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Title:
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Date:
2019

Citation:
Biddulph, S. (2019). The Concept of Public Participation: Planning and Housing Resumption Decisions in Shanghai. Biddulph, S (Ed.). Biukovic, L (Ed.). Good Governance in Economic Development: International Norms and Chinese Perspectives, (1), pp.257-290. UBC Press.

Persistent Link:
<https://hdl.handle.net/11343/253901>

The Concept of Public Participation: Planning and Housing Resumption Decisions in Shanghai

Sarah Biddulph

Public Participation and Democratic Legitimation

Public participation has several layers of significance in terms of good governance. One layer is that it underpins democratic and legitimate decision making. In democratic systems of government, public participation in policy and lawmaking is one of the ways in which people participate in the development of the processes and laws by which they are governed. Through participation, policies, and the laws that result, are legitimated.¹ Another layer is that public participation enhances transparency and the reciprocity between those who govern and those who are governed and so contributes to improving the implementation of policies shaped by participatory processes. Transparency includes not only the right of citizens to access government information but also their right to have input into government decision making and for decision makers to consider public views when making decisions and formulating policies and laws.² Transparency, according to this version, underpins the capacity to hold government agencies to account.³ Even in the era of the administrative state, the ideals of transparency aim to make the state more responsive to the public in regard to democratically defined objectives.⁴ Thus, the legitimacy, transparency, and effectiveness of policy implementation are complementary and mutually reinforcing and deeply embedded in democratic forms of governance. However, as Ljiljana

This chapter examines public participation in government decision making in China. Despite superficial similarities to Archon Fung, Mary Graham, and David Weil's vision of an emerging form of consultative transparency (where the public is able to access information from the government, organizations, and other sources, combines that information independently of government intervention, and plays an active role in influencing policy formation), the role of public consultation in China is arguably much more constrained.⁶ When we seek to understand the role of, and possibilities for, public participation and transparency in authoritarian regimes such as China, we simply cannot assume that public participation, transparency, and democratic legitimation exist in the same relationship to each other. This chapter takes up the theme developed in this volume that domestic engagement and appropriation of international norms is an active (and recursive) process of appropriation and transformation. The relation between transparency and accountability has been explored in Chapters 7, 9, and 10 of this volume, where we embed our discussion in the social and political contexts in which they are given form. In the same way, our examination in this chapter proceeds by locating popular participation in its particular Chinese context and then asking about the functions served by public participation: Does public participation serve a legitimating function by making decision making more open and accountable to the public that is affected by that decision making; does it improve the efficiency and effectiveness of policy implementation; does it seek to identify problems and promote social order; or does it accomplish a mix of all of these functions? Our analysis takes account of who sets the consultation agenda, who can participate in relation to what issues, and whether the views expressed must be taken into account in decision making, among other questions.

This chapter adopts a narrow definition of public participation to include only those forms of consultation that are invited by agencies of the party state in their decision-making processes.⁷ Broader interpretations have included a wide range of interactions between citizen and state, including public protest and petitioning.⁸ While these forms of engagement put pressure on (primarily) local governments to respond, these forms of engagement are not always successful in providing information and views to government in ways that promote engagement rather than simple repression.⁹ Such a broad interpretation blurs the boundaries between participation and protest and is beyond the scope of this volume, which adopts a narrower focus. Official terminology to capture forms of public participation in decision, policy and lawmaking has changed over time and includes consultative dialogue (), public participation (), and consultative democracy (). As there is little to distinguish these terms, they are used interchangeably below.

The chapter starts with an overview of the expansion of public participation in different spheres of governance in China and analyzes its political significance and potential. Unlike the concept of transparency, the

⁶ Fung, Graham, and Weil, *supra* note 2, 151–54.

⁷ Stromseth, Malesky, and Gueorguiev provide a similarly narrow interpretation. See Jonathan R. Stromseth, Edmund J. Malesky, and Dimitar D. Gueorguiev, eds., *China's Governance Puzzle: Enabling Transparency and Participation in a Single-Party State* (Cambridge, UK: Cambridge University Press, 2017), 158–59.

⁸ See, for example, Wang Xixin and Zhang Yongle “The Rise of Participatory Governance in China: Empirical Models, Theoretical Frameworks, and Institutional Analysis,” *University of Pennsylvania Asian Law Review* 13, 1 (2018): 24–71; Tianjian Shi, *Political Participation in Beijing* (Cambridge, MA: Harvard University Press, 1997).

⁹ For a discussion of varying state responses to social action, see Sarah Biddulph, *The Stability Imperative: Human Rights and Law in China* (Vancouver: UBC Press, 2015).

introduction of which can be clearly traced to China's accession to the WTO, public participation in China today has both domestic and international roots. We might conceive of the introduction of international norms associated with public participation as being more like a graft than a transplant, with democratically focused participation grafted onto the existing ideology and practice of the Chinese Communist Party (CCP) and its engagement with the people through the mass line. As a result, we might expect to see a plurality of forms of participation, some of which may coincide with the forms and objectives of international norms of deliberative democracy and others that may diverge, with participation in some sectors and not in others.¹⁰ As Jonathan Stromseth, Edmund Malesky, and Dimitar Gueorguiev note, the party state has never intended to extend public consultation to all areas of policy formation, but it has been used to address specific challenges to governance in the reform era.¹¹

This chapter does not purport to survey all forms of public participation but, instead, after an overview, focuses on recent reform to include public consultation in urban development projects involving housing expropriation and compensation, using Shanghai as its case study. The choice of case study deliberately focuses on an area of local government activity that is politically sensitive and has been beset by massive social unrest – protest, demonstrations, and violence as well as claims of pervasive and severe corruption.¹² It is an area where local government has vested interests but is also under pressure because of social unrest. Thus, an examination of participation in an area of conflict between a state and its citizen helps to shed light on government objectives at the margins of its willingness to engage with its citizens.

The case study traces the path of urban development and housing demolition, the regulatory framework, and the practices prior to the major legislative reforms in 2011 that led to egregious abuses and major social disruption. It goes on to analyze the reforms to housing expropriation and compensation that were enacted in 2011 and to document the ways in which public participation was included at various stages of the planning and implementation processes. The main argument is that the party state has two sets of objectives in introducing reforms to provide for public consultation during the process of urban housing expropriation and compensation. The first is to reduce socially disruptive protest and to promote social order. The second is to confine the scope of complaints to claims about the quantum of compensation and to channel complaints into institutionalized dispute resolution channels and to divert conflict away from government decision making (to affected people fighting among themselves). It seeks, as an indirect consequence, to strengthen the credibility and legitimacy of official decision making as well as to improve its efficiency by forestalling public opposition and protest. As development decisions by local governments have been identified as one of the most fertile areas for corruption, increasing public participation and transparency in decision making in the context of the ongoing anti-corruption campaign is also a way to shield local decision makers from allegations of corruption and from the negative consequences of socially disruptive protest.

¹⁰ The idea of the graft bears some resemblance to Potter's description of the functioning of complementarity in his selective adaptation framework. See Pitman B. Potter, *Assessing Treaty Performance in China: Trade and Human Rights* (Vancouver: UBC Press, 2014), 11, 40.

¹¹ See Stromseth, Malesky, and Gueorguiev, *supra* note 7, 183

¹² Qiang Fu and Nan Lin, "Local State Marketism: An Institutional Analysis of China's Urban Housing and Land Market," *Chinese Sociological Review* 46, 1 (2013): 5–6; Wooyeal Paik, "Land Developers, States, and Collusive Clientelism in Marketizing China," *Pacific Focus* 29, 1 (2014): 69. Biddulph, *supra* note 9, 95–96.

Public Participation: An Evolving Practice in China

This section sketches out the development of approaches to public participation from the mid-1980s, when the need for reforms to implement the socialist market economy coalesced with international demands for governance reform as part of China's efforts to join the World Trade Organization (WTO). The economic reforms produced challenges in governance arising from the decentralization of responsibility for reform to the local levels as well as from the diversification of social and economic interests. The state and its citizenry have become much more plural. As a result, it has become more difficult for central authorities to obtain information, to control local agencies, and to garner support for policies. This transformation poses challenges to the CCP, which purports to both lead and reflect the interests of the people. It has drawn on its own ideological resources – socialist democracy – as well as adopting foreign forms to increase public participation in policy and lawmaking.

In 1978, Deng Xiaoping recognized that socialist democracy, in the form of democratic centralism, had emphasized centralism (the requirement that central decisions be implemented) and neglected or suppressed, to its detriment, democracy (hearing and engaging with popular views in the formation of policy).¹³ In 1978, he stated: “One thing a revolutionary party does need to worry about is its inability to hear the voice of the people. The thing to be feared most is silence.”¹⁴ Since then, public participation has been featured in major political speeches and framed as an element of socialist democracy. Far from being static, the scope and focus of public participation has evolved, first to expand, and later to retrench, certain aspects of participation and to embed participation as an aspect of the program of administration according to law.

From 1987, attempts to effect major political reforms to separate the CCP from government under the leadership of Zhao Ziyang included strengthening consultative dialogue.¹⁵ and government openness at the village level.¹⁶ While political reform fell into abeyance after the purge of Zhao Ziyang in 1989, policies to foster openness and consultation at the village level continued. Since 1997, these policies have received further impetus. Jiang Zemin's report at the fifteenth National Congress of the CCP in September 1997 called on the state to “implement openness in public administration and finances, allow the people to participate in, discuss and decide local level public affairs and public welfare measures and to implement democratic supervision over officials.”¹⁷ Socialist democracy at the grassroots level thus included government openness, consultation, and popular supervision.

¹³ For a discussion of democratic centralism and governance in China, see Sarah Biddulph, “Democratic Centralism and Administration in China,” in *Socialist Law in Socialist East Asia*, ed. Pip Nicholson, John Gillespie, and Fu Hualing (Cambridge, UK: Cambridge University Press, forthcoming), 195–223.

¹⁴ Deng Xiaoping, “Emancipate the Mind, Seek Truth from Facts and Unite as One in Looking to the Future,” in *Selected Works of Deng Xiaoping*, vol. 2 (Beijing: Foreign Languages Press, 1984).

¹⁵ Zhao Ziyang, “Report to the 13th National Party Congress in 1987,” *People's Daily Online* [*Renmin Wang*], October 25, 1987, <http://cpc.people.com.cn/GB/64162/64168/64566/65447/4526369.html> (in Chinese).

¹⁶ In 1987, the Village Committee Organisation Law of the People's Republic of China [Cunweihui Zuzhi Fa], October 28, 2010, introduced the notion of “openness in village affairs” ().

¹⁷ Jiang Zemin, “Report at the 15th National Party Congress,” September 12, 1997, <http://cpc.people.com.cn/GB/64162/64168/64568/65445/4526289.html> (in Chinese).

Subsequent formulations of socialist democracy have continued to be framed in terms of openness, consultation, and popular supervision and have expanded to embrace foreign terminology such as “transparency.”¹⁸ But these forms of participation have consistently been limited in scope and managed by agencies of the CCP and the state. At the sixteenth National Congress of the CCP in 2002, Jiang Zemin called for the party to improve the systems of socialist democracy to “develop diverse forms of democracy, expand citizens’ participation in political affairs *in an orderly way*, and ensure that the people go in for democratic elections and decision making, exercise democratic management and supervision according to law.”¹⁹ In this speech, Jiang also emphasized the need to improve decision making by obtaining a better understanding of the circumstances, preferences, and needs of the people.

Hu Jintao’s report to the seventeenth National Congress of the CCP in 2007 again called on the state to “increase transparency” and “expand public participation” in democratic decision making and, in principle, to hold public hearings “for the formulation of laws, regulations and policies that bear closely on the interests of the public.”²⁰ The broader ambit of openness in governance and public participation that was reflected in this speech demonstrates the expansion of government openness and public participation beyond local governance issues to governance and lawmaking more broadly under the rubric of administration according to law. This move was captured in State Council decisions to promote administration according to law in 1999 and in 2004.²¹ Administration according to law, according to these prescriptions, included requirements to make government information publicly available and to allow public participation in the exercise of administration where the interests of people are affected, public consultation in the formulation of administrative policies, and public participation in drafting laws, regulations, and rules.²²

¹⁸ On the origins of transparency in Chinese discourse see discussion in Chapters 1 and 7 of this volume.

¹⁹ Jiang Zemin, “Report at 16th National Party Congress on 8 November 2002,” Ministry of Foreign Affairs of the People’s Republic of China, November 18, 2002, accessed May 5, 2018, http://www.fmprc.gov.cn/mfa_eng/topics_665678/3698_665962/t18872.shtml (emphasis added). It continues: “Part V Political Development and Restructuring Point 4 – Reform and improve the decision-making mechanism. Correct decision-making is an important prerequisite for success in all work. We will improve the decision-making mechanism by which decision-makers will go deep among the people and get to know how they are faring, reflect their will, pool their wisdom and value their resources, putting decision-making on a more scientific and democratic basis. Decision-making organs at all levels should improve the rules and procedures for taking major policy decisions, establish a system of reporting social conditions and public opinion, a system of keeping the public informed and a system of public hearings on major issues closely related to the interests of the people, perfect the expert consulting system and implement a verification system and a responsibility system in making policy decisions with a view to preventing arbitrary decision-making.”

²⁰ Hu Jintao, “Report at the 17th National Party Congress, 15 October 2007,” *Qiushi Journal* (September 30, 2011), part 6, “Unswervingly Developing Socialist Democracy,” https://www.eapasi.com/uploads/5/5/8/6/55860615/full_text_of_hu_jintaos_report_at_17th_party_congress___qiushi_journal.pdf.

²¹ Decision on Comprehensively Carrying Forward Administration According to Law [Guowuyuan, Guanyu Quanmian Tuijin Yifa Xingzheng de Jueding], State Council, November 1999; Outline on Comprehensively Carrying Forward the Implementation of Administration According to Law [Guowuyuan Guanyu Quanmian Tuijin Yifa Xingzheng Shishi Gangyao de Tongzhi], State Council, August 31, 2004 (Outline on Administration According to Law).

²² Outline on Administration According to Law, *supra* note 21, points 5, 11, 16.

The Opinion on Comprehensively Promoting Open Government Work, issued jointly by the General Office of the Central Committee of the CCP and General Office of the State Council on February 17, 2016, identifies the strengthening of public participation as a core element in improving government transparency.²³ Most recently, in September 2017, the third plenary session of the eighteenth Central Committee meeting resolved to “promote a wide, multi-tiered and institutionalized consultative democracy” (*xieshang minzhu*) as part of its mass line policies.²⁴ These forms of direct public participation in various aspects of the government’s business have continued, even in the face of the increasingly centralized control of governance and the crackdown on civil society and public intellectuals under Xi Jinping.²⁵ Scholars, including He Baogang and colleagues, have documented the growth of increasingly varied forms of public participation in government policy and decision making, including: participation in budgetary decision making;²⁶ deliberative polling (selecting citizens to participate in discussions and decisions about certain policy questions);²⁷ and public recommendations on, and the selection of, local officials.²⁸

While many forms of democratic consultation and public participation remain focused on local and rural governance issues, they have expanded beyond the purely local in several spheres. Public consultation in urban housing expropriation, discussed in more detail later in this chapter, is also mandated nationally by a State Council administrative regulation from 2011. Public hearings have been mandated in advance of administrative decisions affecting the interests of individuals and entities under the 1996 Administrative Punishment Law²⁹ and the 2003 Administrative License Law.³⁰ Public hearings are now also increasingly held as part of policy making and legislative-drafting processes.³¹ A related development is the right given to citizens to obtain

²³ Opinion on Comprehensively Promoting Open Government Work [Guanyu Qianmian Tuijin Zhengwu Gongkai Gongzuo de Yijian], General Office of the Central Committee of the CCP and General Office of the State Council, February 17, 2016, accessed September 22, 2017, http://www.gov.cn/xinwen/2016-02/17/content_5042791.htm (in Chinese).

²⁴ Decision of the CCCPC on Some Major Issues Concerning Comprehensively Deepening the Reform, China.org.cn, point 28, accessed September 21, 2017, http://www.china.org.cn/chinese/2014-01/17/content_31226494_8.htm. http://english.court.gov.cn/2015-10/08/content_22130532.htm.

²⁵ Baogang He and Mark E. Warren, “Authoritarian Deliberation in China,” *Daedalus* 146, 3 (2017): 155–66.

²⁶ Baogang He, “Civic Engagement through Participatory Budgeting in China: Three Different Logics at Work,” *Public Administration and Development* 31 (2011): 122–33.

²⁷ James S. Fishkin et al., “Notes and Comments: Deliberative Democracy in an Unlikely Place: Deliberative Polling in China,” *British Journal of Political Science* 40, 2 (2010): 435–48.

²⁸ Baogang He and Stig Thøgersen, “Giving the People a Voice? Experiments with Consultative Authoritarian Institutions in China,” *Journal of Contemporary China* 19, 66 (2010): 675–92.

²⁹ Administrative Punishment Law of the People’s Republic of China [Zhonghua Renmin Gongheguo Xingzheng Chufa Fa], National People’s Congress (NPC) Standing Committee, March 17, 1996 (effective on October 1, 1996, as amended on August 27, 2009).

³⁰ Administrative License Law of the People’s Republic of China [Zhonghua Renmin Gongheguo Xingzheng Xuke Fa], NPC Standing Committee, August 27, 2003 (effective on July 1, 2004).

³¹ See Hunan Administrative Procedure Regulations [Hunansheng Xingzheng Chengxu Guiding], April 9, 2008, accessed at <http://www.waizi.org.cn/policy/30562.html>. More recent reforms are discussed in Jamie P. Horsley, “Public Participation in the People’s Republic: Developing a More Participatory Governance Model in China,” September 2009,

information held by the government and its departments under the 2007 Open Government Information Regulations.³² These regulations place the onus on local governments and government departments to proactively make information available and give citizens information that is necessary for effective participation in consultative processes. This latter requirement has resulted in massive amounts of information being placed on a range of government websites and in citizens filing administrative suits to seek the release of government-held information. Transparency, accountability, and, arguably, participation mechanisms have also been enhanced by administrative litigation and review, under which an affected individual or entity can challenge the lawfulness (administrative litigation) and the appropriateness of government decision making (administrative review).³³ While China's performance is by no means perfect, the change over the last twenty years has been dramatic.³⁴

While subsumed within the rhetoric of socialist democracy, many of the forms of consultation have been borrowed from international practice or adopted in response to WTO accession requirements. Forms of deliberative democracy have been introduced from Europe and Latin America.³⁵ Participatory budgeting, for example, originated in Brazil and was later imported for use in China.³⁶ In the negotiations leading up to, and following, the accession to the WTO, China has progressively introduced and then expanded provisions for public consultation on draft legislation, shaped by "notice-and-comment" provisions from US administrative law.³⁷ The heavy emphasis on "notice-and-comment" requirements in drafting laws and regulations reflects the distinctively US approach to administrative law that is embodied in article X of the General Agreement on Tariffs and Trade (GATT).³⁸

An early example of consultation in government decision making is the Price Law, which was adopted on December 29, 1997, to effect price reform and implement market reforms.³⁹ It contains a provision requiring consultation with consumers, business operators, and other entities before setting government-mandated and guidance pricing catalogues (article 22). As discussed in more detail in the chapter by Sarah Biddulph and Wang

https://law.yale.edu/system/files/documents/pdf/Intellectual_Life/CL-PP-PP_in_the_PRC_FINAL_91609.pdf.

³² Regulations on Open Government Information of the People's Republic of China [Zhonghua Renmin Gongheguo Zhengfu Xinxi Gongkai Tiaoli], State Council, April 5, 2007 (effective May 1, 2008).

³³ Discussed in more detail in the chapter by Biddulph and Wang in this volume (Chapter 7).

³⁴ See, for example, Shelly Zhao, "China's Mixed Transparency Record," *China Business Review*, July 1, 2012, <https://www.chinabusinessreview.com/chinas-mixed-transparency-record/>.

³⁵ Stromseth, Malesky, and Gueorguiev, *supra* note 7, 166; see also discussion by Biddulph and Wang in this volume (Chapter 7).

³⁶ Baogang He, "Civic Engagement through Participatory Budgeting in China: Three Different Logics at Work," *Public Administration and Development* 31, 2 (2011): 122.

³⁷ See Jamie P. Horsley, "China Implements More Participatory Rulemaking under Communist Party," *Brookings*, March 15, 2018, <https://www.brookings.edu/opinions/china-implements-more-participatory-rulemaking-under-communist-party/> (discussing reforms to expand public consultation in drafting regulations and rules as "notice and comment" provisions).

³⁸ Sylvia Ostry, "China and the WTO: The Transparency Issue," *University of California Los Angeles (UCLA) Journal of International Law and Foreign Affairs* 3, 1 (1998): 5; discussion by Biddulph and Wang in this volume (Chapter 7). General Agreement on Tariffs and Trade, April 15, 1994, 1867 UNTS 187.

³⁹ Price Law of the People's Republic of China [Zhonghua Renmin Gongheguo Jiage Fa], December 29, 1997 (effective on January 5, 1998).

Haifeng in this volume (Chapter 7), public consultation in legislative drafting was mandated in the 2000 Legislation Law (as amended in 2015) and has been expanded since that time.⁴⁰

Forms of deliberation and participation are readily understood as supporting popular democracy by providing institutional bases for popular participation in government. The question that follows is whether the adoption of these forms of consultation (both foreign in origin and local) might facilitate broader political reforms. Wang Xixin and Zhang Yongle argue that the earlier systems of managed participation (top-down and driven by the CCP's state bureaucracy) are being, or should be, replaced by more participatory forms of consultation (bottom-up and driven by popular interests and concerns). While they do not go so far as to argue that this change will lead to reforms in the political system, they do trace a trajectory of greater popular autonomy and agency in engagements with official decision making.⁴¹

He Baogang and his colleagues do not see a clear line between the adoption of these mechanisms and greater political democracy. They argue that popular participation is not inevitably an indication of an embrace of a more participatory form of political democracy. These authors hypothesize that in an authoritarian system such as China consultation is designed to resolve functional problems of governance. Consultation, they point out, is bounded. The party state and its agents retain control of the scope and agendas of consultation: who participates; how they participate; the framing of issues that are open for discussion; the level of governance (usually local); and the geographical limits of the matters under discussion. With market reforms and the pluralization of interests and society, governance has become much more complex and difficult. They posit several reasons why political elites might chose consultation and deliberation as strategies to address these complexities, which include co-opting dissent and maintaining social order; obtaining information about society; providing fora for the exchange of economic information; protecting officials from charges of corruption; deflecting responsibility for losses and difficulties onto processes and away from individuals; and improving the legitimacy of decision making.⁴² Stromseth, Malesky, and Gueorguiev argue that public consultation in an authoritarian regime such as China serves very important functions of legitimating policy choices and improving policy implementation, in that, having consulted on the formation of policy, officials are under a greater obligation to implement the policies and decisions reached through that process.⁴³

Stromseth, Malesky, and Gueorguiev's judgment that democratic consultation and public participation have limited democratic potential is supported by an analysis of the ideological basis upon which democratic consultation rests. As the brief genealogy of public participation in political discourse in the reform era set out earlier shows, the expansion from rural local governance to governance according to law and, within that, the promotion of consultative democracy, is driven by an overall commitment to promote socialist democracy. That is, this consultative democracy serves democratic centralism and the mass line under the leadership of the CCP. The mass line requires that the CCP both lead and serve the interests of the people.⁴⁴ It is a way of ensuring that

⁴⁰ Legislation Law of the People's Republic of China [Zhonghua Renmin Gongheguo Lifa Fa], March 15, 2000 (effective July 1, 2000), China.org.cn, <http://www.china.org.cn/english/government/207420.htm>. See Horsley, *supra* note 37.

⁴¹ Wang and Zhang, *supra* note 8, 24–71.

⁴² He and Warren, *supra* note 25.

⁴³ See Stromseth, Malesky, and Gueorguiev, *supra* note 7, 163–64, 194.

⁴⁴ Opinion on Strengthening the Construction of Socialist Consultative Democracy" [Zhonggong Zhongyang Yinfa 'Guanyu Jiaqiang Shehui Zhuyi Xieshang Minzhu Jianshe de Yijian

the Party maintains close links with, and responds to, the concerns of the people. The mass line remains a key priority in governance today and operates by gathering popular views to feed into the CCP's decision-making processes and then propagating decisions back to the people in the form of Party policies, laws, and priorities. While it requires the Party to listen to popular views, decision makers are not required to follow, or even take account of, those views in decision making.⁴⁵ The mass line is not designed as a mechanism to reflect the popular will as much as it is a mechanism to shape it.⁴⁶ The mass line enables consultation to serve as a mechanism for strengthening the CCP's leadership and its legitimacy and for enhancing implementation rather than strengthening the rights and agency of individuals in relation to the state.⁴⁷ The case study analyzed below not only provides an opportunity for a detailed consideration of the objectives of public participation but also provides some insight into the political limits to reform through the expansion of participatory processes.

Evolution of Public Participation in Urban Renewal and Planning: A Brief Look at the History of Urban Housing Expropriation

Regulatory Framework

Before the mid-1980s, there was no housing market in China. Although private ownership of land and buildings existed prior to 1949, the CCP instituted progressive waves of land reform that dramatically impinged upon the private ownership of land, though these reforms did not entirely eradicate private ownership of housing in urban areas.⁴⁸ The 1982 Constitution, enacted after the adoption of the policy of economic reform, bifurcated the systems of ownership of urban and rural land. It provided that rural land was owned by the collective and that urban land was owned by the state (article 10).⁴⁹ Prior to this, it had been unclear whether building owners also owned the land upon which their buildings stood. This constitutional provision made it clear that they did not.

In urban areas, an amendment to article 10 of the Constitution in 1988 retained state ownership but allowed for "land use rights" to be acquired and privately held.⁵⁰ This legal separation of ownership and land

], Central Committee, February 9, 2015, accessed September 21, 2017, http://www.gov.cn/xinwen/2015-02/09/content_2816784.htm (Opinion on Consultative Democracy).

⁴⁵ Stephen C. Angle, "Decent Democratic Centralism," *Political Theory* 33, 4 (2005): 518–46.

⁴⁶ Zedong Mao, "Some Questions Concerning Methods of Leadership, 1 June 1943," in *Selected Works of Mao Tse-Tung*, vol. 3 (Beijing: Foreign Languages Press, 1967), 119; Roderick MacFarquhar and John K. Fairbank, *The People's Republic, Part 2: Revolutions within the Chinese Revolution 1966–1982*, vol. 15: *Cambridge History of China* (Cambridge, UK: Cambridge University Press, 1991), 3.

⁴⁷ The Opinion on Consultative Democracy, *supra* note 44, point 2.4, reiterates that leadership of the Chinese Communist Party is the premise for consultative democracy.

⁴⁸ Katherine Wilhelm, "Rethinking Property Rights in Urban China," *UCLA Journal of International Law and Foreign Affairs* 9, 2 (2004): 227–300.

⁴⁹ Constitution of the People's Republic of China [Zhonghua Renmin Gongheguo Xianfa], December 4, 1982 (as amended in 1988, 1993, 1999, and 2004) (PRC Constitution).

⁵⁰ In urban areas, land use rights could be either allocated (which cannot be transferred or sold) or granted (which can be transferred, sold, or mortgaged). Allocated land use rights may be converted into granted land use rights upon payment of a fee. Granted land use rights must be held for commercial use of land and are acquired from the local government's land bureau. NPC Standing Committee Law of the People's Republic of China on the Administration of Urban Real Estate

use in urban areas enabled local governments to establish land and housing markets and to engage in urban planning...⁵¹ Issuing land use rights to developers became both a source of revenue for local governments as well as a source of financing for urban reconstruction. Both the specific use of the land and the duration of the rights were specified by contract between the local government and the purchaser of the land use rights, obliging their holders to use the land in the manner specified. For the most part, holders of land use rights are required to develop the land, and, as a consequence, are required to acquire any buildings already existing on the land.

These reforms created the possibility of three different types of interest coexisting in the same geographical space: the state as owner of the land; an entity as holder of the land use rights; and the owner of the building physically situated upon the land. Even though it is clear that the owners of buildings cannot be the owner of the land, the law has remained unclear about whether they hold some type of land use right by virtue of their ownership of the building. While the law clearly protects private property, including houses, it remains silent about what, if any, land use rights flow from housing ownership...⁵² This issue seems to have been resolved in the negative for practical purposes where housing is to be expropriated and demolished. The 2001 State Council's Urban Housing Regulations (now superseded, as discussed further below) merely provided that compensation was payable with respect to housing that had been expropriated but was silent as to the compensation in regard to land use rights...⁵³ If the local government transferred land use rights to an entity for development, home owners were entitled to receive compensation for their housing but not for their land use rights. Nor were they able to prevent the development going ahead, as is also the case in many jurisdictions throughout the world...⁵⁴ In fact, there was no positive obligation on the local government even to notify residents that it proposed to grant land use rights over land on which their houses were located until after the demolition permit had been granted...⁵⁵ Housing owners (and tenants) were thus the subjects of housing demolition and entitled to compensation for their housing, but they were not empowered in any meaningful sense to participate in the planning or development processes or even to be notified of them in advance.

Since the home owners had no say in decisions to grant land use rights, or development and demolition permits, what protections did the law give them with respect to building expropriation? Since 1982, legal promises to protect private property rights, both moveable and immovable, have been progressively strengthened. Further amendments to the Constitution in 2004 promised protection for lawfully held private

[Zhonghua Reminin Gongheguo Chengshi Fangdichan Guanli Fa
], July 5, 1994 (effective January 1, 1995).

⁵¹ Wilhelm, *supra* note 48, 243–45; Frank Xianfeng Huang, “The Path to Clarity: Development of Property Rights in China,” *Columbia Journal of Asian Law* 17, 2 (2003): 202.

⁵² PRC Constitution, *supra* note 49, art. 13; General Provisions of the Civil Law [Zhonghua Renmin Gongheguo Minfa Zongze], March 15, 2017 (effective October 1, 2017), art. 3, provides that “the personal rights, property rights and other lawful rights and interests of parties to civil legal relations shall be protected by law.”

⁵³ Regulations on Management of Demolition of Urban Housing [Chengshi Fangwu Caiqian Guanli Tiaoli], State Council, June 13, 2001 (Urban Housing Regulations).

⁵⁴ *Ibid.*; Detailed Implementing Regulations on the Management of the Demolition of Urban Housing, [Shanghai Shi Chengshi Fangwu Chaiqian Guanli Shishi Xize], Shanghai Municipal Government, October 29, 2001 (Shanghai Housing Regulations).

⁵⁵ Urban Housing Regulations, *supra* note 53, art. 8 requires that a public notice of housing demolition and relocation be made at the time the housing demolition and relocation permit is issued.

property (article 13), promises that were repeated in the Property Rights Law in 2007.⁵⁶ and in the General Provisions of the Civil Law in 2017.⁵⁷ The Constitution and laws such as the Property Rights Law specify limitations for the expropriation or requisition of land and private property conducted in the “public interest,” and they require that compensation be paid.⁵⁸ However, these key protections have been given substantive form very gradually. Prior to 2011, there was no clear definition of the scope of public interest, and the calculation of the amount of compensation was not clearly required to be at fair market value. Moreover, the law provided little by way of effective recourse for unlawful and abusive conduct. These lacunae contributed to practices that were unfair and abusive, that enabled the corrupt and powerful to remove people from their housing without adequate or timely compensation, and that led to massive social disruption and protest. These abuses ultimately led to the reform of the legal framework for the expropriation of urban housing that is discussed in the next section. But, first, a brief description of the processes for expropriation, demolition, and compensation under the regime that preceded the 2011 reforms gives some sense of the difficulties facing residents when confronted with expropriation and the deficiencies in the law that contributed to that difficulty.

Under the regulatory system that was in place prior to 2011, a developer would acquire land use rights from the Land Administration Department of the local government and then receive demolition and development permits issued by the local government’s demolition office. In addition to the fee for the land use rights, a sum was allocated to compensate and relocate residents of the premises that were to be demolished.⁵⁹ The developer would then usually appoint a housing demolition and relocation company, which would be responsible for negotiating the removal of residents and carrying out the demolition. Since this was usually a fixed fee contract, the demolition and relocation company had strong incentives to minimize the amount paid to the residents.⁶⁰ The valuation of the location and buildings was conducted by a licensed appraisal company, which was appointed by the developer.⁶¹ While the law contemplated compensation in the form of both money and/or substitute housing, monetary compensation has become the preferred method of recompense since 2001.

Those individuals subject to eviction were disadvantaged in negotiating compensation in at least three ways. The first was that the value of their property was not clearly market price. Value was calculated according to a formula including the location, district, use, and the construction area of the property with reference to the

⁵⁶ Property Rights Law of the People’s Republic of China [Zhonghua Renmin Gongheguo Wuquan Fa], March 16, 2007 (effective October 1, 2007) (Property Rights Law).

⁵⁷ General Provisions of the Civil Law, *supra* note 52, art. 117 also requires “fair and reasonable compensation be paid if any immovable or movable property is expropriated or requisitioned in the public interest within the legally prescribed scope of authority and according to legally prescribed procedures.”

⁵⁸ PRC Constitution, *supra* note 49, art. 10 authorizes the state to “expropriate land for its use and to pay compensation in accordance with law.” Art. 13 enables the state, in the public interest, to expropriate or requisition private property of citizens and pay compensation in accordance with the law. These requirements extend to both expropriation, which involves a transfer of ownership (*zhengshou*), and expropriation that involves a change of use without a change of ownership (*zhengyong*). The Property Rights Law, *supra* note 56, art. 42 also requires that expropriation of residential premises may only be in the public interest and that compensation as provided by law must be paid.

⁵⁹ Urban Housing Regulations, *supra* note 53, arts. 3–4(1).

⁶⁰ *Ibid.*; Shanghai Housing Regulations, *supra* note 54.

⁶¹ Wilhelm, *supra* note 48, 268.

previous year's market price. Since many houses were in poor repair, there was not necessarily a market for them, and, in any case, the valuation was depressed. This factor, coupled with rapid market inflation, resulted in a low valuation.⁶² The second was that the owners could not prevent the eventual demolition of their home, and so their bargaining position was weakened. The third was that monetary compensation was often insufficient for them to purchase similar accommodation in the same area, and such compensation was often not paid in a timely manner.

On its face, the process of demolition and relocation appears legally to be a civil relationship between a citizen and private entities (the developer and the demolition and relocation company acting on its behalf). The appraisal of the value of the property also appears on the face of the law to be at arms length. But, in practice, the local government was deeply implicated in the whole process of demolition and redevelopment. At the outset, the Land Administration Department of the local government negotiated the fee, which included the granted land use right and compensation for the affected homeowners and tenants. The demolition and relocation company and the appraisal company in each local government district were licensed by the local government. In practice, only one of them was able to obtain a license in each district, requiring close connections with the local government to obtain a licence, thereby creating a local monopoly. For local governments, transferring land use rights became an important source, if not the main source, of revenue and so led to systemic corruption and the abuse of power.⁶³ Property developers (in some circumstances, a corporate offshoot of the local government) also profited enormously in a rapidly rising property market, to the point that a co-dependent relationship grew between the local government and property developers.⁶⁴ Citizens rightly saw the hand of local government in every stage of the demolition and relocation work.

The nominally civil nature of the relationship also undermined the capacity of owners and occupiers to seek redress for grievances. If the parties could not reach an agreement on price (no legal relationship existed between the parties prior to concluding a compensation and relocation agreement), the aggrieved party was authorized to submit the dispute to the local Land Administration Department within the local government. The department could then appoint an assessment committee to determine the value of the property.⁶⁵ However the value would be based on the appraised value and was often less than the amount offered. After providing a determination, if the owner remained aggrieved, they could commence administrative litigation against the administrative determination of the appraised value.⁶⁶ But the scope of the possible claim was very narrow and

⁶² Haiyan Wang, "The Voluntary Group of Shanghai Lawyers and Deficiencies in the Law Relating to Demolition and Relocation," *Soufan.com*, October 8, 2003, <http://news.soufun.com/2003-10-08/202592.htm>.

⁶³ Fu and Lin, *supra* note 12, 5-6; Paik, *supra* note 12, 69.

⁶⁴ Wooyeal Paik and Kihyun Lee, "I Want To Be Expropriated!: The Politics of *xiaochanquanfang* Land Development in Suburban China," *Journal of Contemporary China* 21, 74 (2012): 262.

⁶⁵ Guiding Opinion on the Appraisal of the Price of Urban Housing for Demolition [Jianshe Bu Chengshi Fangwu Caiqian Gujia Zhidao Yijian], Ministry of Construction, December 1 2003, art. 3(2) (Guiding Opinion on Housing); Regulation on the Work of Urban Housing Demolition and Relocation Administrative Rulings [Jianshe Bu Chengshi Fangwu Caiqian Xingzheng Caijue Gongzuo Guiding], Ministry of Construction, December 30, 2003, art. 4.

⁶⁶ Urban Housing Regulations, *supra* note 53, art. 16(2); Shanghai Housing Regulations, *supra* note 54, art. 24.

focused on whether the determination of the appraised value was lawful. Other issues such as the appropriateness of the price or the appropriateness or lawfulness of the development approval could not be subject to scrutiny in administrative cases before the courts. Demolition was not postponed while the case was being heard..⁶⁷

Housing Demolition in Shanghai

Prior to 2001, the focus of housing demolition in Shanghai was on urban renewal and on rebuilding dilapidated housing..⁶⁸ After the administration of land was devolved to local governments, however, the focus of development gradually changed to the more profitable sphere of commercial development. Opposition to housing expropriation for these purposes increased dramatically. Homeowners and tenants no longer benefited from the redevelopment as developers built high-end commercial and apartment buildings in their old neighbourhoods. With the dramatic escalation of housing prices, many were forced to the outskirts of Shanghai, where public goods and infrastructure were being poorly developed at that time..⁶⁹

Adding to their grievance were the violent and unfair tactics often used by employees of the demolition and relocation companies or people acting at their behest. In order to move people quickly, they often promised a premium to people moving early. However, problems arose with those who refused to move since delays in starting construction were very costly for the developer. A number of tactics were used to deal with these “hard nail” households. One was to give them a premium to move. This was often achieved by entering into two contracts, called *yin/yang* contracts. The first was the “*yang*” contract that was public and set out the same calculation of price as for other residents. The second was the “*yin*” contract, which was a secret contract, in which the preferential terms were set out. Although the *yin* contract was supposed to be secret, this approach did not remain secret for long and had the perverse effect of arousing fury in those being cheated. It encouraged people to believe that the process was inherently unfair, that it favoured the strong over the weak, and that only the “hard nail” households would receive decent compensation..⁷⁰ The other strategy to remove residents who were unwilling to move out of their houses was to use violent and coercive tactics, including breaking windows,

⁶⁷ Response to a Request for Instructions on the Issue That the People’s Courts Should Not Accept Cases where Parties Seek to Commence Civil Litigation where They Cannot Reach an Agreement for Compensation and Relocation in respect of Housing Demolition, Supreme People’s Court, August 2005; Shanghai Housing Regulations, *supra* note 54, art. 26; Wilhelm, *supra* note 48, 281.

⁶⁸ James Lee, “From Welfare Housing to Home Ownership: The Dilemma of China’s Housing Reform,” *Housing Studies* 15, 1 (2000): 65; Valerie Laurans, “Shanghai: Modern Conveniences as an Argument for Displacing Residents: The Case of Jianyeli, a Pilot Rejuvenation Project,” *China Perspectives* 58 (March-April 2005): 1–16.

⁶⁹ Biddulph, *supra* note 13, 94–96; Shaoming Ren, “Conflicts over Forcible Housing Demolition and Relocation Have Become the Focus in Recent Times Economy,” *Economy* (2003): 27; Youqi Shi, “A Discussion of Urban Housing Demolition and Relocation and the Protection of Privately-Owned Property Rights,” *Journal of the Zhongnan University of Economics and Law* 6 (2006): 9–12; Yaping Wang and Alan Murie, *Housing Policy and Practice in China* (Basingstoke, UK: Macmillan, 1999), 407.

⁷⁰ Sarah Biddulph, “Justice and Order in Shanghai: The Case of Forced Housing Demolition and Relocation,” in *21st Century China: Views from Australia*, ed. Mary Farquhar (Cambridge, UK: Cambridge Scholars Press, 2009), 54–76.

cutting off electricity, telephone, and gas connections, assaulting family members, kidnapping residents, and even arson.⁷¹

Unsurprisingly, the lack of transparency and fairness in the process of negotiating the terms of compensation and relocation, and the virtual lack of any viable channel for legal recourse, resulted in major disruption in the social order, with many people taking their grievances directly to Beijing.⁷² However, large numbers of petitioners from Shanghai travelling to Beijing to seek redress reflected badly on the Shanghai municipal government, which responded by stationing officers in Beijing to intercept and return petitioners as they arrived. Not only were the aggrieved homeowners and tenants who were petitioning Beijing punished. Even lawyers who took on the cases on their behalf were punished. Zeng Enchong was one well known lawyer who suffered criminal conviction, three years' imprisonment for his advocacy work and then house arrest after his release Zheng Enchong.⁷³

The level of social disruption and protest escalated to the point that the State Council and the Ministry of Construction issued instructions in 2003 and 2004 to municipal governments demanding that they address the problems of violence in the process of housing demolition, that they deal with socially disruptive protests, and that they adjust measures for the appraisal of the value of buildings.⁷⁴ The Shanghai municipal government responded by introducing reforms under the moniker of the "Sunshine Policy."⁷⁵ It required that commercial developments be scaled back and that future developments be in the public interest (which was as yet undefined). In addition to rectifying some of the substantive problems, such as the unavailability of reasonably priced housing, this policy emphasized the need to ensure that housing demolition and relocation was conducted in an "open, just and equal" manner (point 1). Openness and transparency were to be promoted by requiring development projects be publicly announced prior to approval. Instructions were given that grievance letters and

⁷¹ Human Rights Watch, "Demolished: Forced Evictions and the Tenants' Rights Movement in China," *Human Rights Watch Report* 16, 4C (March 2004): 9–11; Biddulph, *supra* note 70; Eva Pils, "Land Disputes, Rights Assertion, and Social Unrest in China: A Case from Sichuan," *Columbia Journal of Asian Law* 19, 1 (2005): 235–92; Eva Pils, "Resisting Dignity Takings," *Law and Social Inquiry* 41, 4 (2016): 888–916.

⁷² In 2004, nearly 90 percent of all petitioners in Beijing were people from Shanghai complaining about housing demolition.

⁷³ Yingfang Chen, "Investigation into Channels for the Expressions by Poor Groups of Their Interests," *Strategy and Management* 6 (2003): 87–92; Human Rights Watch, *supra* note 71; Wilhelm, *supra* note 48, 281–86.

⁷⁴ Urgent Notice on Doing a Good Job of Demolition and Relocation Work in Cities and Towns and Protecting Social Stability [Guowuyuan Bangongting Guanyu Renzheng Zuohao Chengzhen Fangwu Caiqian Gongzuo Weihu Shehui Wending de Jinji Tongzhi

], General Office of the State Council, 2003; Notice on Controlling the Scope of Housing Demolition and Relocation in Cities and Towns and Tightening Up Demolition and Relocation Management [Guowuyuan Bangongting Guanyu Kongzhi Chengzhen Fangwu Caiqian Guimo, Yange Caiqian Guanli de Tongzhi

], General Office of the State Council, June 2004; Guiding Opinion on Housing, *supra* note 65, art. 7.

⁷⁵ Notice on Further Strengthening the Management of Residential Demolition and Relocation [Shanghai Shi Renmin Zhengfu Guanyu JInyibu Jiaqiang Fangwu CaiqianGuanli Gongzuo de Tongzhi], Shanghai Municipal Government, March 7, 2005.

petitions to government were not to be ignored and that the municipality was to establish a complaints and supervision system.⁷⁶

As Table 8.1 shows, the peak in the demolition and relocation of residential property, not only for urban renewal but also for commercial development, which was the cause of large-scale social disruption, was 2003. It was followed by another smaller peak in 2005 and 2006 while construction of the Shanghai Expo site was underway. During the construction of the Shanghai Expo site, the Shanghai municipal government issued instructions that demolition should be conducted in a way that paid attention to fairness and openness in terms of substantial compensation and the procedures for negotiating the removal and compensation of residents. But, after the Shanghai Expo-related demolition, the amount of housing expropriation in Shanghai has decreased progressively, which suggests that, apart from the change in the government's approach to housing demolition, the other factor at play in reducing conflict in Shanghai has been the significant decrease in the amount of demolition.

Table 8.1
Housing relocation situation in Shanghai, 1995–2013

Year	Total number of buildings demolished	Number of residences demolished	Total demolition area (square metres)	Demolition area of residences (square metres)
1995	75,777	73,695	3.2 million	2.5 million
1996	89,132	86,481	3.4 million	2.6 million
1997	79,857	77,388	4.8 million	3.6 million
1998	78,205	75,157	4.5 million	3.4 million
1999	75,185	73,709	3.4 million	2.5 million
2000	70,606	68,293	3.6 million	2.9 million
2001	73,728	71,909	5.2 million	3.9 million
2002	101,097	98,714	6.4 million	4.9 million
2003	80,858	79,077	5.8 million	4.8 million
2004	42,415	41,552	3.0 million	2.3 million
2005	75,857	74,483	12.2 million	8.5 million
2006	81,126	76,874	15.2 million	8.5 million
2007	51,354	49,092	8.3 million	3.9 million
2008	53,583	51,288	10.3 million	7.5 million
2009	68,286	65,439	9.3 million	6.1 million
2010	39,721	38,441	5.9 million	3.9 million
2011	23,112	22,349	3.2 million	1.8 million
2012	21,910	21,262	2.2 million	1.3 million
2013	30,921	30,322	1.6 million	1.2 million
2014	26,799	26,334	1.2 million	0.9 million

⁷⁶ Biddulph, *supra* note 70.

2015	23,062	22,801	0.8 million	0.6 million
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Note: The statistics in this table relate to ten central urban districts.

Source: Shanghai Bureau of Statistics, <http://www.stats-sh.gov.cn/html/sjfb/tjnj/>, <http://www.stats-sh.gov.cn/tjnj/nj16.htm?d1=2016tjnj/C1804.htm>.

2011 Regulations on the Expropriation of Buildings on State-Owned Land and Compensation

What was intended to be a decisive change in the regulatory framework for housing demolition and relocation was instituted in the Regulations on the Expropriation of Buildings on State-owned Land and Compensation, which were adopted by the State Council on January 19, 2011 (Regulations on Expropriation).⁷⁷ The Shanghai municipality passed the Detailed Implementing Rules on the Expropriation of Buildings on State-owned Land and Compensation in Shanghai to implement the Regulations on Expropriation on October 19, 2011 (Shanghai Implementing Rules).⁷⁸ The Regulations on Expropriation provide that the responsibility for organizing and implementing expropriation and compensation work is the building expropriation department within the municipal government (article 4). In Shanghai, this is the Shanghai Municipal Housing Security and Administration Department (Housing Department). The following discussion of the law focuses on the rules for urban renewal projects and the expropriation and demolition of dilapidated urban housing.

The Regulations on Expropriation changed the terminology from demolition (*chaiqian*) to expropriation (*zhengshou*) in order to strengthen the perception that it is a legally bounded process and to demonstrate that the regulated conduct is government led.⁷⁹ Article 3 sets out the basic principles for carrying out expropriation and compensation work as “democratic decision making, procedural justice and open results.” These principles build upon the reforms implemented since the mid-2000s to implement the “sunshine policy” discussed earlier in regard to housing expropriation and demolition. The features of the new regulatory regime include providing a clear definition of the “public interest” so as to constrain the scope of permissible expropriation, increasing obligations for public consultation during the processes of planning, specifying that compensation should not fall below the market price on the date when the building expropriation is announced (article 19), implementing expropriation compensation, and increasing opportunities for affected citizens to challenge decision making through administrative review and litigation.

Definition of the Public Interest

⁷⁷ Regulation on the Expropriation of Buildings on State-owned Land and Compensation [Guoyou Tudi Shang Fangwu Zhengshou yu Buchang Tiaoli], State Council, January 19, 2011 (Regulations on Expropriation); Regulations on Management of Demolition of Urban Housing [Chengshi Fangwu Caiqian Guanli Tiaoli], State Council, June 13, 2001, which were abolished and replaced by the Regulations on Expropriation, art. 35. Discussed in detail in Biddulph, *supra* note 9, 92–96.

⁷⁸ Detailed Implementing Rules on the Expropriation of Buildings on State-owned Land and Compensation in Shanghai [Guoyou Tudi Shang Fangwu Zhengshou yu Buchang Shishi Xize], Shanghai Municipal Government, October 19, 2011 (Shanghai Implementing Rules).

⁷⁹ Wujin Liu, “Interpreting the ‘Regulations on the Expropriation of Buildings on State-Owned Land and Compensation’,” *Government Legal System* 7 (2011): 18–19.

The Regulations on Expropriation limit the scope of expropriation to projects made in the public interest (article 8). They specify a list of items, which is rather expansive, that fall within the scope of “public interest,” including defence, energy, and other public infrastructure such as schools, environmental protection, and disaster mitigation. Public interest projects also include government-organized construction of social security housing (article 8 [4]) and rebuilding urban areas where there is a “high concentration of dilapidated buildings and infrastructure lags behind” (article 8[5]). Framed thus, there remains space for commercial development in these areas. This is not an exhaustive list as there is provision for expropriation that is “necessary for any other public interest as prescribed by law or administrative regulation” (article 8[6]). This provision, though, is not completely open-ended since it requires legislation or an administrative regulation to authorize the expropriation rather than just a local government decision.

Procedures and Public Consultation

The Regulations on Expropriation provide for public consultation at several stages in the formation and implementation of decisions to expropriate urban housing for urban renewal projects. The first is at the planning stage. The Regulations on Expropriation require that all proposed projects be in accordance with the annual plan for economic and social development of the municipality.⁸⁰ The construction of social security housing and urban renewal projects are required to be included in the annual social and economic plans of both the municipal and district governments.⁸¹ The Regulations on Expropriation then go on to impose a requirement in principle that public opinion be solicited with respect to social and economic plans, overall land use, urban and rural plans, and other specialist plans.⁸² However, the nature and extent of public consultation prior to the adoption of the annual social and economic plan is unspecified. The common procedure involves the following steps: preparation of a draft by the municipal Development and Reform Commission; review by the municipal government; review by the Committee of Budget and Economics of the Municipal People’s Congress; and, finally, review and approval by the Shanghai People’s Congress.

The Shanghai Implementing Rules then go on to require that the draft expropriation and compensation plan drawn up by the housing department be reported to the municipal government, which is then required to publicize the draft plan and allow a period of at least thirty days to solicit public opinions.⁸³ According to the Regulations on Expropriation, the municipal or district government is required to publish the opinions provided and state the ways in which these opinions have been taken into account in revising the expropriation and compensation plan.⁸⁴ If the plan relates to the renewal of dilapidated urban areas and the majority of local residents consider that the expropriation and compensation plan is not in accordance with the Regulations on Expropriation, a hearing attended by owners and representatives of the public shall be organized.⁸⁵

In Shanghai, the scope of expropriation of dilapidated housing (for urban renewal) is to be determined by the Construction Department together with housing, development, and reform, planning and land, and

⁸⁰ Regulations on Expropriation, *supra* note 77, art. 9.

⁸¹ Shanghai Implementing Rules, *supra* note 78, art. 9.

⁸² Regulations on Expropriation, *supra* note 77, art. 9.

⁸³ Shanghai Implementing Rules, *supra* note 78, art. 10.

⁸⁴ Regulations on Expropriation, *supra* note 77, art. 11.

⁸⁵ *Ibid.*

finance departments, as well as the local government concerned.⁸⁶ While the manner and scope of public consultation with respect to expropriation and compensation plans is left open in the national regulations, the scope of consultation in the Shanghai Implementing Rules is more targeted. They provide that, after the scope of expropriation for urban reconstruction has been determined, the Housing Department is responsible for conducting public consultation among the affected residents. Accordingly, at least 90 percent of the affected residents (including property owners and tenants of publicly owned housing) must approve the project for it to go ahead.⁸⁷ Obtaining approval of the requisite number of individuals should be accomplished by surveying all affected residents and asking whether the residents want the plan for urban renewal to proceed. Thus, the first phase of consultation is a threshold question of whether the redevelopment will proceed or not.

The Regulations on Expropriation (which the Shanghai Implementing Rules replicate) set out the basic principle that compensation is to be determined based on the market value of the property at the time the expropriation and compensation decision is made,⁸⁸ with adjustments also possible for items including relocation costs and the disruption of business.⁸⁹ Market value is to be assessed by a nominated real estate evaluator appointed by the affected residents and must be paid prior to demolition.⁹⁰ The appointment of the evaluator by affected residents and owners reverses the previous practice, which saw the evaluator appointed by the developer. If dissatisfied with the valuation, residents can ask for a reappraisal and then appeal to an expert committee. The mode of assessment of the value of the properties to be expropriated is to be determined by the responsible administrative department, which is required to solicit public opinion in the process of formulating assessment criteria.⁹¹

In Shanghai, there are very detailed provisions specifying the contents of the expropriation and compensation plan to be submitted to the district government by the Housing Department. Items to be included include the legal basis for expropriation; the purpose; the scope of expropriation; the methods for verifying the size of expropriated housing; the mode, standard, and methods of calculation of compensation; the standards for subsidy and rewards (for agreeing to leave the property early); the circumstances for title swap and determining the modes of purchase; the procedure for selecting real estate valuation agencies; the time limit for signing individual compensation agreements; the time limit for relocation; the period of transition; and the name of the housing expropriation agency conducting the expropriation.⁹² The calculation of subsidies and compensation are prescribed in detail in articles 27–31 of the Shanghai Implementing Rules.

The expropriation and compensation plan is to be made public and open for public comment for at least thirty days and a report prepared on how these opinions have been reflected in amendments to the plan.⁹³ Where the expropriation is for urban reconstruction, the local government is also required to organize a public hearing to be attended by representatives of the affected parties.⁹⁴ Following these stages, the district

⁸⁶ Shanghai Implementing Rules, *supra* note 78, art. 10.

⁸⁷ *Ibid.*, art. 12.

⁸⁸ Regulations on Expropriation, *supra* note 77, art. 19.

⁸⁹ *Ibid.*, art. 17.

⁹⁰ *Ibid.*, arts. 20, 27.

⁹¹ *Ibid.*, art. 19.

⁹² Shanghai Implementing Rules, *supra* note 78, art. 15.

⁹³ *Ibid.*, arts. 15, 16.

⁹⁴ *Ibid.*, art. 15.

government will then make an expropriation decision.⁹⁵ The decision must then be announced publicly along with the compensation plan and rights to challenge the expropriation decision either through administrative review or administrative litigation.⁹⁶

The Housing Department is required to survey affected housing to determine the size, ownership or use rights, location, and uses of the property as the basis for determining the amount of compensation.⁹⁷ Affected tenants and owners are prohibited from making any changes to their property after the scope of expropriation has been fixed, such as building new additions or changing the use of the property in the hope of increasing the property valuation.⁹⁸ The Housing Department then publicizes the survey information by placing it online.⁹⁹ All affected residents have access to the expropriation and compensation plan, which includes principles and standards for compensation as well as the results of the Housing Department's survey that determines the compensable size of all affected properties. The result is that compensation negotiations are structured and constrained by the standards for compensation already approved and by the survey results of the property. By placing all of the survey results online, each affected resident can see and comment on the calculations for compensation for themselves and for every other affected resident. This transparent approach marks a decisive departure from the previous practice of negotiating a compensation package individually and secretly with each property owner. It is a strategy that seeks to eliminate the problem of the yin/yang contract (discussed above), which has resulted in residents who have accepted relocation packages early being compensated less than the "hard nail" households who were able to negotiate a higher compensation. It seeks as well to eliminate perceptions that more beneficial, secret deals can be entered into by some at the expense of others. Finally, this approach acts as a self-regulatory mechanism that can pit residents against each other since affected residents can compare their treatment and can complain if they consider that the survey calculation or compensation agreement for one residence is unfair. It provides a convenient way to deflect anger away from the government agencies involved onto other residents.

The Regulations on Expropriation provide that compensation agreements are to be negotiated between the department in charge of expropriation and demolition and the owner.¹⁰⁰ The expropriation and compensation plan sets out the time limit for signing compensation agreements. The Shanghai Implementing Rules require that, in the case of urban renewal projects, at least 80 percent of contracts be concluded within the designated time, otherwise the expropriation plan will not proceed.¹⁰¹ Thus, there is an added incentive for affected parties (and the possibility of social pressure on those reluctant to move) to conclude agreements in a timely manner if they are not to prejudice the entire redevelopment project. Additional incentives to sign within the prescribed time limit take the form of monetary rewards or receiving the first choice of alternative housing. Where a compensation agreement cannot be reached, the matter can be referred to the local government, which is required to make a "fair" determination.¹⁰² Detailed provisions for the calculation of price, subsidies, and the

⁹⁵ *Ibid.*, art. 19.

⁹⁶ *Ibid.*, art. 20.

⁹⁷ *Ibid.*, art. 13.

⁹⁸ *Ibid.*, art. 11.

⁹⁹ *Ibid.*, art. 13.

¹⁰⁰ Regulations on Expropriation, *supra* note 77, art. 25.

¹⁰¹ Shanghai Implementing Rules, *supra* note 78, art. 21.

¹⁰² Regulations on Expropriation, *supra* note 77, art. 26; Shanghai Implementing Rules, *supra* note 78, art. 42.

size of the property in the Shanghai Implementing Rules limits the scope of administrative discretion. Such specificity also defines the factors that determine whether a decision is appropriate (administrative review) or lawful (administrative review and litigation) and, thus, also shapes the outcome of any appeal against the amount of compensation.

Risk Management

Before a development project can be approved, the Regulations on Expropriation require that the local government at either the municipal or county (district) level carry out a social stability risk assessment.¹⁰³ Where the expropriation involves a large number of owners, the expropriation decision shall be made at a higher administrative level than normal – namely, at the executive meeting of government. This provision also requires that the money earmarked for compensation be paid into a special purpose account prior to a decision on expropriation being made. This positive assertion of responsibility illustrates the significance of the problems it seeks to address – that is, the risk to social stability of projects involving large-scale housing demolition and the severity of problems that arise when funds for payment of compensation are not immediately available. The Shanghai municipality has issued a number of documents that illustrate the centrality of social order risk assessments in all decision making. Since 2011, major construction projects, especially those that involve large-scale expropriation of land or housing must first undergo a social stability risk assessment. Depending on the outcome, they may not be approved or, if already underway, may have approval suspended, pending the identified issues being addressed. Some projects that have not passed the social stability risk assessment have had their implementation suspended.¹⁰⁴

An example is the Shanghai municipal government’s Work Rules, which **provide that, when requesting the Shanghai government to approve a major project, each department (or, where the project involves several departments, then all in consultation), must provide an evaluation of its lawfulness, necessity, scientific basis, feasibility, and controllability after seeking the opinion of the relevant district government.**¹⁰⁵ **A social stability risk assessment must be conducted for those projects that may give rise to problems of social stability and, “where necessary[,], the views of the public may be obtained through methods including publicity and public hearings.”**¹⁰⁶ **The risk to social security of large-scale development projects that involve extensive housing expropriation and demolition is identified as one of the core areas of concern and attention in government planning and decision making.**

Administrative Review and Litigation

Courts hear and determine claims in relation to expropriation and compensation in four main areas. The first is where a person is dissatisfied with the expropriation decision, alleging, for example, that the mandated procedures were not followed or that the expropriation is not in the public interest. The purpose of such an

¹⁰³ Regulations on Expropriation, *supra* note 77, art. 12.

¹⁰⁴ “Gongbo Jian 7 Projects That Have Not Passed the Guidelines for Social Security Risk Assessment for Major Projects Have Already Been Suspended,” *Jiefang Daily*, June 24, 2011, <http://jfdaily.eastday.com/j/20110624/u1a894670.html> (in Chinese).

¹⁰⁵ Work Rules [Shanghai Shi Renmin Zhengfu Gongzuo Guize], Shanghai Municipal Government, May 17, 2013, **art. 21.**

¹⁰⁶ *Ibid.*, art. 21.

administrative suit is to allege that the expropriation decision is unlawful.¹⁰⁷ The second circumstance is where the agency responsible for the detailed work of expropriation and compensation (the Housing Department or its agent) and the party whose property is to be expropriated have reached a compensation agreement, and one party does not perform the agreement. In this case, the other party can commence proceedings to enforce the agreement.¹⁰⁸ The third situation is where the parties cannot reach agreement, and the matter is referred by the Housing Department to the local government, which then makes an expropriation decision. If the affected party is dissatisfied with the amount of compensation set out in the decision, he or she may commence administrative litigation.¹⁰⁹ The Administrative Litigation Law, revised in 2014 and again in 2017, affirms the capacity of a complainant to bring an administrative litigation claim in regard to a decision on expropriation or requisition and a decision in relation to compensation for expropriation or requisition.¹¹⁰ A party may commence administrative review instead of administrative litigation if dissatisfied with an expropriation decision or with a compensation decision made by the local government in the absence of an agreement between the parties.¹¹¹

Finally, where an expropriation decision has been made and the owner neither commences administrative review or litigation, nor vacates the premises, the local government may apply to the court for an order to enforce the expropriation decision.¹¹² Further detailed regulations were passed in 2012 to specify the procedures, including a hearing for obtaining an expropriation decision from the local government where a compensation agreement cannot be reached. After obtaining an expropriation decision, the regulations go on to specify procedures for applying to the court for compulsory enforcement of the decision. They also provide that the local government is responsible for implementing the court's compulsory enforcement decision.¹¹³

Practical Factors and Limits on Reforms

Maybe more significant has been the change in the ways these housing expropriation projects are funded. It is now common practice that the local government responsible for acquisition and redevelopment funds the project. This model contrasts with earlier models where the developer was granted development rights and funded the project. In theory, local governments now have less incentive (in the form of kickbacks from the developer) to push through projects. The Regulations on Expropriation provide that the designated building

¹⁰⁷ Regulations on Expropriation, *supra* note 77, art. 14; Shanghai Implementing Rules, *supra* note 78, art. 22.

¹⁰⁸ Shanghai Implementing Rules, *supra* note 78, art. 40.

¹⁰⁹ Regulations on Expropriation, *supra* note 77, art. 26; Shanghai Implementing Rules, *supra* note 78, art. 42.

¹¹⁰ Administrative Litigation Law of the People's Republic of China [Zhonghua Renmin Gongheguo Xingzheng Susong Fa _____], April 4, 1989 (effective October 1, 1990, as amended November 1, 2014, and June 27, 2017, with amendments to take effect from July 1, 2017), art. 12(5).

¹¹¹ Shanghai Implementing Rules, *supra* note 78, arts. 22, 24.

¹¹² Regulations on Expropriation, *supra* note 77, art. 28; Shanghai Implementing Rules, *supra* note 78, art. 43.

¹¹³ Notice on Approving and Transmitting the Provisions of Shanghai Municipality on Compensation Decisions for Housing Expropriation on State-owned Land Made by the Municipal Housing Security and Administration Bureau in English], Shanghai Municipal Government, August 8, 2012, art. 9. access April 10, 2019

<http://www.shanghai.gov.cn/shanghai/node27118/node27386/node27408/n30601/n31186/u26ai35511.html>

expropriation department (the Housing Department) is responsible for overseeing the project, and even though it contracts out the specific work of negotiating and carrying out expropriation and compensation, this entity is not permitted to operate for profit. The Housing Department, as the agency responsible for overseeing the project, remains liable for the consequences of the actions of the agency conducting the expropriation...¹¹⁴ In fact, anecdotal accounts suggest that local governments are more inclined to see these redevelopment projects as pure work, without many incentives flowing back to the local government.

In Shanghai, the municipal government makes financial provision for a certain amount of redevelopment work each year, which is allocated to the different local governments within the Shanghai municipality. As a result of budgeting processes, the funding allocation for each project is subject to a time limit. If the allocated money is not spent within the time limit, then it must be returned. Thus, the linear manner in which the legislation envisages processes for planning, consultation, approval, and then implementation of housing redevelopment projects sits in tension with the time limits imposed on the financing of projects. Prior to the Regulations on Expropriation, it was not uncommon for local governments to start processes of expropriation of land and housing, both of rural and urban land, before approval for the project had been obtained. The practical problem of balancing procedural propriety and budgetary time limits has not been resolved...¹¹⁵

An important shortfall in these regulations is that they do not, and cannot, address other extremely serious problems involving housing and land expropriation in peri-urban rural areas. In large cities such as Shanghai, urban creep has swallowed large swathes of land that were previously categorized as rural. This process has accelerated as the subway system has expanded outwards in all directions. The Regulations on Expropriation apply only to housing on state-owned land – that is, urban housing. Since land on the suburban fringe of large cities such as Shanghai is commonly still classified as rural land, this land is collectively owned and regulated by a different statutory regime. Houses on rural land, while, in theory, owned by individual farmers, are vulnerable when the land on which they sit is converted into state-owned land and made available for development and construction. Even though they are entitled to receive compensation, under the Land Management Law, the value of their land is calculated by reference to the value of agricultural production and so is significantly lower than state-owned land...¹¹⁶ <auth: Source in this footnote is missing a Chinese title (pinyin & characters) and date of issue.> It is notorious that farmers are not the people who are benefiting from the massive changes in land and housing values that are occurring when land is converted from being collectively owned to state owned and then transferred for construction purposes. Problems arise in relation to rural land when the collective owners, often without the consent of those holding rights to use the land, convert

¹¹⁴ Regulations on Expropriation, *supra* note 77, art. 5.

¹¹⁵ Qun An, Yang An, and Min Du, “Contemporary Theoretical Reflection and Perfecting the Path for Expropriation of Collectively Owned Rural Land,” *Theoretical Construction* 5 (2012): 27–32. Jie Cheng “Procedural Anomie and Reconstruction in Land Expropriation and Requisition,” *Studies of Law* 1 (2006): 62–78. Shujuan Wang, “A Functionalist Perspective on China’s Land Expropriation Procedures and Their Perfection,” *Fujian Forum: Humanities and Social Sciences Edition* 8 (2014): 17–23.

¹¹⁶ Land Management Law of the People’s Republic of China [Zhonghua Renmin Gongheguo Tudi Guanli Fa Standing Committee of the National People’s Congress, August 28, 2004, art. 47.

the land so that it can be sold to developers for development...¹¹⁷ In these situations, farmers have little redress. They certainly do not enjoy the rights to be consulted or to challenge decisions to dispose of the land by the collective owner.

Conclusion: Public Participation and Risk Management

Without doubt, the Regulations on Expropriation represent a dramatic shift in the regulation of urban housing expropriation. These regulations introduce elements of public consultation into all stages of the process of urban housing expropriation from the planning stage, through the formulation of expropriation plans, to the valuation and calculation of compensation for expropriated housing. They create both an obligation on the local government to consult and a reciprocal right of affected citizens to be consulted. They also improve transparency in the sense of enabling those affected to be informed about development and expropriation plans as well as introducing a requirement that the outcome of public consultation be reported back. The regulations also clearly specify the availability of formal mechanisms for challenging planning and expropriation decisions through administrative litigation and review. But, at present, it would be difficult to conclude that a truly collaborative form of transparency has been enacted. For collaborative transparency in the sense described by Fung, Graham, and Weil, not only are the government and related enterprises obliged to provide information, but citizens are also provided an opportunity to investigate and obtain information and initiate actions for information disclosure in a way that enables them to contribute to policy formation and implementation...¹¹⁸ The processes of public consultation described in this chapter provide no evidence that the processes of urban planning and redevelopment are enabling substantial public input or even that they are taking account of popular views in practice (except perhaps to veto an unpopular housing redevelopment project).

The description of the processes of consultation as they are implemented in Shanghai suggests that they are targeted and managed, in that those directly affected are consulted and only on a narrowly defined set of issues. The two rounds of consultation address the threshold question of whether to proceed with the redevelopment project and then the quantum of compensation. Benjamin van Rooij and his research team have examined a related phenomenon in their study of local activism in a community in Yunnan. There, activists were seeking to redress problems of environmental pollution. They found that a combination of the power of the local government working together with polluting industries, coupled with their capacity to shape conceptual frameworks for understanding the nature of the harm suffered as well as the possibilities for redress, effectively reduced claims to monetary compensation. Even though they might have sought pollution prevention, abatement, or remediation, they did not pursue those broader, and, arguably, more appropriate, remedies because of the ways in which their understanding of the nature of the problem and the possible remedies had been structured and limited...¹¹⁹ So too in the case of housing expropriation where the primary claim reasonably

¹¹⁷ An example of this was in Wukan, Guangdong Province, discussed in Hualing Fu, "What Does Wukan Offer? Land-Taking, Law, and Dispute Resolution," in *Resolving Land Disputes in East Asia: Exploring the Limits of Law*, ed. Hualing Fu and John Gillespie (Cambridge, UK: Cambridge University Press, 2014), 173–93.

¹¹⁸ Fung, Graham, and Weil, *supra* note 2, 153.

¹¹⁹ Benjamin van Rooij et al., "Activist Acquiescence: Power, Pollution and Access to Justice in a Chinese Village," *Social Science Research Network*, 2014, 1–23, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2406219.

left after consultation has been completed relates to the calculation of compensation (in money or in kind). Thus, this regulatory regime leverages the legitimating impact of public consultation but, ultimately, does so in a way that does not leave state agencies susceptible to broad policy-based demands or preferences.

Another important driver of the new approach to regulation in this area is risk management. As discussed in this chapter, housing demolition practices prior to reform led to severe problems of social unrest, violence against homeowners, and unfair and deceptive practices and fostered rampant corruption. As a result, the risk of mass incidents involving large numbers of people in public protests and large-scale petitioning were of particular concern to both local and central authorities as they raised questions about social but also political stability. As discussed in this chapter, the Regulations on Expropriation impose explicit requirements for governments to carry out a social stability risk assessment prior to making any decision on expropriation.¹²⁰ The requirement to carry out a social stability risk assessment prior to the approval of a development project involving large-scale, or potentially controversial, housing expropriation, is a direct response to the massive social disruption that arose because of the lack of transparency and accountability in both the decision making and implementation of demolition decisions.¹²¹ This case study also points to a conclusion that the expansion of participatory processes, in this area at least, provides little evidence for their transformative potential and strong evidence that participation serves to bolster the managerial system of governance currently in place.

Notes

[<insert notes here>](#)

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¹²⁰ Regulations on Expropriation, *supra* note 77, art. 12.

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<the following is an unnumbered note to appear before the numbered notes for Chapter 9>

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