacy by including the public in the establishment of spatial planning policies, planning procedures, and project execution. Communities are given the chance to express their worries, exchange their knowledge, and actively participate in formulating sustainable development initiatives.

Public participation also contributes to the development of trust and social cohesion as it fosters chances for cooperation, communication, and shared ownership of activities aimed at attaining the SDGs.²⁵ Some theories explain the concept of public participation in the formation of legislation. The need to recognize the interests and concerns of all key stakeholders in decision-making processes is emphasized by stakeholder theory. When it comes to legislation, this idea calls for including a wide range of stakeholders, including individuals, communities, and companies. Stakeholder theory seeks to generate more balanced and sustainable solutions that represent the different interests of individuals impacted by legislation by identifying and embracing numerous views.²⁶ Equally, the goal of participatory governance theory is to increase public participation in decision-making beyond what is possible under standard representative democracies. It underlines how crucial it is to actively include individuals and local communities in the creation and execution of public policies.²⁷

The following section of this study analyzes how spatial planning legislation in Indonesia has incorporated public participation and how this process can be improved to achieve genuine participation in spatial planning governance.

²³ I Gusti Ngurah Parikesit Widiatedja, "Fragmented Approach to Spatial Management in Indonesia: When it Will Be Ended?" *Kertha Patrika* 43, no. 2 (2021): 147, <https://doi.org/10.24843/KP.2021.v43.i02.p03>.

²⁴ I Gusti Ngurah Parikesit Widiatedja, 151.

²⁵ Laura H. Berry (et al.), "Making Space: How Public Participation Shapes Environmental Decision-Making," accessed on July 16, 2023, <https://www.sei.org/wp-content/uploads/2019/01/making-space-how-public-participation-shapes-environmental-decision-making.pdf>

²⁶ Thomas Donaldson and Lee E. Preston, "The Stakeholder Theory of the Corporation: Concepts, Evidence, and Implications," *The Academy of Management Review* 20, no. 1 (1995): 65, <https://doi.org/10.2307/258887>.

²⁷ Renée A. Irvin and John Stansbury, "Citizen Participation in Decision Making: Is It Worth the Effort?" *Public Administration Review* 64, no. 1 (2004): 55, <https://www.jstor.org/stable/3542626>

1. Before the Job Creation Law

Prior to Indonesian independence, spatial planning regulation in Indonesia was under the purview of the Dutch government. In 1948, the Township Planning Ordinance, also known as *Staadsvorming Ordonatie* (SVO), was passed along with its implementing regulation, the *Stadsvormings Verordening* (SVV) in 1949.²⁸ The SVO aimed to grant local governments the power to ensure town development while considering social and geographical aspects as well as projected expansion.²⁹ Meanwhile, the SVV outlined local governments' responsibility to provide a general and detailed spatial plan, particularly concerning technical norms governing building and road projects.³⁰ However, none of the SVO and the SVV placed importance on the inclusion of public participation in spatial planning.

After Indonesia gaining independence in 1949, the Soekarno Administration (1945-1966) was hesitant to implement the SVO and SVV into domestic legislation. However, the government did not establish a formal spatial planning regulation during this period. It was only in 1976, under the Soeharto Administration (1966-1998), that the SVO was finally established.³¹ This was accomplished through a Presidential Instruction that mandated local governments to issue laws for spatial planning. Finally, in 1992, this administration passed the first central government spatial planning legislation, namely Spatial Planning Law Number 24 of 1992 (SPL 1992), which legally superseded the SVO and the SVV.³² Regarding public participation, only Article 25 was observed to address this issue. The provision stipulated that the government is responsible for facilitating public engagement by announcing and disseminating spatial planning information.

Following Soeharto's demise in 1998, Indonesia entered a reformation era.³³ In this era, the central government faced with solid political pressures to decentralize most of the authorities related to spatial planning management.³⁴ The country's first comprehensive law on spatial planning was introduced in Law Number 26 of 2007 (SPL 2007).³⁵ This law mandates that governments consult the public when carrying out the application of spatial planning. Public involvement is critical to achieving the goals of spatial planning, which include creating pleasant, safe, productive, and

²⁸ Delik Hudalah and Johan Woltjer, "Spatial Planning System in Transitional Indonesia," *International Planning Studies* 12, no. 3 (2007): 291, <https://doi.org/10.1080/13563470701640176>.

²⁹ Freek Colombijn (et al.), *Kota Lama Kota Baru, Sejarah Kota-kota di Indonesia* (Jakarta: Penerbit Ombak, 2005), 117.

³⁰ Johan Silas, "Perjalanan Panjang Perumahan di Indonesia Dalam dan Sekitar Abad XX," (Ph.D. Dissertation the Institute of Technology Bandung, 1989), 34.

³¹ Presidential Instruction Number 1 of 1976 on the Synchronization of Task and Responsibilities Between Agrarian Issues, Forestry, Mining, Transmigration and Public Works Point 25 (ii).

³² Law Number 24 of 1992 on Spatial Planning (SPL 1992).

³³ Simon Butt and Tim Lindsey, *Indonesian Law* (Oxford: Oxford University Press, 2018), 176.

³⁴ Reveny Vania Rugebregt, Abrar Saleng and Farida Patittingi, "Government Policy in the Natural Resource Management of Local Community," *Hasanuddin Law Review* 2, no. 1 (2016): 125, <http://dx.doi.org/10.20956/halrev.v1n1.219>.

³⁵ Joko Riskiyono, "Partisipasi Masyarakat Dalam Pembentukan Perundang-undangan Untuk Mewujudkan Kesejahteraan," 167.

sustainable areas.³⁶ The importance of this phenomenon is further emphasized in Government Regulation Number 15 of 2010, which serves as the implementing regulation for SPL 2007. This regulation requires public input needs to be taken into consideration in developing the conceptual framework for creating spatial planning.³⁷

Despite the requirement for public participation in spatial planning, it is often disregarded in practice. Even when implemented, public involvement is often restricted to exchanging data and consultations, which are formalities. For example, the extent of community involvement in the development of a tourism hamlet in Wonorejo, Surabaya, was assessed by Idajati and Pamungkas in 2016.³⁸ According to Arnstein's definition of the level of engagement,³⁹ public participation was only present during the therapeutic period. It indicates that engagement with the public was merely an attempt to influence their opinion rather than receiving ideas from them.⁴⁰

The Benoa Bay Reclamation Project is a prime example of how the absence of public participation can render spatial planning regulation ineffective. When the central government amended the presidential regulation, the Coordinating Minister for Economic Affairs and the Bali Provincial Government held public consultations, inviting only those who had previously expressed support for the project. This exclusionary approach is alarming, given that local communities such as Kuta, Kelan, and Kedonganan, as well as the well-known environmental NGO WALHI Bali were not invited to participate.⁴¹

2. After Job Creation Law

The Law Number 11 of 2020 on Job Creation Law (JCL 2020) sought to remove barriers to investment and job creation in Indonesia by changing and repealing around 74 laws, including SPL 2007. Specifically, SPL 2007 addressed 80 elements, 45 of which were left unchanged, 26 were simplified, and nine were eliminated. JCL 2020 aims to provide more public participation options. Interestingly, Government Regulation superseded regulation *in lieu* of Law Number 2 of 2022 (GRIL 2022) at the end of 2022. However, the Law Number 6 of 2023 on Job Creation Law (JCL 2023) has

³⁶ Article 3 SPL 2007. This is better than Forestry Law in Indonesia that provides a little room for public participation. See Safrina, "The Logging Ban Policy in Addressing Deforestation: A Comparison Between Thailand and Indonesia," *Indonesian Journal of International Law* 12, no. 2 (2015): 233, <https://doi.org/10.17304/ijil.vol12.2.601>.

³⁷ Government Regulation Number 15 of 2010 on the Implementation of Spatial Plan (SPGR 10 of 2010).

³⁸ Hertiar Idajati, Adjie Pamungkas, Vely Kukinul S, "The Level of Participation in Mangrove Ecotourism Development, Wonorejo Surabaya," *Procedia - Social and Behavioral Sciences* 227 (2016): 520, <https://doi.org/10.1016/j.sbspro.2016.06.109>.

³⁹ Sherry Arnstein, "A Ladder of Citizen Participation," accessed on September 12, 2022 <https://www.planning.org/pas/memo/2007/mar/pdf/JAPA35No4.pdf>.

⁴⁰ Sherry Arnstein.

⁴¹ Invitation Letter of the Coordinating Ministry of Economy Number UND-50/D.VI.M.Ekon/04/2014 of 10 April 2014 (The Letter of Coordinating Minister of Economic).

revised GRIL 2022 as of 2023. It is important to note that there have been almost no changes in the contents of this law compared to JCL 2020, particularly concerning spatial planning governance.

JCL 2023 contained several provisions that emphasized the importance of public participation in spatial planning. For example, Article 14 on JCL requires that the detailed plan available for the public in a digital format, allowing them to assess the suitability of the proposed location for their activities. Furthermore, Article 17 on JCL specifies that several sections of the 2007 SPL have been modified, including Point 10 revising Article 18 Point 2 to require public consultation on the district-level detailed plan before obtaining significant approval from the Central Government. It demonstrates a commitment to ensuring that the public is involved in the spatial planning process and has the opportunity to provide feedback before final decisions are made.

Moreover, Article 17 Point 28 of 2023 on the JCL amends Article 60 of 2007 on SPL, which 1) Grants unrestricted access to the current plan, 2) Allows individuals to benefit from the additional value of space generated from the arrangement of spatial planning, 3) Permits people to lodge complaints with the relevant agency against the development of their area conflicting with spatial planning, and 4) Enables individuals to seek fair compensation for losses arising from the application of development activities under spatial planning.⁴² Furthermore, Article 17 Point 31 modifies Article 65 of 2007 on SPL to emphasize that spatial planning needs to include the public in the formulation, implementation, and supervision of spatial planning.⁴³

The significance of public participation is emphasized in Government Regulation Number 21 of 2021 on Spatial Planning Management (SPGR 2021), which is currently in force and does not conflict with JCL 2023. Article 16 of SPGR 2021 states that provincial spatial planning needs to be developed with public input.⁴⁴ Article 27 also underscored the importance of public participation, particularly in the development of an island or archipelago spatial planning.⁴⁵ Article 220 provides for the establishment of a dedicated monitoring mechanism in case of unusual circumstances resulting from public complaints or concerns about spatial planning governance. It is the first time such a mechanism has been set up and it stimulates certain events, examines their outcomes and future projections, and provides potential alternatives to address the situation.⁴⁶

As previously stated, MDAR 2019 includes regional government for involving the public in the development of regional spatial planning. Public input can be obtained

⁴² Article 60 SPL 2007 (amended version).

⁴³ Article 65 SPL 2007 (amended version).

⁴⁴ Article 16 Government Regulation Number 21 of 2021 on the Management of Spatial Planning (SPGR 2021).

⁴⁵ Article 21 SPGR 2021.

⁴⁶ Article 220 SPGR 2021.

through public consultation, public hearings, work visits, and seminars/workshops.⁴⁷ In the regional spatial planning, the public has 14 working days before the implementation date to offer any comments.⁴⁸ Furthermore, the government might host a meeting forum to discuss the findings of the regional spatial planning analysis.⁴⁹

The current JCL 2023 and SPGR 2021 have made some improvements by explicitly stating the importance of public participation in spatial planning. They have provided avenues for the public to voice their concerns about spatial planning and specific projects that can contradict them. However, as these regulations are relatively new, it is necessary to conduct further study to evaluate their implementation and enforcement in society, given the significant gap between the law in the book and the law in practice in Indonesia. Additionally, there are no clear provisions outlining legal consequences or penalties for failure to involve the public in spatial planning. Consequently, it can be challenging to avoid the typical Indonesian scenario where the government rigs procedures by only inviting members of the public who support their position. It is also unclear to whom the public can direct their complaints about spatial planning issues and which entity has the authority to address them.

C. Regulation of Public Participation in Spatial Planning in Australia

1. The Structure of Government in Australia

Australia's federal government is composed of three levels of political authority, namely the Commonwealth (national), state and territory, as well as municipal governments. When the country was founded in 1901, the Commonwealth Constitution created a separation of powers between the federal and state governments, and the Commonwealth was not granted extensive direct responsibility over natural resource governance, spatial planning, the environment, or land-use regulation.⁵⁰ Consequently, each state and territory has its own regulatory, legislative, and procedural frameworks to manage these issues.⁵¹ Some states have also passed their planning legislation,⁵² such as the Environmental and Planning Act of 1987 in Victoria⁵³ and the Environmental Planning and Assessment Act of 1979 in NSW.⁵⁴

⁴⁷ Article 5 MDAR 2019.

⁴⁸ Article 9 MDAR 2019.

⁴⁹ Article 11 MDAR 2019.

⁵⁰ Peter John Williams and Angelique Mary Williams, "Sustainability and Planning Law in Australia: Achievements and Challenges," 227.

⁵¹ Ed Wensing, "Indigenous Rights and Interests in Statutory and Strategic Land Use Planning: Some Recent Developments," *James Cook University Law Review* 24 (2018): 169, <https://doi.org/10.1080/07293682.2023.2216318>.

⁵² Libby Porter, "Indigenous People and the Miserable Failure of Australian Planning," *Planning Practice & Research* 32, no. 5 (2017): 556, <https://doi.org/10.1080/02697459.2017.1286885>.

⁵³ EPA VIC 1987.

⁵⁴ EPAA NSW 1979.

Planning decisions are typically made at the local government level, particularly with regard to development proposals. In fact, the majority of planning applications are submitted to and resolved by local governments rather than the states.⁵⁵ Strategic planning, on the other hand, often involves the identification of planned or future land uses and the implementation of legislative planning restrictions, hence, subject to more significant direction from state governments.⁵⁶

2. A Procedure of the Issuance of Planning Permits in Australia

Victoria's land use and development are governed under EPA VIC 1987, with each municipality having its planning system under local government. The planning scheme identifies if planning permission is needed for changes to land use, construction of buildings, or other modifications to the land.⁵⁷ Municipalities follow certain procedures to develop their planning scheme, including the submission of a planning proposal to the Commissioner of Public Works, who then receives a report from the Planning Board on the scheme. After considering the board's findings, the Governor in council can adopt the scheme, and once a notice of approval is published in the *Government Gazette*, the planning scheme comes into effect.⁵⁸

A planning scheme is a comprehensive document that typically includes maps depicting land zonings and overlays, ordinances defining land use rules for each zone and overlay, as well as state and municipal planning policies, such as a Municipal Strategic Statement. A zone is used to designate the principal use of a piece of land, such as industrial, rural, commercial, or residential, and to specify the allowable land use in that area. The land use restrictions for each zone are typically outlined in three sections: (1) the land uses that do not need permits, (2) the land uses that require permits, and (3) the land uses that are prohibited.⁵⁹ In addition, ordinances often include guidelines and specifications for construction, development, and subdivision.⁶⁰

A planning permit allows for the use or development of property to a certain purpose. However, it can be subject to conditions to ensure that the land is utilized or developed appropriately.⁶¹ Therefore, it is crucial for applicants to investigate the planning scheme before submitting their application.⁶² The second stage is to

⁵⁵ Paul Williams and Paul Maginn, "Planning and Governance," in *Planning Australia: An Overview of Urban and Regional Planning* (eds.) Susan Thompson & Paul Maginn (Port Melbourne: Cambridge University Press, 2012), 57. See also Khandakar Farid Uddin, Awais Piracha, "Urban Planning as a Game of Power: The Case of New South Wales (NSW) Australia," *Habitat International* 133, no. 102751 (2023): 1-8, <https://doi.org/10.1016/j.habitatint.2023.102751>.

⁵⁶ Peter John Williams and Angelique Mary Williams, "Sustainability and Planning Law in Australia: Achievements and Challenges," 227.

⁵⁷ Section 6 EPA VIC 1987.

⁵⁸ Murray Raff, "A History of Land Use Planning Legislation and Rights of Objection in Victoria," *Monash University Law Review* 22, no. 1 (1996): 91.

⁵⁹ Section 6 EPA VIC 1987.

⁶⁰ Section 6 EPA VIC 1987.

⁶¹ Section 47 EPA VIC 1987.

⁶² Section 49 EPA VIC 1987.

prepare and submit the application to the local council. After reviewing the application, the council can request further details or a referral if necessary. Once completed, the application is publicized for at least 14 days via methods such as a letter to the neighbors, signs on the property, and articles in the newspaper.⁶³ Council then evaluates the application, considers any objections, convenes a mediation meeting if necessary, and takes referral remarks into account.⁶⁴

After the public notice period is completed, the local council decides whether to grant permission, usually with certain limitations, or to deny the permit.⁶⁵ In case the planning application is denied, the applicant can file an application for review with the Victorian Civil and Administrative Tribunal (VCAT). Similarly, when the local council approves the application, an objector can also file an application for review with VCAT.⁶⁶

In NSW, there are nine different approval routes for planning, with the size and scope of the development determining the most appropriate ones. Small building works and modest home improvements, such as constructing a garage, balcony, platform, or garden shed, planning or building do not necessarily require approval routes for planning.⁶⁷ It is because these types of projects fall under exempt development, meaning no permit is required provided certain development criteria and site conditions are met. On the other hand, low-impact residential, commercial, and industrial projects that require planning clearance can be eligible for a fast-track approval process known as complying development.⁶⁸ In case the proposal meets particular criteria and land requirements, a Complying Development Certificate (CDC) can be obtained without the need for a complete development application through the local council or an authorized certifier.⁶⁹

On a broader scale, “regionally important development” encompasses projects with high investment value, wide scope, and significant complexity. These projects require evaluation by an impartial panel of experts, such as the Sydney District and Regional Planning Bodies, which act as independent panels, also called Planning Panels.⁷⁰ Specifically, Planning Panels are responsible for determining the approval or denial of regionally significant development applications. Some types of infrastructure are designated as having state importance (SSI) due to their size, economic worth, or prospective effect. SSI refers to major transportation and service improvements that have more significant relevance and influence than merely the

⁶³ Section 51 EPA VIC 1987.

⁶⁴ Section 56 EPA VIC 1987.

⁶⁵ Section 61 EPA VIC 1987.

⁶⁶ Section 77 EPA VIC 1987.

⁶⁷ Division 4.1 EPAA NSW 1979.

⁶⁸ Division 4.2 EPAA NSW 1979.

⁶⁹ The Government of New South Wales, “Planning”, accessed on October 17, 2022, <https://www.planning.nsw.gov.au/Assess-and-Regulate/Development-Assessment/Planning-Approval-Pathways>.

⁷⁰ Division 4.2 EPAA NSW 1979.

local area.⁷¹ Examples of SSI developments recognized by the government include rail and road infrastructure, water storage and treatment plants, as well as wharf and boating facilities. The State Minister for Planning approves SSI applications but is likely to delegate authority to top department executives to make several decisions.⁷²

3. How Public Has Been Involved in Spatial Planning in Australia

In 1987, the EPA VIC implemented significant requirements for proposed alterations to a planning scheme, particularly for amendments related to rezoning.⁷³ This meant that anyone could tender a submission, and if the concerns were unresolvable, the matter had to be sent to a planning panel for investigation and report.⁷⁴ Planning objectives and framework provided a solid foundation for discussing the merits of a project.⁷⁵ Moreover, the panel reports had to be made public, ensuring transparency in the process. Ultimately, the planning authority decided whether to implement the adjustment, but the process was straightforward and accessible to laypeople.⁷⁶ Additionally, anyone affected by the proposal was instructed to submit their objections to the Secretary of the Town and Country Planning Board or the relevant municipal clerk within three months of the notice being published in the *Government Gazette*.⁷⁷

Planning permit applications necessitated widespread notification of the proposal. It ensured that anyone adversely affected by the permit's approval could object. Section 60 of the Act required the relevant authority to examine any significant environmental consequences.⁷⁸ In case an individual filed a written objection, an appeal can be forwarded to the Administrative Appeals Tribunal (AAT).⁷⁹ Public participation in planning panels varies between states. In Victoria, the State Minister of Planning selects each panel in accordance with EPA VIC 1987.⁸⁰ These Planning Panels consist of six senior panel members and the chief panel.⁸¹ In contrast, NSW includes a representative of the local community as a member of planning panels.⁸²

These panels have multiple roles, including the nomination and operation of planning panels, advisory committees, ministerial advice regarding planning

⁷¹ EPAA NSW 1979 Division 4.7.

⁷² The Government of New South Wales.

⁷³ Section 19 EPA VIC 1987.

⁷⁴ Section 24 EPA VIC 1987.

⁷⁵ Section 26 EPA VIC 1987.

⁷⁶ Section 27 EPA VIC 1987.

⁷⁷ Murray Raff, "A History of Land Use Planning Legislation and Rights of Objection in Victoria," 94.

⁷⁸ Section 60 EPA VIC 1987.

⁷⁹ Murray Raff, 95.

⁸⁰ Peter Williams, "The 'Panelization' of Planning Decision-Making in Australia," *Planning Practice and Research* 29, no. 4 (2014): 426, <https://doi.org/10.1080/02697459.2014.893677>.

⁸¹ Section 153 EPA VIC 1987.

⁸² Section 2.18 EPAA NSW 1979.

approval, and environmental assessment queries.⁸³ The main purpose of the regulating body is to create a mechanism for public participation. It allows all applicants, including laypeople, to be heard in a neutral and informal setting.⁸⁴ In addition, planning panels provide an impartial evaluation of planning proposals by considering submissions, holding hearings, and creating reports.⁸⁵ Consequently, they ensure that all voices are heard and planning decisions are made objectively.

Regarding planning agreements, there are differences between Victoria and NSW. In Victoria, municipalities can enter into planning agreements with landowners, which outline any requirements or limitations on the utilization and development of the land or to achieve other planning goals.⁸⁶ On the other hand, in NSW, the focus is on the voluntary nature of this arrangement and the fact that it is made between a planning authority and a developer.⁸⁷ These agreements are essentially contracts that provide both parties with equal rights. The advantage of such an agreement is that it can be recorded on the title of the land, thereby binding any subsequent owners and occupants of such parcel of land.⁸⁸ Similar to a permit requirement or a municipal planning strategy, planning agreements are enforceable, making them a powerful and unique hybrid instrument. These agreements aimed to simplify the achievement of planning goals for a region or specific piece of land, which was probably not feasible when relying on existing legislative systems such as permit stipulations.⁸⁹

D. Developing Effective Public Participation Procedures: Lessons Learned from Australia

As societies change and become more complex in Indonesia, the inclusion of many voices and viewpoints in the processes that determine public policies and programs becomes increasingly important. Australia, a country noted for its dedication to democratic values, has experienced building effective public participation mechanisms. This part digs into the lessons learned from Australia's efforts to improve public participation. It investigates the techniques and approaches that have emerged as important instruments for engaging citizens in decision making processes, drawing on their own experiences.

1. The Comparison Between Indonesia and Australia

When comparing Indonesia and Australia, it is critical to understand the distinction between the Romano-Germanic and the Common Law Traditions. This distinction indicates how each country engaged the public in spatial planning governance. In the

⁸³ Peter Williams, "The 'Panelization' of Planning Decision-Making in Australia," 428.

⁸⁴ Section 160 EPA VIC 1987.

⁸⁵ Peter Williams.

⁸⁶ Section 173 EPA VIC 1987.

⁸⁷ Section 7.4 EPAA NSW 1979.

⁸⁸ Rebecca Leshinsky, "Use of Planning Agreements to Support Sustainability and Environmental Preservation: A Case Study from Victoria, Australia," 98.

⁸⁹ Rebecca Leshinsky, 99.

Romano-Germanic Tradition, which Indonesia primarily adopts, the rule of law is not simply a means of providing answers to actual circumstances. Instead, it has become elevated to a higher level through systematization, becoming a rule of behavior with a certain generality that extends beyond the implementations made by courts and practitioners.⁹⁰ Similarly, the notion of the *état de droit* or *rechtsstaat*, the legal state, contains a discernment of what constitutes the rule of law.⁹¹ The fundamental premise is that government and administrators execute powers subjected to legal authority.⁹² The concept of a hierarchy of norms is fundamental to the *état de droit*.⁹³ Therefore, the rule of law is interpreted within a firmly positivist structure, where the rule of law is upheld when behavior adheres to the (written) norms.

This perspective differs significantly from Dicey's common law interpretation of the rule of law (1959). In this context, the rule of law is of utmost importance in ensuring the protection of individual rights and the preservation of overall societal order.⁹⁴ In the common-law tradition, discretionary activities were often considered a virtue, as they allowed policies to be formulated and executed in a way that closely reflected local realities and objectives. However, the Romano-Germanic tradition viewed discretionary activity in a different light, with legal systems generally designed to curtail officials' and politicians' ability to exercise discretion in implementing their statutory duties.⁹⁵

The above distinction has a significant implication for public participation in spatial planning legislation, particularly in Australia, where discretionary power is commonly vested in planning-related authorities, such as planning panels and administrative tribunals. This arrangement is designed to ensure equal and impartial decision-making, with public participation taking on a substantial rather than a merely formal role.⁹⁶ For example, public members are entitled to submit objections to proposed amendments to a planning scheme, which need to be reviewed by a planning panel, with representatives from the local community sometimes included among its members.⁹⁷ Moreover, individuals who are adversely affected by a plan can submit written objections to the Civil and Administrative Tribunal and also appeal to the AAT if necessary.⁹⁸ Furthermore, planning authorities and public or landowners are permitted to enter into planning agreements in order to ensure that land use is

⁹⁰ Rene David and Jauffret-Spinosi, *Les Grands Systèmes du Droit Contemporain* (Paris: Dalloz, 1998), 87.

⁹¹ Albert Venn Dicey, *Introduction to the Study of the Law of the Constitution* (London: Macmillan 10th ed, 1959), 56.

⁹² Albert Venn Dicey, *Introduction to the Study of the Law of the Constitution*, 57.

⁹³ Albert Venn Dicey.

⁹⁴ Philip Booth, "Planning and the Rule of Law," *Planning Theory & Practice* 17, no. 3 (2016): 344, <https://doi.org/10.1080/14649357.2016.1183810>.

⁹⁵ Philip Booth, 345.

⁹⁶ Section 24 EPA VIC 1987.

⁹⁷ Section 2.18. EPAA NSW 1979.

⁹⁸ Murray Raff, "A History of Land Use Planning Legislation and Rights of Objection in Victoria," 96.

consistent with the existing plan. The content of these kinds of agreements can also cover other planning goals pertaining to the land.⁹⁹

On the other hand, Indonesia has taken a different approach by expressly regulating the role of public participation. The public can be involved in various stages of the planning process, such as the creation, implementation, and monitoring of spatial planning.¹⁰⁰ In cases where the application of the existing plan leads to losses, the public can receive appropriate compensation. The people can also file a request to oppose any development in their territory that conflicts with the spatial plan.¹⁰¹ However, the regulation does not provide detailed information on the transparency and openness of the decision-making process. Consequently, public participation remains more of a formal requirement than a substantial one.

2. The Establishment of Planning Panels

Indonesia can benefit from studying how Australia has accommodated the role of the public in spatial planning and needs to consider creating planning panels to achieve a positive outcome. To ensure impartiality and equal representation, these panels need to comprise members of the local community, representatives of the government, and planners. Similar to how it has been undertaken in Australia, planning panels can review any requests to revise spatial planning and decide whether the changes need to be implemented.¹⁰² Due to this decision-making process, the public has to be allowed to voice their opinions, especially those who object to the amendment of the spatial plan.

The semi-independent nature of planning panels suggests that they can be an effective tool for promoting justice and fairness in spatial planning. Currently, the decision to create these panels lies with the Minister of Agrarian and Spatial Planning, which is undoubtedly not an independent entity but rather a part of the government executing spatial planning authority in Indonesia. Moreover, these panels can also play a role in assessing mega-projects or regionally significant development, which have a significant effect on both the environment and society. This is particularly important, given that the government has previously amended spatial planning in haste to support such projects. For example, the government published *Masterplan Percepatan dan Perluasan Pembangunan Ekonomi Indonesia* (MP3EI, the Masterplan of Acceleration and Extension of the Development of the Indonesian Economy). This program aims to hasten and broaden Indonesia's economic growth over 15 years from 2011 to 2025.¹⁰³ The plan included specific

⁹⁹ Section 173 EPA VIC 1987.

¹⁰⁰ Article 65 SPL 2007 (amended version).

¹⁰¹ Article 60 SPL 2007 (amended version).

¹⁰² The Government of Victoria, "What is a Planning Panel", accessed on October 18, 2022, <https://www.planningpanels.vic.gov.au/guides-and-resources/what-is-a-planning-panel>.

¹⁰³ Presidential Regulation Number 32 of 2011 on the Masterplan of Acceleration and Extension the Development of Indonesian Economy 2011-2025 (MP3EI).

measures to amend spatial planning in order to facilitate infrastructure projects.¹⁰⁴ The introduction of planning panels ensures that the need to accelerate economic development is balanced with the need to protect the environment. The involvement of the public in the decision-making process is essential to achieve this goal.

3. The Creation of Planning Agreements

Considerations need to be given to the implementation of planning agreements between the government and the general public. For example, in Victoria, Australia, the EPA VIC 1987 permits local councils and landowners to negotiate agreements that dictate land use. These agreements can include provisions that restrict the division of land, require development in stages, or mandate the preservation of certain features of the area. Once agreed upon, the contract can be recorded on the land title, giving potential buyers or other interested parties the ability to review the agreement. It is worth noting that despite not being legally binding, these agreements can provide local governments with greater flexibility in land-use planning. When new owners purchase the land, they are still subject to the agreement's terms and conditions despite not being part of the original negotiation.¹⁰⁵

To enhance public participation in large-scale or mega-projects in Indonesia, the consideration of planning agreements can be beneficial as they have never been applied in Indonesia. These kinds of agreements will assist the government and the public in establishing a contractual relationship, specifically with the local community affected by the project. The agreement's primary objective is to ensure that the project does not negatively impact the lives of the local community. This agreement includes provisions that are not addressed by the current spatial laws and regulations, providing additional safeguards. Notably, this approach demonstrates the government's commitment to protecting the interests of the local community.

4. The Establishment Planning and Land-Use Tribunals

As discussed earlier, civil and administrative tribunals have been established in NSW and Victoria in order to resolve disputes related to planning. In case commercial projects clash with the current plan and harm the public, they can sue the government or investors. In addition, the general public can challenge a planning panel's decision in court, particularly when it comes to the amendment of spatial planning. Peradventure, if they are unsatisfied with the court's verdict, the public can appeal to the AAT.

¹⁰⁴ "Spatial Planning Regulations Revised to Accommodate Megaprojects," accessed on May 3, 2017, <http://www.thejakartapost.com/news/2017/05/03/spatial-planning-regulations-revised-to-accommodate-megaprojects.html>.

¹⁰⁵ The Government of Victoria, "Using Victorias Planning System," accessed on October 11, 2022, <https://www.planning.vic.gov.au/guide-home/using-victorias-planning-system>

Establishing a specific court to handle planning-related issues in Indonesia is quite challenging. However, considering the prevailing situation in land administration, this idea seems sensible. Conflicts over land, especially when it reaches a court, are complex and latent issues. They require resolutions. As the community's demand for land increases, such as for settlements, agriculture, plantation, mining, etc., the intensity of these conflicts is also increasing.¹⁰⁶ Unfortunately, the general court system is no longer equipped to handle land disputes due to the massive backlog of cases that have gone unresolved for years.¹⁰⁷ Recognizing this fact, the Coordinating Minister for Politics, Law, and Security suggested forming a special court to address disputes related to the land mafia, which are considered complex.¹⁰⁸ Upon implementation, the proposed plan for a special land court can also extend to cover planning-related issues.

E. Conclusion

Public participation is critical in spatial planning governance to ensure sustainable development. The Indonesian government has acknowledged this fact and has enacted spatial planning laws and regulations, such as SPL 1992, SPL 2007, JCL 2020, GRIL 2022, and the recently approved JCL 2023, emphasizing the importance of public involvement. However, the methods for incorporating the public have been criticized for lacking genuine participation, with opportunities only offered formally. On the other hand, the Australian government has actively involved the public in various aspects of planning, including the (1) development of a planning scheme, (2) issuance of planning licenses, (3) formation of planning panels, and (4) implementation of planning agreements.

It implies that Indonesia can look into Australia's approach and consider establishing planning panels in the regulation of spatial planning. Similar to how it has been done in Australia, planning panels can examine any proposals to amend spatial planning and determine whether the changes need to be agreed. Furthermore, planning agreements can be beneficial, especially for large-scale or mega projects that substantially impact the environment and the local community. This Agreement contains measures that provide extra protections and are not covered by the existing Spatial Planning Laws and Regulations. Finally, the idea of establishing planning and land-use courts in Indonesia is not far-fetched. Land disputes are difficult and lingering problems that need to be resolved through court.

¹⁰⁶ Hukum Online, "Urgensi Pengadilan Pertanahan Menurut Kajian MA," accessed on October 14, 2022, <https://www.hukumonline.com/berita/a/urgensi-pengadilan-pertanahan-menurut-kajian-ma-lt578aeb03d4514/>.

¹⁰⁷ Hukum Online, "Mendorong Kembali RUU Pertanahan Masuk Prolegnas," accessed on October 17, 2022, <https://www.hukumonline.com/berita/a/mendorong-kembali-ruu-pertanahan-masuk-prolegnas-lt637da12e8d51d/>.

¹⁰⁸ Kompas, "Mahfud Wacanakan Pengadilan Tanah Buat Tangani Sengketa akibat Mafia," accessed on October 16, 2022, <https://nasional.kompas.com/read/2023/01/20/17273341/mahfud-wacanakan-pengadilan-tanah-buat-tangani-sengketa-akibat-mafia>.

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