Nagoya University

Graduate School of Law

PUBLIC PARTICIPATION INSTITUTIONS IN CHINESE ADMINISTRATIVE LAW: LESSONS FROM JAPANESE EXPERIENCE

Student ID: 430904118

Doctoral candidate student: Beibei Qian

Main academic supervisor: Prof. Katsuya Ichihashi

Sub-supervisors: Prof. Kenji Kamino

Assoc. prof. Kazumasa Inaba

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Content

TABLES

Table Page

PUBLIC PARTICIPATION INSTITUTIONS IN CHINESE ADMINISTRATIVE LAW: LESSONS FROM JAPANESE EXPERIENCE

Introduction

As a state transitioning from planned economy to market economy, every step in the political reform deserves deep investigation. Lacking of a participatory democratic culture, China after a long stagnation in the political reform since 1989, at last carefully opened the first valve up in recent years—introduction of public participation into administrative law. Given the status quo of unclear separation between politics and administration in China, This introduction could be regarded as a pioneer of political reform.

In traditional Chinese culture, "listening to public opinions" is always a governing way for showing benevolence of the governor,[1] Communist Party also stresses the "mass line" working methods.[2] But these conceptions are lacking institutional support. The rulers can maneuver everything concerning listening to public opinions like whether to listen, how to listen, how to deal with these opinions and etc., without institutional constraints. Introduction of public participation into legal system is a latest phenomenon. In such a process, administrative law as the main actual public law in China has been regarded as the main experimental fields. Within the legal aids from various developed countries, USA played a major role in the establishment of public participation institutions in Chinese administrative law. Professor Jeffery S. Lubbers once described in detail how he, Yale

[1] For example, in *Shangshu·Taishizhong*, there is a sentence like this "Tianshi ziwo Minshi, Tianting ziwo Minting," which means what the public see is what the God sees and what the public hear is what the God hears. This sentence is always used for teaching the governor to listen to public opinions and follow public opinions.

[2] Zedong Mao, "Guanyu Lingdao fangfa de Ruogan Wenti[Some Problems concerning Leading Methods]," in *Mao Zedong Xuanji [Selected Works of Mao Zedong]* 3, (Beijing: People's Publishing House, 1991), 897-902.

University China Law Centre and Asia Foundation (funded by USAID) focused on helping China go toward a more open and participatory process both in administrative rulemaking and major administrative decision-making.[3] Administrative rulemaking and significant administrative decision-making are also two fields where this thesis will study on public participation institutions. Hence, the "public participation" in this thesis refers to public involvement in those two main administrative processes. According to North, "Institutions are the rules of the game in a society" and they "include any form of constraint that human beings devise to shape human interaction" regardless of whether they are formal or informal.[4] Formal rules include such rules "from constitutions, to statute and common laws, to specific bylaws, and finally to individual contracts defines constraints, from general rules to particular specifications."[5] Above all, "public participation institutions in administrative law" in this thesis mainly refer to the formal legal rules concerning public participation in administrative rulemaking and significant administrative decision-making. In detail, four perspectives will be emphasized to analyze these rules: (1) which particular administrative actions the public can participate; (2) who can participate; (3) how to participate and (4) what is the legal effect of the participation. At the same time, though legal rules are the main study objects in this thesis, the other issues related to these rules will also be discussed, like

[3] Jeffrey S. Lubbers, "Assisting China in the Transformation of Its Administrative Law: It's Meaning for China and for Comparative Law," in *Transformation of Administrative Law under Globalization and Transition*, January 30-31, 2011 (Mie Prefecture of Japan: Mie University, 2011), 10-15.

[4] Douglass C. North, *Institutions, Institutional Change and Economic Performance* (New York: Cambridge University Press, 1990), 3-4. But institutional economics haven't reached a consensus on the connotations of the jargon "institution". For example, for Masahiro Aoki, statutory law and regulations per se are not institutions if they are not necessarily observed, since he employed the "institution" focusing on the equilibrium "believes" but not rules per se. See Masahiko Aoki, *Toward a Comparative Institutional Analysis* (Cambridge: The MIT Press, 2001), 4-14. However, the concept proposed by North is more amenable to the analytical purpose of this thesis, so I will employ the term of "institution" in North's sense.

[5] North, 47.

relevant social backgrounds and legal theories, for a profound understanding of these institutions.

Present researches on Chinese public participation have made great progresses. In individual administrative fields, like in environmental impacts assessment, environmentalists have fully paid attention to the thin public participation institutions in Environmental Impacts Assessment Law and encouraged relevant NGOs to use this mechanism proactively.[6] In administrative law, scholars focused on the advocacy of public participation,[7] or tended to study on a particular form of public participation, like the hearing,[8] or the practice of public participation institutions.[9] However, a comprehensive study of public participation institutions in the present administrative legal system is inadequate, though American Professor Jamie P. Horsley did make a brief report describing the development of public participation institutions in Chinese administrative rulemaking and significant administrative decision-making.[10] Thus, the purposes of this thesis are: first, to display the comprehensive picture of public participation institutions in Chinese administrative law system; second, to point out the problems existing in present Chinese administrative law that have been ignored before; third, from Japanese experience to reflect on these problems and explore more available evolving path of public participation

[6] Thomas Johnson, Environmentalism and NIMBYism in China: Promoting a Rules-based approach to Public Participation, *Environmental Politics* 19, no.3 (2010): 430-448; Yuhong Zhao, Public Participation in China's EIA Regime: Rhetoric or Reality? *Journal of Environmental Law* 22, no.1 (2010): 89-123.

[7] Xixin Wang, *Gongzhong Canyu he Xingzheng Guocheng：Yige Linian he Zhidu Fenxi de Kuangjia [Public Participation and Administrative Proceedings: A framework for theory and institutional analysis]* (Beijing: China Democracy and Rule of Law Press, 2007).

[8] Zongchao Peng, Lan Xue and Ke Kan, *Tingzheng Zhidu [Public Hearing Institutions in China]* (Beijing: Tsinghua University Press, 2004); Chunyan Li, *Zhongguo Gonggong Tingzheng Yanjiu [Research on Public Hearing in China]* (Beijing: Law Press, 2009).

[9] *Gonggong Canyu he Zhongguo Xingonggong Yundong de Xingqi [Public Participation and the Rise of Chinese New Public Movement]*, ed. Xixin Wang (Beijing: China Legal Publishing House, 2008).

[10] Jamie P. Horsley, "Public Participation in the People's Republic: Developing a More Participatory Governance Model in China," (2009). http://www.law.yale.edu/intellectuallife/publicparticipation.htm (accessed March 3, 2011).

institutions in Chinese administrative law.

As Professor John K. M. Ohnesorge pointed out, "with respect to administrative law, reforms such as information disclosure and rights of public participation in administrative rulemaking clearly have U.S. roots."[11] That is also can explain why USA played the leading role in aiding the establishment of Chinese public participation institutions. However, overemphasis on American experience will inevitably face the following dilemmas: (1) Chinese political and social structure is totally different from American. As mentioned before, China has no participatory democratic history in the western sense, while democratic culture of America was described vividly by Tocqueville as early as in 1835 when his great work *Democracy in America* (volume 1) was first published in French; (2) the model of public participation in administrative law in USA mainly is embodied in the cases of federal courts, but not directly in the statutory articles.[12] For China regards the statutes as the main legal sources and judicial independence is weak, the applicable limitation of this model is obvious; and (3) over-focusing on developed participatory experience in America will neglect other useful experience in other countries with the emerging administrative participatory institutions. Based on the above reasons, I prefer to turn to Japan, since its participatory culture is relatively mild and its evolving path of public participation institutions in administrative law is clearer. Additionally, as sharing the same civil law culture, Japan also stresses the statutory rules in promoting public participation.

This thesis will put Chinese public participation institutions in the historical

[11] John K.M. Ohnesorge, "Developing Development Theory: Law and Development Orthodoxies and the Northeast Asian Experience," *University of Pennsylvania Journal of International Economic Law* 28, (2007), 266.
[12] Richard B. Stewart, "The Reformation of American Administrative Law," *Harvard Law Review* 88 (1975), 1723-1760.

backgrounds to reveal two momentums both from the upper and the bottom calling for the introduction of public participation into the legal system. Then I will do some literature reviews to look into official claims and theoretical views on public participation. Legal institutional analysis is the main methodology in this thesis for displaying the status quo of public participation institutions in Chinese administrative law and Japanese administrative law, sometimes intertwined with theoretical criticisms. And lastly, I will learn some Japanese experience for the future development of public participation institutions in Chinese administrative law.

Part One: Public Participation Institutions in Chinese Administrative Law

Chapter One

The social backgrounds and theories of public participation institutions in Chinese administrative law

I. The social backgrounds against the rise of public participation within Chinese administrative law

At the opening of the classic textbook *Law and Administration*, two public law scholars Carol Harlow and Richard Rawlings said this: "Behind every theory of administrative law there lies a theory of the state."[13] They also indicated, "The machinery of government was an expression of the society in which it operated; one could not be understood except in the context of the other."[14] It is also the fundamental stance when I try to analyze the public participation institutions within Chinese administrative law.

Hence, it is better to put public participation against a broad social backdrop to observe. The huge background is the transition of China, from a state planned economy to a socialist market-oriented economy; from a closed economic system toward a more open one. The reform and opening up policy, which was raised by Deng Xiaoping in 1978 but really launched in 1992 after Deng's South tour, aiming to integrate China into the world economic system, was a process of marketization and globalization in nature. Though the initial proponents of this policy only wanted to limit its effects within a certain range, the implications of it are far beyond the reformers' intentions. On the one hand, the transplantation of market economy into China's planned economic system has brought

[13] Carol Harlow and Richard Rawlings, *Law and Administration* (New York: Cambridge University Press, 2009), 1.
[14] Ibid.

about the social structural change, which conversely called for the reform of pre-reform political and social institutions to promote the market economy further; on the other hand, though the reform of economic system was carried out gradually, the corresponding political reform was not advanced synchronically. The intension between the changed economic, social structures and the most of unreformed political system produced a lot of problems. These remaining political systems concerning administration mainly include: (1) the top-down pyramid-shaped managerial administration model, (2) strong administrative power, (3) inadequate external oversights on public administration; while the changed ones include: (1) the diversification of social interests, (2) The public's awareness of rights, legal interests and desire for participation and democracy.

1. The unreformed political system concerning administration

1.1 The pyramid-shaped managerial administration — Chinese traditional model of public administration

1.1.1 The omnipotent government under state planned economy period

After the founding of new China, China mimicked the Soviet model to establish the highly concentrated planned economy system.[15] Under this kind of economic system, the government is not only the administrative body, but also the economic body; not only the owner of all people's property, but also the manager and actual operator of the property; not only the provider of the public products, but also the representative of the common good, and

[15] Yibo Bo, *Ruogan Zhongda Juece yu Shijian de Huigu [Review of Some Significant Decisions-making and Events]* (Beijing: Chinese Communist Party Central School Press, 1991), 462–464.

it both directly initiated and distributed investments, arranged and managed consumptions. The government controlled all aspects of social life by policymaking, executing and enforcing. People's Congress only had the symbolic meaning. Professor Kim Lane Scheppele once accurately pointed out the importance of administration in the configuration under the Soviet's highly planned economy model which she called as the "administrative state socialism": "There is a veneer of public parliamentarianism, but the real work of the state was done in off-the-book Communist Party committees, whose views were communicated to small administrative state bodies for direct enactment as regulation."[16] "State Socialism worked toward the formal realization of equity of all persons through the ownership by the state of the crucial means of production. As a result, the management of the economy and the leveling of the population were accomplished through state administration…."[17]

Under this model, all kinds of power are centered in the Party and governments and then governments issued the commands to control economy and society. This model can quickly implement the Party's policy, but not be easy for the public to participate in the official decision-making process. Though the party also emphasized the "mass line" at the same time, which includes both "going to the mass" and "coming from the mass", under this highly centered power structure, the "mass line" usually became only "going to the mass" but without "coming from the mass".

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[16] Kim Lane Scheppele, "Administrative state socialism and its constitutional aftermath," in *Comparative Administrative Law*, ed. Susan Rose-Ackerman and Peter L. Lindseth, (Cheltenham: Edward Elgar Publishing, 2010), 93.

[17] Ibid., 94.

1.1.2 The managerial government under 1982 Constitution

During the Cultural Revolution from 1966 to 1976, the whole China fell into a big chaos. Everything has been ruined. The tragedy ended in 1978. Then in 1982, China promulgated a new Constitution—1982 Constitution.

According to Article 89 of 1982 Constitution, in addition to the usual executive functions and leading role in the administrative system, State Council is also invested with a wide range of mandates to plan and manage economy, education, science, culture, sanitation and so on. And according to article 107 of Constitution, local governments above county's level also have the corresponding authorities within the local regions. Actually, it is not difficult to understand the reason why 1982 Constitution stipulated such prescriptions. It is because 1982 Constitution made a great reference to the 1954 Constitution.[18] Especially concerning the functions of the government, the contents even expanded.[19] And speaking of 1954 Constitution, a lot of institutions in it were under the influence of Soviet Union,[20] which can be reminiscent of the omnipotent government model. Though up to now, the Constitution has undergone seven times of amendment, the above two articles remain. They convey a piece of fundamental information that the government still keeps the constitutional authority to intervene the society and economy widely.

Though during this period, along with the official recognition of other economic

[18] Hanbin Wang, "The process of drafting 1982 Constitution," http://www.legaldaily.com.cn/index_article/content/2011-04/07/content_2579301.htm?node=5958 (accessed April 23, 2011).

[19] For example, under the 1954 Constitution, State Council only had the authority to execute national economic plan and national budget, but 1982 Constitution mandates State Council not only to execute but also to stipulate national economic plan and national budget, plus the social development plan.

[20] Dayuan Han, *1954 nian Xianfa yu Xinzhongguo Xianzheng [1954 Constitution and New China's Constitutionalism]* (Changsha: Hunan People's Publishing Press, 2004), 43-59, 500.

ingredients besides the public economy, administration has been a little different from the one under the state planned economy, but the omnipotent government color still keeps heavy.[21] Some scholars named it as the "managerial administration" model.[22]

The characteristics of "managerial administration" in China context are mainly embodied in three aspects: (1) the state and the public power still maintain broad and deep intervention in the social affairs; (2) administration operates in a top-down pyramid-shaped fashion. The public at the bottom can hardly reflect their opinions into administrative decisions; and (3) administrative bodies usually keep their process closed to the public, which greatly relates to (2).

1.2 Strong administrative power

In addition to the well-known administrative discretion, strong administrative power in China also particularly is manifested in the dual legislative system. Dual legislative system means the legislative power is shared by two authoritative bodies. For example, at the central level in China context, the legislative power to some extent is shared by both National People's Congress (NPC) and State Council.

Article 89(1) of Constitution provides that State Council can adopt administrative measures, stipulate administrative regulations and issue decisions or orders according to Constitution and laws, and the following clauses of the same article provide that State Council is invested with all the authorities to direct and administer economic work and

[21] Lu Shi, *Zhengfu Gonggong Juece yu Gongmin Canyu [Citizen Participation in the Government Public Decision-making]* (Beijing： Social Science Academic Press, 2009), 102-103.

[22] Xixin Wang and Yongle Zhang, "Woguo Xingzheng Juece Moshi zhi Zhuanxing: Cong Guanli Zhuyi dao Canyu Zhili Moshi [The transition of administrative decision-making model in China context: from the managerial government model to participatory governance model]," *Fashang Yanjiu [Studies in Law and Business]* 139, no 5 (2010): 3.

urban and rural development; work concerning education, science, culture, public health, physical culture and family planning; the work concerning civil affairs, public security, judicial administration, supervision and other relevant matters and etc. The most controversial point within public law scholars is whether this article can be regarded as the legal basis when there is no relevant individual statute concerning a particular issue, State Council still has the authority to make administrative regulations on that issue without a delegation from NPC or its Standing Committee (NPCSC) in order to perform its duties enumerated in article 89? In other words, does the independent administrative legislation exist constitutionally?

Administrative law scholars and constitutional law scholars gave different answers to that question. Most of constitutional scholars said no to it. They contended that all rulemaking power exercised by administrative organs including State Council should be delegated by Congress. Administrative organs only have delegated legislative power but no independent legislative power.[23] They also vigorously opposed the employment of the term "administrative legislation" which they thought it had mixed administration and legislation.[24] On the country, most administrative law scholars adopted a more lenient and pragmatic approach toward that question. They argued that China launched her legal institutionalization very late and the congresses could not promulgate relevant statutes in time to regulate the changing society. If China did not admit the existence of independent administrative legislative power, a lot of social areas would have been fallen into disorder

[23] Lei Wang, "Dui Xingzheng Lifaquan de Xianfaxue Sikao [Reflection on Administrative Legislative Power from a constitutional Perspective]," *Zhongwai Faxue [Peking University Law Journal]* 59, no 5 (1998): 58-63.
[24] Ibid.

since administrative bodies would have nothing to administer.[25] In their textbooks, independent administrative legislation is a concept compared with implementing legislation.[26]

The Legislation Law seems to prefer administrative law scholars. On the one hand, it follows the Constitutional language in article 7 prescribing that NPC and NPCSC exercise state legislative power. On the other hand, article 8 prescribes if 9 matters enumerated pertaining to a decree then the decree should be enacted by NPC or NPCSC in a statutory form. From this article, we can infer conversely that if a matter falls outside the enumerated 9 matters, enactment of a statutory law is unnecessary. And then, article 56(2) prescribes that administrative regulation could be laid down in respect of matters mentioned below: (1) matters that are required in order to implement a statutory law; (2) matters under article 89 of Constitution concerning State Council's administrative duties. In administrative academia, the former is called implementing legislation (zhixingxing Lifa), which means State Council can make any administrative regulations in order to implement a statute according to the relevant statutory law. It cannot create substantive rights and obligations on a private person.[27] The latter is called authoritative legislation (zhiquanxing lifa) which means State

[25] Xin Liu, *Xingzheng Lifa Yanjiu [A study on administrative legislation]* (Beijing: Law Press, 2003), 62.
[26] Ming'an Jiang, *Xingzhengfa yu Xingzhengsusongfa [Administrative law and administrative litigation law]* (Beijing: Pecking University Press and High Education Press, 1999), 166. According to the author's view, creative administrative legislation was classified into two categories, one is the independent legislation, which means, if there is no individual law or regulations, the administrative bodies can use the legislative power conferred by the Constitution and the administrative organic law for administrative management. The other is to supplement the contents of laws and regulations. But this kind of creative legislation needs special delegation of the individual law. In this thesis, the first kind of "creative legislation" is called creative legislation or independent legislation, which means the substantial legislative power shared both by congresses and states. And the other kind of "creative legislation" is categorized into the delegated legislation, which distinguishes from the independent legislation.
[26] Ibid.
[27] Shicheng Zhang, "Lifafa de Jiben Yuanze ji Lifa Quanxian de Huafen [The Fundamental principles of Legislation Law and the distribution of Legislation Power]," *Zhongguo Xingzheng Guanli [Chinese Public Administration]*, no.4 (2000): 6. The author regarded that the Bumen Guizhang are implementing rules in a general sense and they cannot set criteria for people's conduct, especially cannot impose obligations on people independently. The author worked in administrative law

Council can set substantive regulations on a particular issue directly pursuant to Constitution (article 89) within its jurisdiction when no relevant law exists.[28] Authoritative legislation is also called independent administrative legislation.

The confirmation of independent administrative legislation by Legislation Law was not unchallenged by constitutional law scholars. They asserted Legislation Law is unconstitutional.[29] But since no mechanisms for constitutional review of a statutory law especially like the Legislation Law promulgated by NPC have been established,[30] Legislation Law is still the most authoritative footnote of Constitution now. In practice, State Council also positively exercises this independent legislative power. For example, in the circumstance of lacking a statutory law in respect of government information disclosure, State Council took the lead to promulgate the Information Disclosure Regulation.

The provincial and the main municipal government are the same when the public affairs are involved in a certain regional area.[31] The admission of independent administrative legislative power in the present legal system makes the government easier to act in an arbitrary way with a lawful veneer in form.

1.3 Inadequate external oversight

Even if the government power is strong and its authority covers a wide range, effective oversight can weaken the seriousness of arbitrariness. However, the external oversight on

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office of legal affairs under the NPCSC.

[28] Ming'an Jiang, 165.

[29] Yongkun Zhou, "Fazhi Shijiao xia de Lifafa-Lifafa Ruogan Buzu zhi Pingxi [Legislation Law from the perspective of rule of law]," *Faxue Pinglun [Law Review]* 106, no 2 (2001): 2.

[30] According to Article 88, 89, 90, 91 of Legislation Law, Legislation Law per se established some mechanisms to review the statutes promulgated by NPCSC and other lower norms. However, concerning the constitutionality of statutes promulgated by NPC, no mechanisms have been established.

[31] Legislation Law, article 73(2).

administrative power is also inadequate in China.

Though China does not recognize the political principle of the separation of powers and checks and balances among the legislative, executive and judicial bodies, the Constitution still confers different functions on different bodies. According to these functions, both the People's Conference and Court have the authority to check administrative bodies. But the present legal institutional configurations weakened these external oversight mechanisms established in Constitution.

1.3.1 The inadequate oversight of People's Conferences

According to the present Constitution, the functions of People's Congresses mainly include the legislation, oversight the governments by review and approval of government's work reports or exercising the power of removing the leading members of government.[32] Of course, People's Congresses have the ultimate policy-making power, no matter by legislation or approving government reports which may include important plans concerning economy or social development.[33] However, people's conferences cannot effectively perform these functions. Take the NPC as an example.

According to Rules of Procedures for NPC, the meeting of NPC is held once a year in the first season of each year and in practice the period of the meeting only lasts for 10 to 15 days[34] usually with more than 2000 people.[35] And all the representatives do not work

[32] Constitution, article 62, 63.
[33] Ibid.
[34] "Lijie Quanguo Renmin Daibiao Dahui de Zhaokai Shijian," Renda Ziliao Guan, http://www.cnr.cn/zhuanti1/2007qglh/rdzlg/200703/t20070302_504410469.html (accessed April 28, 2011).
[35] The number of representatives becomes more and more, and in the fourth session of the eleventh National People's Congress, the number of representatives attending the meeting amounts to 2923.

exclusively for NPC, they engage in their own jobs in daily life. Under this kind of system, NPC has no enough time and personnel to effectively perform its functions in compliance with the position of the highest state authority.[36] Therefore, during the period of NPC's recession, NPCSC exercises most of policy-making power by amending law or legislation or oversight on the government. But State council still assumes the responsibility of drafting statutory laws almost two times than the NPCSC.[37] The article 67(7) of Constitution provides that, NPCSC can annual the administrative rules and regulations, decisions or orders of State Council which contravene the Constitution or the statutory laws. But up to now, NPCSC has made no such annulment. The most dysfunctional point of the congress is that no substantial review on the government's budget plan is performed. Though according to Constitution, government budget plans should be approved by the corresponding congress, in practice, administrative bodies are the ultimate determiner of government budgets and the congresses never oversight on it in a substantive way.[38] That is to say, State Council both lacks the legislative supervision from NPC and NPCSC, also lacks the routine supervision from them.

Recent years, local standing committees of people's congresses began to refuse to pass the government reports,[39] but it still cannot say people's congresses have played a big role in policy-making and have supervised on government like the Western countries. The

[36] Take the tenth NPC for example, only one constitutional amendment and one law were passed, and all government reports were passed. It is hard to see NPC performs its function well.
[37] This is the conclusion observed from 1987-2004. http://www.law.ruc.edu.cn/fazhan/ShowArticle.asp?ArticleID=23617 (assessed May, 1, 2011).
[38] Guisong Wang, "Cong Xietiao Zouxiang Zhiyue: Guojia Quanli Hengxiang Guanxi de Fazhan [From Coordination to Control: the development of horizontal relationships among state power]," in *Gongfa de Zhidu Bianqian [The Institutional Transition of Public Law]*, ed. Dayuan Han, (Beijing: Peking University Press, 2009), 201.
[39] Biyao Tian, "Reports were not passed: precious democratic samples," http://npc.people.com.cn/GB/15037/6098353.html (assessed May 6, 2011)

congresses still haven't changed the image of "rubber stamp".

1.3.2 Limited judicial review

In Chinese Administrative Litigation Law (ALL), Courts only review specific administrative action.[40] A lot of policy-making behaviors cannot meet that standard. And article 12 of ALL clearly excludes the reviewability of the administrative regulations and rules, or decisions and orders with general binding force formulated and promulgated by administrative bodies. That is to say, except the specific administrative action, court cannot intervene in the other multitude of administrative actions.

And even within the limited scope of judicial review, because of courts' lack of independence in personnel arrangements and finance, which are affiliated with the government at the corresponding level, courts usually cannot assume the task of oversight on government effectively.

2. Social changes along with the marketization and their challenges to the preceding administrative system

2.1 The emergence of interest-based society and its challenges to top-down pyramid-shaped managerial administration

The first direct consequence of the reform and opening up policy is the rapid growth of economy and the interest diversification. Because of the reform, the liberalization of the economy has led to a new and dramatic motivation to seek wealth in society, which resulted

[40] Administrative Litigation Law, article 11.

in an interest-based social order. One report pointed out, from 1992 to now, China's society can be divided into ten stratums and the conflict among social stratums is increasing.[41] And in the circumstance of no legislative directives or general legislative languages, which widely exist in China, the administrative bodies, not the peoples' conferences are pushed into the forefront of social issues. Not to mention in China context, according to the Constitution, government has the duty to govern the society just as what has been pointed out in the previous section.

Facing with the more and more complicated society, if the government still exploits the top-down command approach to make a policy, the public may resist such a policy since it cannot reflect their various needs or may reflect only one part of people's interests but neglect the others. A good fair administrative decision is expected to deal with every kind of interests it may involve. Top-down managerial administration obviously is incompatible with the plural modern society. The problem of "Sanpai"[42] vividly describes how a poor policy emanates from the top-down pyramid-shaped administration in Chinese actual administration.

[41] Jianguo Huang, Chunlin Li and Wei Li, "Shehui Jieceng Jiegou [The structure of social stratum]," in *Dangdai Zhongguo Shehui Jiegou [Social Structure of Contemporary China]*, ed. Xueyi Lu, (Beijing: Social Science Academic Press, 2010), 387-422.

[42] *Hunansheng Xingzheng Chengxu Guiding Shiyi [An interpretation on Hunan Provincial Administrative Procedural Provisions]*, ed. The Legal Institute under Hunan Provincial Government, (Beijing: Law Press, 2008), 45. "Sanpai" means "clapping the brain when decision making, clapping the breath when executing and flattering when problems arising." "In practice, because of the inadequate procedural rules, indifference of accountability and decision-making arbitraries, the phenomenon of 'sanpai' happens frequently, which greatly impairs the image of government and restrains the development of the economy and society."

2.2 The public's increasing awareness of rights and desire for participation in public decision-making process

Though the relationship between the market economy and democracy is still debatable, Chinese scholars still think the transition to a market economy is the essential driving force towards democratization.[43] Anyway, the reality is that Chinese people desire to participate in public decision-making process.

PX accident happened in 2007 in Xiamen City is a classical case showing the public's desire to express their voice in public affairs. PX project was a kind of chemical project which has a potential to cause serious environmental pollution to the surrounding residents. But it was also a lawful project which had been approved and supported by the central government and local government. The governments closed the whole decision-making process to the public. But with some reasons, the citizens of Xiamen knew such a project. They felt PX project likely to endanger their life and health. So some citizens consciously gathered together and made a demonstration to protest against the project. Facing with the great pressure from the citizens, the local government had no choice but to suspend that project and the relevant administrative agency re-conducted the environmental assessment and initiated public participation procedures in such an assessment process. Most of the citizen representatives participated in the assessment expressed their oppositions to the project. Finally, the local government decided to respect the citizens' wills.

[43] Zengke He, "Democratization: The Chinese Model and Course of Political Development, in *Democracy and the Rule of Law in China*, ed. Keping Yu, (LEIDEN·BOSTEN: Brill, 2010), 59-68. In this paper, He proposed five momentums motivating China's democratic political development. They are economic advancement, the transition to a market economy, the healthy development of a civil society, positive interactions between various political forces and globalization. If we make a further analysis, the other motivations are also the consequences of market-oriented reform.

From all the above, on the one hand is the traditional top-down managerial administrative configuration and strong administrative power with limited external oversights, on the other hand is the new society with plural interests, desiring to participate in public affairs. The former is incompatible with the latter and the latter also constantly challenges the former. The intension between the two caused a lot of problems, mainly manifesting as the policy-failure and abuse of administrative power, which further includes well-known corruption and "capture" problem.

In this kind of circumstance, the introduction of public participation institutions into administrative law is expected to assume the following functions: (1) Open the administrative process and input more information into administrative process to make the administrative decision more rational to reduce the policy-failure. (2) Make the public become the third subject in addition to the congress and court to check arbitrary governmental actions and protect people's rights and interests. (3) Reflect more public's wills in administrative decisions and enhance the democracy of decision-making. (4) Involve the stakeholders in the administrative process through participation to decrease interest conflicts. If we use more simple words, they are promotion of rationality, protection of rights and interests, democracy and interest coordination. And we will see the Party's documents, State Council's documents and administrative law theories concerning public participation in the next section also stressed some of these expected functions.

II. Two sources of institutionalization of public participation in administrative process

In order to react to the previous problems, it is necessary to institutionalize public

participation in administrative process so that is can perform anticipated functions effectively. But before analyzing the institutions of public participation in present legal system, it is also necessary to illustrate two sources of public participation institutions. One of them is the relevant statements concerning public participation in Party's documents and State Council's documents. The other is the relevant theories in administrative law academia.

1. Statements concerning public participation in Party's documents and State Council's documents

1.1 Statements concerning public participation in Party's documents

Early in October, 2000, the report of fifth plenary session of the fifteenth Chinese Communist Party's (CCP's) Central Committee put forward the idea of "public's orderly political participation" in the first place.[44] It mentioned "public participation" as "reinforce the democratic political construction, promote the rationalization and democratization of policy-making, and enlarge the public's orderly political participation." Then in the official report of the sixteenth CCP's Conference in 2002, it reclaimed that in order to improve the institutions of democracy and enrich the forms of democracy, it is necessary to enlarge the public's orderly political participation and make sure people to practice democratic election, democratic policy-making, democratic management, and democratic supervision.[45] And

[44] "Guanyu Zhiding Guomin Jingji he Shehui Fazhan dishige Wunnian Jihuan de Jianyi"
[The suggestion about enacting the tenth five-year program of national economy and social development] (A Party decision, Beijing, October, 11, 2000).

[45] Zeming Jiang, "Quanmian Jianshe Xiaokang Shehui Kaichuang Zhongguo Tese Shehuizhuyi Xinjumian [Building a Moderately Prosperous Society and Creating of A New Situation of Socialism with Chinese Characteristics]" (speech, Beijing, November 8, 2002).

then the official report of the seventeenth CCP's Conference in 2007 indicated that "keeping all the power of state belonging to the people, enlarging the public's orderly political participation from every level, every area, motivating and organizing the people to manage state affairs, social affairs, economic and cultural affairs according to law as widely as possible."[46]

From the above three reports, we can see that in the Party's documents, public participation usually was regarded as an important channel to demonstrate the Chinese democracy and mainly means the political participation. But it is not the whole. If we delve into the party's documents, we can find the Party's emphasis on public participation in administrative process scatters in various documents. For example, early in the report of fourteenth CCP's Conference (held in 1992), the reports pointed out that "the leading organs and the leading cadres should listen to the statements of the public……to accelerate the establishment of a democratic and rational decision-making[47] mechanism."[48] Since the leading organs also include administrative bodies, this means when the administrative body wields decision-making power, it also needs to listen to public opinions. Then in 2002's report, it required the government to promote institutional reform according to the succinct, uniform and efficient principle and a collaborative approach among the decision-making, execution and oversight organs. And just before the foregoing part, the report also required the decision-making organ to improve the institutions of knowing and reflecting public

[46] Jingtao Hu, "Gaoju Zhongguo Tese Shehuizhuyi Weida Qizhi wei Duoqu Quanmian Jianshe Xiaokang Shehui Xinshengli er Fendou [Holding High the Great Banner of Socialism with Chinese Characteristics and Struggling for the New Triumph on the Construction of A Prosperous Society]" (speech, Beijing, October 12, 2007).
[47] Concerning the concept of administrative decision-making, see Chapter 3.
[48] Zeming Jiang, "Jiakuai Gaige Kaifang he Xiandaihua Jianshe Bufa Duoqu you Zhongguo Teshe Shehui Zhuyi de Gengda Shengli [Accelerating the Pace of Reform and Opening up and Modernization and Wining a Greater Victory of Socialism with Chinese Characteristics]" (speech, Beijing, October 12, 1992).

opinions, gathering the public's wisdom extensively, cherishing the resources from public and then promote the rationalization and democratization of decision-making. It also required that "every decision-making organ should improve the rules and procedures concerning the significant decision-making, especially establish the institutions that public can reflect their opinions and the notice and publish institutions when the decisions concern the relevant public interests and the hearing institution…to prevent arbitrary decision-making."[49] Then in the 2007's report, apart from it still required the government to divide its inner power into decision-making, execution and oversight, it clearly employed the term of "public participation" which refereed as "(the government should) promote the rationalization and democratization of decision-making, improve the institutions of supported system of information and wisdom, and strengthen the transparency and the degree of public participation when decision-making. The government should listen to the public's opinions openly in principle when enacting laws, decrees and policy when public interests are involved."[50] Moreover, this report even located public participation in administrative process as a right.

From above descriptions, we can conclude that the Party focused on three functions of public participation, the first is democratization, which appears in the all three listed documents; the second is rationalization, which mainly embodied in the 02's report like "gathering the public's wisdom" and 07's report like "improve the mechanisms of supported system of information and wisdom"; the third is the oversight function, especially in the 02's

[49] Zeming Jiang, *Quanmian Jianshe Xiaokang Shehui Kaichuang Zhongguo Tese Shehuizhuyi Xinjumian.*
[50] Jingtao Hu.

report that listening to public opinions is a way to "prevent arbitrary decision-making". The following table can delineate the Party's views on the public participation in administrative processes from a "function—procedural apparatus" perspective.

Table 1

The Party's views on the public participation in administrative processes

Functions	Procedural apparatus
Democratization	The public can reflect their opinions and the government should listen to public opinions
Rationalization	The same with above
Oversight	The same with above

1.2 Public participation in State Council's documents

Though the Party proposed the ideas of public participation and institutionalization of public participation, it is the State Council that advanced the legal institutionalization of public participation in administrative proceedings in three documents. They are *The Decision on Comprehensively Promotion of Administration Accordance with Law* issued in 1999 (1999's Decision), *The Outline of Promoting the Project of Implementation of Administration Accordance with Law* promulgated in 2004 (2004's Outline) and *The Decision on Reinforcing Administration Accordance with Law at the County Level* issued in 2008 (2008's Decision). In these three documents, the State Council further specified and refined the public participation ideas proposed in the Party's documents and even required some detailed procedural devices as the guidance for the relevant government to establish public participation institutions. These three documents all regarded institutionalization of

public participation in legal system as an important task for promoting administration accordance with law.

In 1999's Decision, State Council proposed to introduce public participation into the process of government legislation. The decision required the relevant governments to "adhere to the mass line and extensively seek opinions, take in-depth investigation[51], summary up experiences and fully reflect the will of the people." But this decision has no further requirements on the public participation institutions in administrative legislation process.

2004's Outline began to stress public participation institutions in decision-making process. In the second part of the Outline concerning the goals of prompting the realization of administration accordance with the law, one of the goals is to "form rational, democratic and standardized institutions of decision-making, and people's requirements and wills can be reflected." Later, in the fifth part, the Outline further put forward that decision-making model composed of public participation, expert consultation and government determination. Regarding public participation, "the government should notice the public and widely listen to the opinions of the public by conducting panel discussion, hearing or feasibility study meeting[52] when the decision involves a wide range of people in the society and connects closely to the interests of the public." On elaboration of the fundamental requirements of the administration accordance with law in the third part, it indicated, "administrative bodies should…open administrative process, listen to the opinions of the citizens, the legal persons

[51] Concerning the concept of "in-depth investigation", see Chapter 2.
[52] Concerning the definitions of the three concepts, see Chapter 2.

and the other groups; should observe the legal procedures strictly, protect the right to know, the right to participate and the right to access to remedy of administrative addresses and relevant stakeholders." And this report again highlighted the public participation in government legislation. "The intensity of public participation should be increased." "When drafting the law, decrees and administrative rules, the relevant administrative body should adopt various ways to listen to opinions. When the draft involves the significant interests of the public or the interests linking closely to the public, the government should hold public hearing, panel discussion and feasibility study meeting or notice the draft to society and so on to listen to opinions. The government should respect the majority's will and adequately reflect the fundamental interests of overwhelming majority of the people. The government should explore and establish the institution of reason-giving for whether to adopt those opinions or not…." The State Council's proposals in this Outline are embodied in Table 2:

Table 2

The State Council's proposals on public participation institutions in 2004 Outline

Function	Field	Procedures
Democratization	Significant administrative decision-making	Notice to the public, Panel discussion, public hearing and feasibility study meeting to listen to public opinions
	Administrative rule-making	Publish the draft to the public, Panel discussion, public hearing and feasibility study meeting to listen to public opinions, reason-giving.

In 2008's Decision, State Council put forward higher and detailed requirements on the governments at the county level. It asked "the county governments and their functional

branches should lay down procedural rules of public participation in significant decision-making process… when formulating public policy that relates closely to the public; the relevant administrative body should notice to the society and seek opinions openly." In addition to seeking public opinions in a general way, this document particularly put an emphasis on the enlargement of hearing's applicable scope. It also prescribed the minimum procedures for hearing: selecting the public hearing representatives should be in a rational way; Ascertainment and distribution of the quota of hearing representatives should take all factors into consideration like the nature of the relevant matter, the degree of complexity and the influences; The list of the representatives' names should be published to the society; Ten days before the hearing, the relevant administrative body should notice the representatives about the anticipated contents, reasons, basis, and background materials; Except the hearing matter involving the state secret, the commercial secret or the individual privacy, the public hearing should be held openly and ensure equal and adequate cross-examination and debate among the participators on the fact and legal issues. The relevant administrative body should adopt the reasonable opinions and suggestions, and should notice to the representatives whether to adopt or not and the corresponding reasons in written. It also should publish the outcome and reasons to the society. On formulating normative documents[53], this Decision required the relevant government to "listen to opinions extensively in various forms… if this step was skipped, the government cannot promulgate it."

Compared with the former 2004's Outline, this decision further specified the procedures in rule-making process and it also emphasized the consequence of procedural

[53] Concerning the concept of other normative documents, see Chapter Two.

non-compliance. The whole contents of the 2008 decision and the detailed public hearing procedures are as follows:

Table 3.1

State Council’ s proposals of ordinary forms of seeking opinions in 2008 Decision

Function	Field	Procedures
Democratization	Significant Administrative Decision-making	①Seek opinions openly from the society; ② Hearing
	Administrative Normative document -making	Listen to opinions extensively in various forms.

Table 3.2

State Council’ s proposals of the public hearing procedures in 2008 Decision

Procedures	Standards and contents
①Selection of the representatives and publish the list of their names	take all factors like the nature of the relevant matter, the degree of complexity and the influences into consideration
②Notice the representatives	Ten days before the hearing Contents, reasons, basis, and background materials
③ Cross-examination and debate between the representatives	Fact and legal issues
④Decision and reason statement	The reasons of adoption or abandonment of the opinions

1.3 An analysis on the official statements

Though the Party firstly put forward some ideas concerning public participation and

institutionalization of public participation, it is the State Council that issued the three documents above to implement the Party's policy and put the institutionalization of public participation in the legal system under the task of realizing administration accordance with law, which greatly prompted the legal institutionalization of public participation in administrative rule-making and significant decision-making fields. These official documents have no legal effects, but they have yielded overwhelming influences on practical institutional construction in China context. Those influences also can be seen both in the Chapter 2 and 3.

From these three documents, we can infer that: (1) The necessary processes for public's involvement are the administrative rulemaking process and significant administrative decision-making process. But from the expected institutions of public participation, we can see they take on the tendency of a convergence of listening to public opinions. (2) The overwhelming emphasized function of public participation in these documents is democratization. This is not to deny that public participation itself naturally has the function of rationalizing the administrative process since participation is a process for inputting information. However, the three documents obviously thought that the experts can be more effective to play the rationalization role embodied in the assertion of "public participation, expert consultation and government determination". Therefore, experts were stripped from the public to be counted as a particular participatory group. (3) Though all these official documents stressed the democratization function of public participation, in proposed institutions public participation only has an advisory function. Though Distinction between

hearing and other forms of public participatory (panel discussion, feasibility study meetings, in-depth investigation) has been made, especially in 2008's Decision hearing was highlighted to be made up of a set of qua judicial-type procedures. But from the proposed public hearing procedures, "hearing" is still only an advisory form but with particular procedures.

On the one hand the official documents emphasized on the advisory function, and except hearing other participatory forms even have no clear fundamental procedural requirements, on the other hand they claimed for democracy. It seems some conflicting places exist in official documents. However, if we pay attention to State Council's remarks in respect of the "mass line" principle in 1999's Decision and given the Chinese official attitudes toward the democracy different from the western type, this seemingly incompatible phenomenon could be understandable.

1.3.1 The mass line theory

Mass line is the traditional leading principle of Chinese Communist Party. Chairman Mao first expounded this principle systematically in *Some Problems concerning Leading Methods* in 1943. In that article, Mao explained the mass line as:

> In all practical work of our Party, the correct leading way is coming from the mass and going to mass. That is to say, [we should] gather public opinions (scattered and unsystematic opinions) and put them together (through research, and convert them into centralized and systematic opinions), and then go to the mass to disseminate and explain them [the centralized and systematic opinions] and convert them into public opinions, make the public adhere to them and practice them. Whether these opinions are true or not also can be tested by the public practice. And again gather public opinion from the mass, and go into the masses. Infinite rounds, and every time [the leading method] will become more accurate, more vivid and richer.[54]

[54] Zedong Mao, 899.

This paragraph shows that mass line is a Party's leading method requiring the Party carders to master people's wills and integrate them into Party's policy so that its policy will not be resisted by people. On the other hand, the public practice also could polish Party's policy and improve them. Under this theory, the ruling class (CCP) and the public seem to have a well-interactive relationship. However, this kind of mutual respect and interplay depend on the Party carders' moral consciousness. After all, the Party is the leading group, and the mass are all led. They are not equal. Under mass line, the public can only participate in policy-making passively, but cannot actively take part in. And public only could give some opinions to the ruling class, but cannot share the final decisive power.

1.3.2 Chinese concepts of democracy

Chinese concepts of democracy could be embodied in two concepts, one the is "people's democratic dictatorship" and the other is "democratic centralism". The former emphasized the class nature of democracy and the latter has three different meanings.

Chairman Mao once called the "people's democratic dictatorship" as the combination of democracy for the people and dictatorship over the reactionaries.[55] Who will be the people and who will be the enemies? It all turns on the class that the person belongs to. However, the class division also lacks objective criteria. As the Professor Keping Yu pointed out, at last "it is left to the will of the leaders to distinguish 'the people' (or the proletariat) from 'the enemy'."[56]

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[55] Zedong Mao, "Lun Renmin Minzhu Zhuanzheng [On People's Democratic Dictatorship]," in *Mao Zedong Xuanji [Selected Works of Mao Zedong]* 4, (see note 2), 1468-1482.

[56] Keping Yu, "Toward an Incremental Democracy and Governance: Chinese Theories and Assessment Criteria," *in Democracy and Rule of Law in China,* ed. Keping Yu, (see note 43), 5.

On the "democratic centralism", according to Professor Guangyu Han's generalization, Chairman Mao once used it in three different dimensions. "Democratic centralism" firstly means a political configuration-the system of People's Conferences. "Democratic centralism" secondly means the collective leadership within the Party. For public participation into administrative process, the third meaning relates most closely to this thesis. That is the leading method, which means the public could express their opinions freely and the Party carders should make a decision upon these opinions.[57] The first meaning was adopted by 1982 Constitution.[58] The second meaning of "democratic centralism" is now called "intraparty democracy" advocated as the first step for China toward modern democracy.[59] And the Fifteenth Party's Constitution confirmed the third meaning of "democratic centralism" as the application of the mass line in Party's practice.

In China, most civil servant posts are qualified as a Party member, especially the important leadership posts. So the Party's working methods are also the government working methods. Regarding the public participation into government decision-making, because the third meaning of democratic centralism can be incorporated into the mass line, the official attitudes toward the public participation are all embodied in the mass line. And I have indicated the characteristics of public participation under the mass line as the passive participation and advisory function, so it is logically that the Party's statements and State Council's statements all equaled public participation to hearing public opinions in different forms as the government working methods to democratize government decisions.

[57] Guangyu Han, "Mao Zedong dui Minzhu Jizhong zhi de Sanzhong Chanshu [Mao Zedong's Three Elaborations on Democratic Centralism]," *Lilun Qianyan [The Forefront of Theories],* no 12 (2004): 25-26.
[58] Constitution, article 3.
[59] Keping Yu, 26.

2. Theories in administrative law academia

The above section analyzed one of the sources of the actual institutions of public participation. The below will analyze another source — academic theories of public participation in administrative law. Different from the official statements mainly under the influence of traditional Party's fundamental principles, the second source is mainly under the influence of western legal theories.

2.1 Two theories of public participation in administrative law academia

In administrative law academia, scholars all agree public participation can perform a lot of beneficial functions,[60] but these functions are not definitely mutually inclusive and compatible. According to emphasis on the different functions of public participation and the corresponding procedural apparatus equipped in the administrative proceedings, I conclude two "ideal types" of theories on public participation in Chinese administrative law. The reason why call them "ideal types" just because the scholars endorsing one version to some extent also admit the persuasiveness of the other. But the discrepancy is still fundamental. The difference between them demonstrate two different orientations of public participation's development in administrative proceedings: one is judicialization of public participation institutions and the other is politicization of public participation institutions.

The first ideal type is the "due process" model. The key points of this theory are as

[60] Ming'an Jiang, "Gongzhong Canyu yu Xingzheng Fazhi [Public Participation and Administration according to Law]," *Zhongwai Faxue [Peking University Law Journal]*, no 2 (2004): 31-32. In this article, the author concluded six functions of public participation in administrative process: (1)protecting rights and interests; (2) ensuring the smooth enforcement of administrative decisions; (3) eliminating prejudice and ensuring fairness; (4) oversight on public authorities and preventing corruption; (5) enhancing the individual's civility; (6) promoting the civil society.

follows: (1) Public participation is the extension of due process in the modern administrative state to control administrative power. When the modern state transformed from parliamentarian state into administrative state, along with the enlargement of administrative authorities, the requirements to control administrative power also increased. Compared with traditional controlling techniques, that are legislative directives and judicial review, now new controlling techniques have developed. First is the extension from substantial control to procedural control. Second is from ex post control to ex ante control. Third is from the legislative and judicial control to the public's direct control.[61] The three expanded dimensions have supplemented the deficiencies of traditional controlling techniques and now they together make up a complete controlling system. (2) Public participation's controlling effects in administrative law are mainly embodied in the procedural control. (3) Scholars endorsing this theory regarded public participation as a part of due process, so they also tended to apply the traditional due process requirements to evaluate public participation institutions. Hence, they usually favored the strict and court-type procedures. For example, they extrapolate "hearing" in the significant public decision-making and administrative legislation process from the traditional adversary qua-judicial "hearing" procedures in Administrative Punishment Law. This tendency particularly embodied in the assertion of procedures on "public hearing" in price-setting field and the claim for the requirements like the impartiality of the conductor of public hearing and the legal effects of hearing records and so on.[62] They thought public participation works only as a mean to achieve the due

[61] Wanhua Wang, speech in Xingainian Xingzhengfa Yantaohui [Discussion on New concept of Administrative Law], *Xingzhengfa Luncong [Administrative Law Review]* 11, (2008): 62-63.
[62] Wanhua Wang, "Woguo Zhengfu Jiage Juece Tingzheng Zhidu Quexian Fenxi, (An analysis on the defects of hearing

process, but itself makes little sense in substance.[63]

The second "ideal type" is the "deliberative democracy" model. This model involves a relatively complicated reasoning process. The reasoning process and main viewpoints are as follows: (1) The exercises of administrative power and administrative activities in modern administrative state are always under the influence of democratic political institutions and theories. "The political theory of modern state is the democracy theory."[64] Though democracy varies a lot in practice, the essential element of democracy is the same, that is the consensus from the governed, and it is also the legitimacy of political governance.[65] (2) The traditional administrative legitimacy model is the "transmission belt" model, which means that administration obtains legitimacy from strict compliance to the legislative directives. And in a representative democratic regime, legislative directives represent people's wills which confer its final legitimacy.[66] It is a kind of politics—law—administration legitimation path. In China context, "transmission belt" theory is also called "administration in accordance with law" (Yifa Xingzheng).[67] (3) However, "vague, general, and ambiguous statutes create discretion and threaten the legitimacy of agency action under the 'transmission belt' theory of administrative law."[68] Specifically, because of some reasons in modern welfare state, the legislators usually enact goal-oriented statutes in broad and vague

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institutions in the administrative price-setting proceeding)," *Fazhi Luncong [Rule of Law Review]* 20, no.4 (2005): 72-78. The tendency particularly embodied in this article is the assertion of procedures on "public hearing" in price-fixing field. The author extrapolated the "public hearing" procedures in the significant public decision-making proceeding and administrative legislation proceeding from the traditional adversary qua-judicial "hearing" procedures in Administrative Punishment Law.

[63] Wanhua Wang, *speech*, 63.

[64] Xixin Wang, *Gongzhong Canyu he Xingzheng Guocheng*, 2.

[65] Ibid.

[66] Ibid., 5-11; Xixin Wang, "Yifa Xingzheng de Hefa hua Luoji Jiqi Xianshi Qingjing [The legitimacy logic of administration according to law in its practical context]," *Zhongguo faxue [China legal Science]*, no 5 (2008): 63.

[67] Xixin Wang, *Yifa Xingzheng de Hefa hua Luoji Jiqi Xianshi Qingjing*, 64-66.

[68] Stewart, 1676.

languages which make the most of administrative actions are also goal-oriented. And "goal-oriented administration means administrative bodies have the authority to make balance and choices both in target-definition and means-choice."[69] Hence, in the circumstance of discretion, the administration is actually without any substantive legal constraint. Especially in China context, except the discretion in the foregoing two meanings, the administrative bodies also perform some real legislative functions because of the dual legislation system. (4) Since the broad legislative directives cannot afford clear, specific and authoritative rules, the process of application of them in the administrative proceedings can be regarded as the extension of political proceedings which should be completed within the representative deliberative bodies.[70] And even in the administrative enforcement, the situation that administrative bodies balance all kinds of interests and make a decision by discretion exists widely.[71] Thus, "the necessary policy balance and its underlying discretion revealed that administrative proceeding is a kind of political process in nature."[72] Of course not to mention some governments above certain level in China context perform legislative function in a real sense. This is a politics-administration legitimation path. (5) However, this theory does not deny the necessary incorporation of administrative expertise into an administrative proceeding and also thinks expertise can justify the decision through rationalization.[73] In order to solve the intension between the expertise and democratic need, this theory relied on the distinction between the value choice and means choice in the

[69] Xixin Wang, *Yifa Xingzheng de Hefa hua Luoji Jiqi Xianshi Qingjing*, 67.
[70] Ibid., 68
[71] Ibid., 69.
[72] Xixin Wang, *Gongzhong Canyu he Xingzheng Guocheng*, 23-24; *Yifa Xingzheng de Hefa hua Luoji Jiqi Xianshi Qingjing*, 68
[73] Stewart, 1687; Wang Xixin, *Yifa Xingzheng de Hefa hua Luoji Jiqi Xianshi Qingjing*, 70.

administrative proceedings.[74] They claimed that democracy should be introduced into the value choice field but left the experts in the means choice especially when the professional and technical things are involved.[75] Nevertheless, this theory also recognized the difficulty of clearly distinction in practice between values and means and claimed that when things cannot be identified, democratic institutions are more important to prevent the abuse of experts' rationality.[76] (6) Democratic institutions vary a lot both in theory and in practice. After making comparisons among all theories of democracy, the scholars who are endorsing the politics-administration model voted for the deliberative democracy.[77] This choice closely connects with the assumed acceptance of political pluralism theory in legal academia.[78] (7) Since this theory preferred deliberative democracy, it also tended to introduce deliberative public participation procedures into administrative law.

This theory has not given any detailed procedures but only some guidance for device of administrative procedures according to the deliberative democracy ideals. The detailed suggestions on the administrative procedures are as follows: (1) Proportionate interest representatives. This means all those whose interests are affected by administrative decision

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[74] Xixin Wang, *Yifa Xingzheng de Hefa hua Luoji Jiqi Xianshi Qingjing*, 70.
[75] Ibid., 73.
[76] Xixin Wang, "Gonggong Juece zhong de Gongzhong, Zhuanjia he Zhengfu-yi Zhongguo Jiage Juece Tingzheng Zhidu wei Gean de Yanjiu Shijiao [The Public, Experts and Government in Public Decision-making: A Research Perspective from the Hearing Procedures in Price-setting in China Context]," *Zhongwai Faxue [Pecking University Law Journal]* 18, no.4, (2006), 479.
[77] Ibid., 480-482; Xixin Wang, "Dangdai Xingzheng de 'Minzhu Chizi' Jiqi Kefu [The 'Democratic Deficiency' in Modern State and the Overcome]," *Fashang Yanjiu [Studies in Law and Business]* 129, no.1, (2009), 46-47; Beigen Xiao, "Xingzheng Juece Tingzheng Zhidu zhi Minzhuxing Kunjing ji Tuwei [The Democratic Predicament and its Breakthrough in Hearing Procedures in administrative decision-making]," *Guangdong Shehui Kexue [Guangdong Social Science]*, no 5, (2010), 181-183.
[78] Xixin Wang, *Dangdai Xingzheng de 'Minzhu Chizi'Jiqi Kefu*, 46. The author asserted, "This is a kind of consideration to legitimate administrative decisions through the participation, deliberation and compromise by the interest representatives, which reacts to a theory of pluralism legitimacy. Political pluralism could be regarded as a kind of concentrated expression of individual values." The classical viewpoint of political pluralism is also embodied in the definition of public interest. This theory also claims that ascertainable and objective public interest does not exist. Only the particular interest of individuals and groups do. The so called public interest is actually the compromise of various interests.

should be represented and involved in the administrative proceedings. (2) Equal and effective deliberation. Administrative procedures should ensure all participants are equal before the law in the communication so as the thorough and rational communication is possible. Hence, the administrative procedures should offer rules that can prevent or restrain the suppression, manipulation or any operation in black-box. (3) Rational and accountable decision. The procedural rules of participation can urge the administrative bodies to take all conclusions compromised in the deliberative process into appropriate consideration and should give a reason for the ultimate choice or decision.[79] From these proposed procedures, we can conclude the so-called "deliberative democracy" model actually is an interests-coordination consultative participation model among participants in nature.

2.2 An analysis on the two theories of public participation

From the previous descriptions, we can see both the two theories in China have developed against the western backdrops, especially against the USA experiences. The "due process" theory's social background is the state's transition from the parliamentary regulation to administrative regulation.[80] But it is not the true situation for China. Section one has depicted China's real situation. The "deliberative democracy" theory is more American-style. The whole reasoning process is greatly influenced by the paper *The Reformation of American Administrative Law* published in 1975.

The above debates reflect the complexities of modern administration when the modern

[79] Xixin Wang, *Gongzhong Canyu he Xingzheng Guocheng*, 44.
[80] In fact, such a conclusion is also not true. At least in United States, the scholars defined the administrative state as the transition from "a system of rules elaborated and implemented by the judiciary to a system of rules of comprehensive regulation elaborated and implemented by administrative agencies." See Edward Rubin, "It's Time to Make the Administrative Procedure Act Administrative", *Cornell Law Review* 89 (2004 2003): 96.

state comes into administrative state era. I think the fundamental reason why the advocacy of judicializing administrative process and politicizing administrative process appeared is that administrative agencies exercise more and more authorities that once exercised by the courts and the legislatures in a traditional country commitment to separation of powers. However, even leaving aside the problem of ignorance of path-dependence in China context in these two theories, they also have their own weaknesses both in reasoning and in practice.

2.2.1 The assessment of "due process" model

For the "due process" model, its kernel function is to realize fairness through mimicked judicial process. When an individual person is involved in the traditional administrative sanction process, it is both possible and necessary to involve him or her into an oral hearing and cross-examination and other similar court-type procedures to ensure the accuracy of fact-finding. But for the administrative legislation and public decision-making in the modern complex society, a public decision may involve a number of interests and may need multiparty persons to participate in the administrative process. Securing of an over cumbersome judicial-type process will definitely suffocate the administrative process. Additionally, "due process" requirement needs equal and fair treatment of every party involved and decides in a "white or black" way just as the court does. However, policy-making in public decision focuses on the "allocation of benefits and burdens to groups for the overall advantages of society"[81] and there is no need for the administrative body to make a choice between the white and black. They seek different goals. That is why

[81] Edward Rubin, "It's Time to Make the Administrative Procedure Act Administrative", *Cornell Law Review* 89 (2004 2003): 113.

in United States, though the APA prescribed the formal procedures inspired by the traditional due process requirements for the administrative rulemaking, Congress rarely stipulated statutes to impose such a request and the courts also tried to avoid such an interpretation. "Formal rulemaking has turned out to be a null set."[82] That is to say, "due process" model may be appropriate for the traditional court-like administrative actions, but for an administrative action involving various interests, it is not suitable any more.

2.2.2 The assessment of "deliberative democracy" model

"Deliberative democracy" theory contains some conflicting points in its reasoning process. First, it emphasized that as long as the relevant legislative rule affords obscure directives and then the administrative body has to balance various interests, administrative process becomes a political process. On the other hand it also admitted the importance of instrumental rationality of experts in administration and recognized expertise also could justify administrative action. This conclusion at least manifested administrative process may also be a technical one, which challenges the first conclusion. Second, from its suggestions for device of procedures, the deliberative outcome of the participants only have the advisory function, which means the government still has the authority to give the final decision. This also contradicts the first conclusion, since if administrative process is the political one, the participants who represent various interests of the public will have the final say.

The main reason for causing above contradictions lies in the theory's persistence in the judgment that administrative process is the political process in nature. Actually, just as it

[82] Ibid., 106-107.

admitted later, the rationale of administration also lies in its expertise. Conversely, if the administrative process was the political process, then there was no need for administration to exist since administrative affairs should have been handled by the political body-congresses. From this point, it is necessary to make a distinction between administration and politics, though as the "deliberative democracy" pointed out that administration in some occasions does involve some political factors. Taking administrative process as political process once prevailed in USA，but it has been under failure in institutional practice and great criticism in theory now.[83] Politicizing administrative process makes the suggestions according to this theory on the procedural institutions are nothing new more but just the transplantation of reg-neg from USA experiences based on the deliberative democracy model.

Another inadequacy lies in "deliberative democracy" theory per se. If the theory works empirically, it has to satisfy a precondition that all interests could be compromised and all the people involved could reach a consensus finally. How about the interests are antagonist fundamentally? Chantal Mouffe argued, dimension of power and antagonism are ineradicable characters of human society which she defined as "the political" and she regarded "politics" as the establishment of discrimination between us and them which she got the inspiration from Carl Schmitt's dichotomy between friend and enemy.[84] She claimed the aim of democratic politics is to transform an antagonism between enemies to an agonism between adversaries which refer to "somebody with whose ideas we are going to struggle

[83] Patricia Wald, "Negotiation of Environmental Disputes: A New Role for the Courts?" *Columbia Journal of Environmental Law* 10 (1985); William Funk, "Public Participation and Transparency in Administrative Law: Three Examples as an Object Lesson," *Administrative Law Review* 61, (2009).
[84] Chantal Mouffe, "Deliberative Democracy and Agonistic Pluralism? " *Social Research* 66, no. 3 (1999): 745-757; Chantal Mouffe, *the Democratic Paradox* (London· New York: Verso, 2000), 36-57.

but whose right to defend those ideas we will not put into questions."[85] Therefore, "A democratic society makes room for the expression of conflicting interests and values,"[86] even if just expression may lead to the dimension of undecidability. "Agonistic pluralism" theory gives us a method in an antagonistic context how to realize pluralist democracy.

Mention of "agonistic pluralism" is not aiming at proposing a replacing theory of "deliberative democracy", but to point out it may be difficult to be pursuant to a particular political theory to guide the devise of public participation institutions in administrative process. First, after a long history of development, democratic patterns have varied a lot. But it does not mean new patterns and theories have denied the old ones, though they do be established on the criticisms of old ones. New ones are complementary to old ones in changed concrete contexts, instead of simple replacement. And just as deliberative democracy theory and agonism theory have revealed, some preconditions always accompany a particular theory if it operates well in practice. That is why in modern democratic countries, different democratic patterns co-exist together like the referendum as the direct democracy, parliamentary democracy, deliberative or agonistic democracy and so on. Chinese scholars' concentration on a particular one and try to use it to unify all public participation institutions will inevitably simplify these institutions and deprive their flexibility in different contexts.

However, in my opinion, except the efforts to politicize administrative process, there are some valuable points containing in this theory. It has realized that public participation is

[85] Mouffe, *Deliberative Democracy*, 755.
[86] Ibid., 756.

most necessary when value choice is involved in administrative process, but emphasized expert roles when administration only concerns technical issues. This means different administrative issues call for different public participation institutions.

Generally speaking, Chinese administrative law theories are far from reasonable. The "due process" theory analogized the judicial process to the administrative proceeding and expected to realize fairness through public's involvement. However, it mixed the function of courts and administration and since this model unavoidably eventuates in delay and ossification of administrative proceedings, so it should be careful to adopt such a public participation mechanism. The "deliberative democracy" theory analogized the political process to the administrative proceeding and expected public participation to legitimize administrative decision through deliberative democracy mechanisms. However, administrative process is not political process, since the efficiency and expertise have a rudimentary importance to administration, though in some occasions, political factors also occupy a considerable weight. And that theory regarded a particular kind of democracy as an only recommendable one as the guidance of institutional devise also narrowed public participation models in administrative law.

All above have revealed that—both judicializing public participation and politicizing public participation cannot reflect the true nature and values of administrative processes. According to Professor Susan Rose-Ackerman, government accountability demonstrates in three distinct dimensions—performance accountability, rights-based accountability and

policy-making accountability.[87] That is to say, competency, rule of law and democracy are three main values that government should seek at the same time. However, these three values are not always inclusive and compatible. How to balance these values will be prime issue of administrative procedural devise. And I also talked about public participation's expected functions in Section one in Chinese present circumstance. Therefore, I think it is better to locate public participation institutions in the whole administrative process according to their anticipated functions and these functions' importance in the whole administrative process compared with other values. And when democratic considerations dominate the administrative process, given the diversities of democratic models, public participation institutions also should be flexible and reactive in various contexts. However, these two important aspects have been ignored in Chinese administrative law academia when scholars turned into western experience.

III. An overview of the evolution of public participation institutions in Chinese administrative law

Against the above social backgrounds and supports from official statements and academia, institutions of public participation were quickly introduced into administrative processes in actual laws and regulations. The following section takes an overview on the evolving path of institutionalization of public participation within actual administrative law chronically.

[87] Susan Rose-Ackerman, "Regulation and Public Law in Comparative Perspective," *University of Toronto Law Journal* 60, no. 2 (2010): 523.

1. Before public participation model — "hearing" procedures in specific administrative action[88]

Different from the western states having the experience transforming from night watchman to the welfare state which is also called the administrative state, China is in the transition from the administrative state socialism to a government according to law. China started to construct a limited government by rule of law to protect individual rights only in recent years. Against this social background, it is logical for China initially to focus on the administrative procedures that could control administrative power and protect individual rights. And one of the ways to realize this purpose in administrative law is to introduce hearing procedures in specific administrative action.

In 1996, the Administrative Punishment Law primarily provided informal hearing procedures[89] and the trial-type hearing procedures in administrative law for the people to be punished to participate in the decision-making process.[90] And in Administrative License Law enforced in 2004, the trial-type procedures further improved.[91] But the people who can participate in this kind of process is only limited to the particular administrative addressees or particular stakeholders. Though it is a kind of participation, it is not the public participation that will involve a range of people's interests in the strict sense.[92]

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[88] "Specific administrative action" in Chinese administrative law equals to the concept of "administrative disposition" in Japanese administrative law and "administrative adjudication" in USA's APA. But in practice, its scope is much smaller than the other two countries.

[89] Administrative Punishment Law, article 31, 32.

[90] Administrative Punishment Law, article 42.

[91] Administrative License Law, article 48.

[92] Article 48 of Administrative License Law should have developed into public participation procedures, which also can be seen in public hearing procedures in Japanese APA in rendering disposition upon application. However, from the hearing contents of article 48, it provides the debate and cross-examination among applicants and stakeholders. It is a kind of adversary judicial style procedure which is not suitable for multiparty participation. This means Administrative License Law only anticipated opposite parties to be involved in the process, but not the public participation in a broad sense.

2. Public participation in administrative rulemaking

Public participation institutions introduced into administrative law in a true sense was the Legislation Law promulgated in 2000. In article 58, Chapter 3, it provides, "in the process of drafting administrative regulations (Xingzheng fagui)[93], the opinions from relevant organs, organizations and citizens shall be solicited extensively. The solicitation of opinions may be conducted by panel discussion, feasibility study meeting and hearing." Then in the later, Administrative Regulation concerning the Procedures for the Formulation of Administrative Regulations (2001) and Administrative Regulation concerning the Procedures for the Formulation of Administrative Rules (2001) issued by State Council, the provisions about institutions of the public participation are more detailed. Local governments also make their respective regulations to enrich public participations institutions. A case of Guangzhou City will be studied as an advanced local example. These institutions are all examined in Chapter Two.

3. Public participation in significant administrative decision-making[94]

Obviously, administrative actions are not limited to the specific administrative action and abstract administrative action (administrative rulemaking). In the transitional period, the government still plays a leading role both in economic and social matters and their decisions affect a wide range of people's interests, for example, the action of policy-making, plan-making or others like disposal of state-owned assets. It is very hard to classify them

[93] Administrative regulations is a kind of normative decrees enacted by State Council through a certain procedures and only could be titled as "Tiaoli", "Guiding", "Banfa" or "Zanxing tiaoli", "Zanxing guiding". Article 4of the Xingzheng Fagui Zhiding Chengxu Tiaoli[Ordinance concerning the Procedures for the Formulation of Administrative Regulations].
[94] Concerning this concept, see Chapter Three.

into specific administrative action or abstract administrative action just as analyzed before, but the outcome of them will affect people's interests greatly, which makes the introduction of public participation into these kinds of actions most imperative.

At the central level, significant administrative decision-making process has developed one by one in different individual administrative field. Early in 1997, NPCSC passed the Price Law, which first time introduced public participation institutions in a statute in an individual administrative field. In order to implement the Price Law, the State Development and Reform Committee (SDRC) enacted the detailed procedural rules of public hearing about the price-fixing. SDRC also revised it three times.[95] And now the Rule of public Hearing in Government Price Hearing in effect was issued in 2008. The Law on Environmental Impact Assessment (2002) is another statute providing the institutions of public participation. In 2006, The State Environment Protection Agency issued detailed rules particularly on the public participation institutions in evaluation of environmental impact process. And in 2009 State Council further promulgated an administrative regulation concerning environmental impact assessment procedures. In order to support the public participation in environmental impact assessment field, in 2008, the Rules of Environment Information Disclosure was also enacted. Another national statute in central level is Urban and Rural Planning Law, though no detailed rules about public participation enacted by State Council and its agencies. Public participation institutions in these three administrative fields will be examined in Chapter three.

[95] The predecessor of the State Development and Reform Committee is the State development Planning Committee. Two times revision was made by the State Development Planning Committee.

On the other hand, a tendency toward a uniform set of administrative procedures in the significant administrative decision-making process appeared in local places. Given the limited significant administrative decision-making process provided at the national statutory level, there are still a lot of administrative actions left unregulated. Therefore, the local governments themselves began to initiate the codification of public participation institutions in the significant administrative decision-making process. Public participation institutions in Administrative Procedure Provisions of Hunan Province will be studied as a case.

Conclusions: This chapter includes three sections. The first section aims to give a huge social backdrop against the rise of public participation institutions in Chinese administrative law. I concluded as the tension between the outdated political configurations concerning administrative system left from the concentrated state planned economy period and the changed social structures caused by the reform and opening up policy launched in the beginning of 90s. The former further displayed in three dimensions: (1) the top-down pyramid managerial administration model; (2) strong administrative power; (3) inadequate external oversights on public administration which further encompasses the inadequate external oversights from the congresses and courts. The latter mainly displayed in two dimensions which relate to our topic: (1) the diversification of social interests; (2) the public's awareness of rights and legal interests and desire for participation and democracy. The tension between these two has produced a lot of problems, like policy-failure, corruption, "capture" problem, and even the public's informal demonstration for expressing

their views and etc. Against such a social background, public participation is greatly advocated and expected to reform the old administrative system and respond to the public's enthusiasm for participation.

The second section is about the official approaches and scholars' approaches to the public participation as the two sources of the institutionalization of public participation in legal system. It has revealed that it is the Party first time proposed the idea to develop public participation institutions to achieve democratization, rationalization of administrative process and oversight on government actions. And then State Council issued three documents to prompt institutionalization of public participation in the legal system, mainly in administrative rulemaking process and significant administrative decision-making process. These propositions have made great influences on the construction of public participation institutions in the present legal system. However, both the public participation conceptions and institutions suggested by these official documents are overwhelmingly under the guidance of the mass line theory and Chinese concept of democracy. Public participation was regarded as a kind of working methods but not people's right. Therefore, official attitude toward public participation is the passive participation with advisory function. Another source is the academic theories. I tried to summarize them as two idea types：one is the "due process" model and the other is "deliberative democracy" model. These two theories tried to answer why public participation is necessary from the theoretical perspective but also represented two tendencies concerning the development of public participation institutions in administrative processes: one is judicialization of public

participation and the other is politicization of public participation. These two theories actually were all proposed against the western history. And even in the west, they have been under challenge both in theory and practice. After analysis, I think both of these two theories are one-sided and narrow. Instead of employment of a particular theory to unify public participation institutions, I try to conceive of two dimensions for consideration when enacting public participation procedures. First are the anticipated functions of public participation and the importance of those functions in the whole process compared with other pursed values. Second are the varieties of democratic models in different contexts when political consideration dominates.

The third section is about an overview of the evolution of public participation institutions in Chinese administrative law. I summarized them as three phases. The first phase is the hearing in specific administrative action before public participation. It is a participatory model but since it usually only refers to the individual involvement or very limited particular persons' engagement, it falls outside of this thesis's topic. The second phase is the public participation institutions in the administrative rulemaking, both including the development at the central level and local level. They are the central contents of Chapter two. The third phase is in the significant decision-making processes. They also include the different developing orientations at the central level and local government level. And they are the main contents of Chapter three. Though I organized the three stages in chronicle, they are not in a very strict sense, since from the first phase to now totally less than 15 years.

All the above contents have answered the question about why (Section One) and how

(Section Two and Three) public participation institutions have been introduced into Chinese administrative law, and I will move to the status quo of public participation institutions in Chinese administrative law and explore the influences of the two sources on the actual public participation institutions.

Chapter Two

Public participation institutions in administrative rulemaking process

I. Chinese administrative rulemaking system

1. Chinese formalist approach to administrative rules

There are two main kinds of approaches to the administrative rules. One is the functional approach and the other is the formalist approach. China falls into the latter category. I will analyze this characteristic compared with USA's functional approach.

Under Administrative Procedure Act (APA) of United States, rulemakings are classified into formal rulemaking[96] and informal rulemaking[97]. Formal rulemaking procedures are triggered only when a statute particularly has the requirement that administrative rules should be made on the record after opportunity for an agency hearing. Because of the cumbersome characteristics of the formal procedures, most of administrative regulations are enacted through informal rulemaking procedures—notice and comment procedures. Under

[96] 5 U.S.C. §553(c), 556, 557.
[97] 5 U.S.C. §553.

APA, notice and comment is not applicable in some occasions.[98] However, the Federal Courts adopted a functional approach to treat the administrative rules regardless of what labels the administrative agencies put on their documents. In a series of cases, though the relevant agency asserted that their documents fall into the exceptions of notice-and-comment requirements as the interpretative rules or general statement of policy and so on, the Court still made an examination on the languages of the documents to judge whether they have a legislative intention or not and if the answer is yes, they should be subjected to notice-and-comment requirements.[99] This approach means, as long as the languages of an administrative rule exposes an intention of legal binding on private persons, the relevant administrative agency should enact it through notice-and-comment procedures.

On the contrary, Chinese administrative law adopted a formalist approach. Regarding this approach, Professor William Funk had a classical description, "a simple test for whether a rule is a legislative rule or a non-legislative rule: simply whether it has gone through notice-and-comment rulemaking… If an agency gives a non-legislative rule binding legal effects, then the agency has acted unlawfully, not because the non-legislative rule was a procedurally invalid legislative rule, but because the non-legislative rule cannot have the legal effect that the agency accorded it."[100] This approach means the legal effects turn on the procedures in the rule-making. If an administrative rule is made through notice-and-comment procedures, it is legislative and has legal effect. Otherwise, they are not.

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[98] 5 U.S.C. §553(b) (3).
[99] Breyer et al., *Administrative Law and Regulatory Policy: Problems, Text, and Cases*, 7th ed. (New York: Wolters Kluwer Law & Business, 2011), 576–599.
[100] William Funk, "A Primer on Nonlegislative Rules," *Administrative Law Review* 53(2001): 1324-1325.

The difference between these two approaches lies in if an agency is intended to make a rule with legislative effects but adopts non-legal binding procedures, how the court deal with such a rule? The court with functional approach will regard such a rule as a legislative one and remand the rule to the agency to initiate the notice-and-comment procedures, while the court with formalist approach will admit such a rule as what the agency stated but deny its legal effects. If the administrative agency does an action only pursuant to such a rule, the court with formalist approach will invalidate such an action for lacking of legal basis. For a formalist defender, the procedures decide which category a rule falls into and what kind of legal effects it has.

In China, classification of administrative rules and identification of legal effects of these rules depend on the certain statutory procedures undertaken when the rule is made, no matter whether these rules are substantive, procedural or interpretative. For example, when State Council enacted administrative rules going through procedures enshrined in Legislation law, these rules fall into the category of administrative regulation, and they have the legal effects, even binding the courts.[101] But if the rules have not adopted such procedures, then they are classified into the other normative documents, and they have no clear legal effects. This problem will be also explained in the next part.

2. Chinese hierarchical approach to the administrative rules

In Chinese administrative law, administrative rulemaking can be divided into administrative legislation (Xingzheng Lifa) and formulating other normative documents

[101] Administrative Litigation Law, article 52.

(Qita Guifanxing Wenjian). Administrative legislation is regulated by Legislation Law. It is subjected to statutory procedural requirements and the rule through such procedures is titled a particular name. According to Legislation Law, only State Council, the administrative agencies under State Council, the provincial governments, municipalities directly under the central government or particular major cities have the authority of administrative legislation.[102] In contrast, there is no any statutory requirement concerning formulating other normative documents. So in principle, every rule stipulated without going through the statutory procedures falls into the category of other normative documents.

Administrative legislation can be further divided according to the position of the administrative bodies in the hierarchical bureaucratic configuration. Administrative regulations promulgated by the State Council (Xingzheng Fagui) can bind courts in administrative litigations, while the administrative rules promulgated by administrative agencies under the State Council (Bumen Guizhang) or by local governments (Zhengfu Guizhang) have no such strong binding effects, but courts can make a reference to them.[103] Bumen Guizhang(Agency rules) and Zhengfu Guizhang(Government rules) are collectively known as Guizhang. The whole Chinese administrative rulemaking systems are as table 4:

Therefore, two criteria are employed to locate Chinese administrative rules in administrative law system. One is the formalist and the other is hierarchical approach. Some Chinese scholar has made sharp criticisms on this kind of identification of administrative rules.[104] I will not develop the criticisms though I think the drawbacks are obvious.

[102] Legislation Law, article 56, 71, 73.
[103] Administrative Litigation Law, article 52, 53.
[104] Mang Zhu, "Lun Xingzheng Guiding de Xingzhi-cong Xingzheng Guifan Tixi Jiaodu de Dingwei [The Nature of The

However, the present administrative rule systems do constitute the significant arenas for public participation in Chinese administrative law.

Table 4

Chinese administrative rulemaking system

Subjects	Terms	Legal effects
State Council	XingzhenFagui (Administrative regulation)	Binding the courts
Administrative agencies under State Council	Bumen Guizhang (Agency Rules)	The courts could make a reference[105]
The local governments prescribed in Legislation Law	Zhengfu Guizhang (Local government rules)	The courts could make a reference
Any administrative body	Qita Guifanxing Wenjian (Other normative documents)	No clear legal effects[106]

Other Normative Documents-Location from the Legal Normative Perspective]," *Zhongwai Faxue [Peking University Law Journal],* no. 1, (2003). In this article, Professor Mang Zhu pointed out the most fatal drawback lying in this identification is that the formalist approach and hierarchical approach cannot explain the rule itself is a legal one or non-legal one. And it really has made some confusion in practice. For example, in present Chinese legal system, the other normative documents made by State Council could be the basis of agency rules and government rules. But the former has no legal effects, while the agency rules and government rules have legal effects.

[105] What means "the court can make a reference" in the legal sense? According to article 62 of Zuigao Renmn Fayuan Guanyu Zhixing《Zhonghua Remnin Gongheguo Xingzheng Susongfa》Ruogan Wenti de Jieshi [The Interpretation on Several Problems in Implementing 《Administrative Litigation Law 》] promulgated by Supreme Court in 2000, The Supreme Court interpreted it as courts can invoke the valid Guizhang in 2000. Later in 2004 in a notice (Zuigao Renmin Fayuan Guanyu Yinfa 《Guanyu Shenli Xingzheng Anjian Shiyong Falv Guifan Wenti de Zuotanhui Jiyao》) to the lower courts, the Court required all the lower courts to make a judge on the validity of the Guizhang. This means if the Guizhang valid, then the court must invoke it; if not, then the court should choose not to apply. However, the court has no power to declare Guizhang invalid. According to the Explanation on the draft of Administrative Litigation Law (Guanyu《Zhonghua Renmin Gongheguo Xingzheng Susongfa (Caoan)》 de Shuoming) issued by the Standing Committee of National People's Conference in 1989, the Notice is most approximate to the legislative intention.

[106] Administrative Litigation Law said no words concerning the legal effects of the other normative documents. But in the Interpretation in footnote 98, the Supreme Court said the courts can invoke the valid Qita Guifanxing Wenjian. However, in the Notice, it subjects the other normative documents to judicial review. And it said the other normative documents are not the sources of administrative law and therefore they cannot bind the courts. However, there are still some Qita Guifanxing Wenjian, their legal effects are higher than Guizhang, for example, Some documents issued by the State Council without through the statutory procedures of Xingzheng Fagui will fall into the other normative documents, but according to the Legislation Law and hierarchical corollary of the bureaucratic centralism, such a documents can bind the agencies under the State Council and the lower governments and bind them. If valid Guizhang can bind the courts, how about such documents falling into the category of the other documents cannot bind the courts logically? So some chaos exists in the legal effects in the Qita Guifanxing Wenjian field. It is not only because the formalist approach adopted in dividing the administrative rules, but also the consequence of dividing these rules according to a hierarchical bureaucratic configuration.

II. The status quo of public participation institutions in administrative rulemaking at the central level

1. Public participation institutions in making administrative regulation (Xingzheng Fagui)

1.1 Public participation institutions in making administrative regulation in Legislation Law and the Ordinance concerning the Procedures for the Formulating Administrative Regulations (OPFAR)

The Constitution does not impose any kind of public participation requirements on State Council when it enacts administrative regulations. It is the Legislation Law promulgated in 2000 first time imposed such requirements.

Article 5 of Legislation Law is the one of the principles concerning legislative activities. It requires all legislative activities to reflect the wills of the people, promote socialist democracy, and ensure that people are able to participate in the rulemaking process through various channels. This principle is of course applicable to State Council when it enacts administrative regulations. The third chapter of Legislation Law is exclusively about administrative regulations. Article 58 is about the procedures of administrative regulation making. It provides, "in the process of drafting an administrative regulation, the drafting body shall solicit opinions from a wide circle of constituents such as the relevant agencies, organizations and citizens. The opinion collecting may be conducted in various forms such as panel discussion, feasibility study meeting, hearing etc."

Article 58 treats the relevant agencies, organizations and the individual citizens equally.

It is too abstract and general as to have little feasibility in practice. Moreover, it is also the only article concerning the administrative regulation making procedures in Legislation Law and it limits public participation only to the drafting phase. Only according to this approximately empty article, it is hard to see it can reflect the democratic aim embodied in article 5. So State Council promulgated the OPFAR in 2001 to enrich article 58 of Legislation Law and further enlarged the scope of public participation and clarified the weight of public participation in the formulation of administrative regulation. It is noteworthy that the OPFAR is an administrative regulation, which means the State Council regulates its own administrative regulation action in the form of administrative regulation beyond the requirements of statutory law. The following is a further examination on the contents of the OPFAR.

OPFAR divides the whole administrative regulation making process into four sub-processes. They are (1) agenda setting, (2) drafting, (3) review and (4) decision and promulgation. The following part will make an analysis on the public participation institutions in the four steps. Table 5 is about the main public participation institutions in the whole administrative regulation making process.

1.2 A detailed analysis of public participation institutions in OPFAR

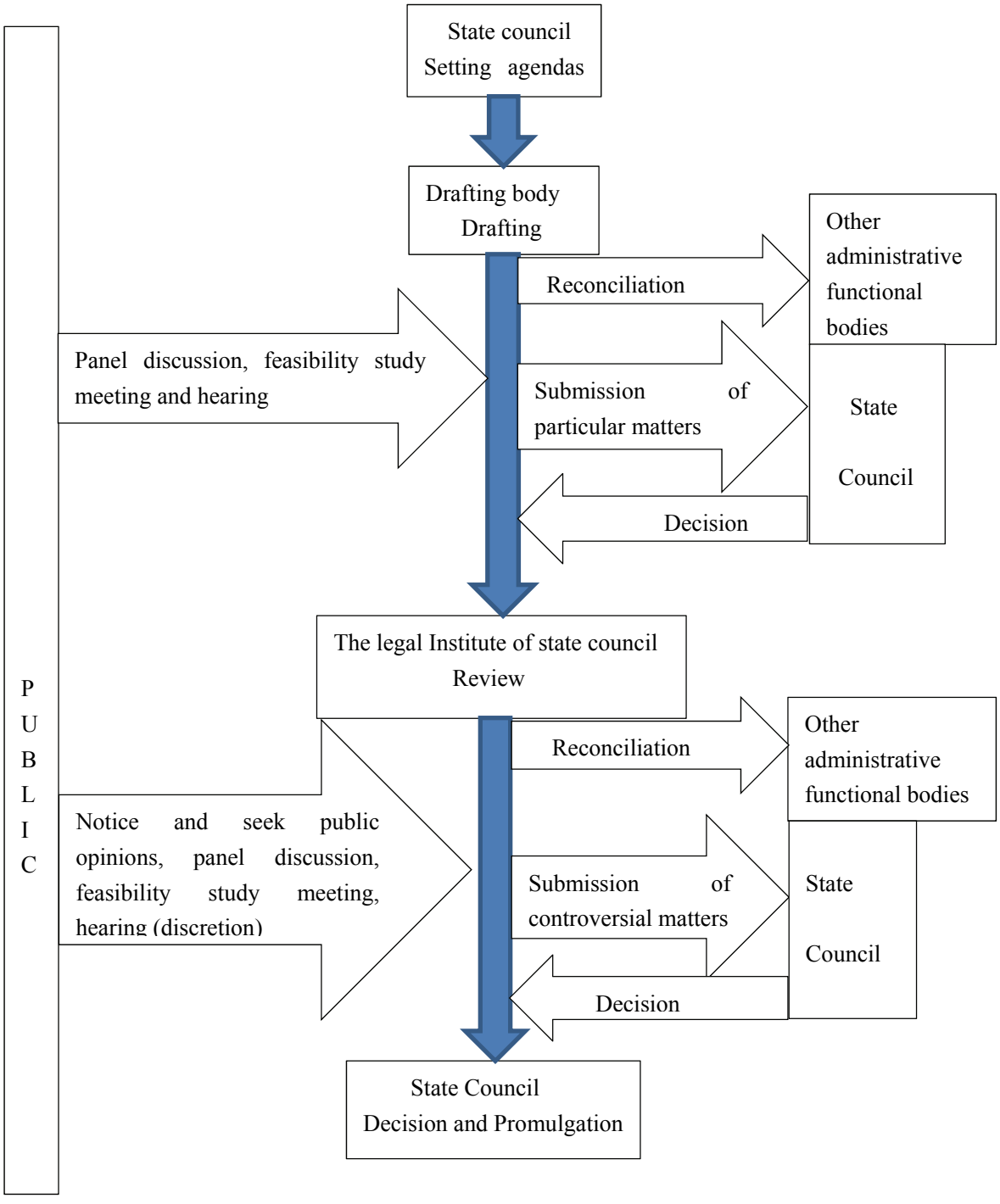
1.2.1 Agenda setting

In this phase, according to the article 7 of the OPFAR, only agencies under State Council are qualified to apply to State Council for their administrative legislative projects

being put on the State Council's annual legislative work plan. The public cannot participate in agenda setting phase.

Table 5

Administrative regulation formulating process in OPFAR



1.2.2 Drafting

1.2.2.1 The contents of public participation in the drafting phase in OPFAR

Though State Council organizes the drafting work, a particular agency or several agencies under State Council or the Legal Institute of Sate Council assumes the specific drafting work.[107] The article 12 of OPFAR provides that, "In the process of drafting an administrative regulation, the drafting body should conduct thorough investigations and researches, summarize practical experiences, solicit opinions broadly from all sides such as the relevant agencies, organizations and citizens. The opinions seeking may be in various forms such as panel discussion, feasibility study meeting, hearing etc." The late half paragraph of this provision is the same with article 58 of Legislation Law. It still has all the problems that have been pointed out.

1.2.2.2 The official Explanation on the OPFAR

The most official footnotes of OPFAR is the Explanation on the OPFAR (OPFAR Explanation) written by some members who engaged in drafting OPFAR. Though the Explanation has no legal effects, to some extent it reveals legislative intentions of the OPFAR. The authors of the Explanation thought investigation and researches include materials' collection and on-the-spot investigation. Materials' collection has nothing to do with the public participation, but on-the-spot investigation includes collecting opinions from the public. There are no clear procedures but only some principles imposed on the investigation and researches like the objects of investigation must be broad, representatives

[107] OPFAR, article 10.

must include grassroots representatives and the regulated stakeholders. And the investigation body should be skilled at posing questions and collecting opinions, should be able to analyze, synthesize and summarize viewpoints from all sides.[108]

They also explained that "solicit opinions broadly from all sides" has two meanings. One is that the relevant administrative body should collect opinions broadly when it drafts administrative regulations. Not only the scope of public is broad but the contents of information being collected are also broad. They mentioned that the drafting body should not only collect opinions from the relevant agencies, but also from the objects being regulated; not only from its own inner administrative branches, but also the other relevant administrative departments; not only from the leader but also the public; not only agreements but also objections.[109] The second meaning is that the forms of collecting opinions are various. For example, they illustrated the panel discussion as the a kind of meeting held by the drafting body to listen to the views of participants invited to the meeting who are relevant experts, members of relevant departments, individuals, companies, and other organizations. "The panel discussion can be applied widely, the organizer often put forward the problem to resolve or the outline, and participants can make comments from every perspective."[110] The panel discussion has some requirements like: (1) The notice of the meeting should be given to the participants in advance and the notice should include the topic of the meeting and make sure the participants have enough time to prepare the meeting. (2) The size of the meeting should be proper so as to ensure every participant's opportunity

[108] *An Interpretation on OPFAR*, ed., Jiankang Cao (Beijing: China Legal Publishing House, 2002), 51-52.
[109] Ibid., 52.
[110] Ibid., 53.

to express their voices. (3) A meeting record is needed, conference recording is better. (4) The drafting body should summarize the opinions from the meeting and make a thorough study on them.[111] Feasibility study meeting is another kind of form of soliciting opinions. It is a kind of meeting that the drafting body in order to evaluate a preliminary administrative regulation draft, or an institution or a measure in the preliminary administrative regulation draft, invites some experts and organizations to study on the necessity, feasibility thereof. The professional knowledge is emphasized in this kind of meeting.[112] The last form listed is the "hearing". But even in the Explanation, there is no clear definition and procedural requirements concerning hearing. It said, "Hearing is a new sort of institution. In which circumstance hearing should be adopted, how to organize hearing, how to deal with the opinions from the hearing need more explorations in practice."[113] Though hearing is also a kind of method to solicit opinions, the Explanation regarded that the hearing procedures are stricter than the preceding two forms. They make a comparison between the hearing and the other two forms. These differences are: (1) Speakers in the hearing should follow hearing procedures and the directives of hearing host and concentrate on the topic of the meeting while the other two forms are at will. (2) A hearing should be held open. So if a draft needs to keep secret, then a hearing should not be adopted. (3)The participants of a hearing should include the parties whose stakes are antagonist.[114]

[111] Ibid.
[112] Ibid., 53-54.
[113] Ibid., 54.
[114] Ibid., 86.

1.2.2.3 Assessment of the four forms of public participation in OPFAR

According to OPFAR and its Explanation, on-the-spot investigation is a new kind of public participation in addition to the traditional participatory forms of panel discussion, feasibility study meeting and hearing in Legislation Law. How should we assessment these four forms of public participation.

First we will evaluate the on-the-spot investigation. Actually no clear rules have been imposed except the grassroots and stakeholders' involvement according to the Explanation. It is only a casual way for seeking opinions.

Second, we will evaluate the panel discussion and feasibility study meeting. From the comparison in the Explanation that if a draft needs to keep secret then a hearing meeting should not be adopted, we can infer that the panel discussion and feasibility study meeting can be the forms of collecting opinions from a small range of persons in a closed circle, without opening to the general public. From this point, panel discussion and feasibility study meeting in most circumstances are the limited public participation. Additionally, if we accord to most scholars' opinions that expert consultation should be separated from public participation[115] and official proposition of "public participation, expert consultation and government decision", in the light of the Explanation's definition of feasibility study meeting, feasibility study meeting is more approximate to expert consultation but not the public participation since only experts are involved. Moreover, according to the Explanation, panel discussion is a kind of consultation with some set requirements. But the

[115] Mang Zhu, "Lun Chenshi Guihua Tingzhenghui zhong de Shimin Canyu Jichu [The basis of citizen participation in the hearing in urban planning]," *Fashang Yanjiu [Studies in Law and Business]*, no.3, (2004): 14.

drafting body has the discretion to elect the participants. No separation has been made between the public and experts. Therefore, feasibility study meeting is a kind of expert consultation, and panel discussion is a casual way for seeking opinions.

Third, we will evaluate the "hearing". If we refer to the Black's Law Dictionary, "hearing" in administrative law means "any setting in which an affected person presents arguments to a decision-maker"[116] on zoning variations and legislative hearing in legislative practice means "any proceeding in which legislators or their designees receive testimony about legislation that might be enacted". Just as American administrative law scholars pointed out,

> Beware of oversimplified labels like the term hearing. A 'verbal coat of many colors', the term hearing is used by courts and commentators to refer to a wide variety of procedural requirements, ranging from 'legislative' hearings where interested persons are invited to express views orally to a decisionmaker and response to the questions, to informal appearances by a party before a decisionmaker, to full trial-type procedures with oral testimony and formal presentation of documentary evidence, cross-examination by counsel, and decision on the basis of a formal record. Using the term hearing is often unavoidable because of its convenience, but you should always identify the particular type of 'hearing' in question.[117]

Obviously, in China, the concept of "hearing" in the relevant legislators' minds is more narrow and stricter than the west. And we can see, the places where the western scholars want us to pay heed are just the ones that the OPFAR deliberately bypassed. If nothing about hearing procedurals is prescribed except the mention of the label per se, it equals to say nothing. The administrative regulation drafters seem to stick to the concept of "hearing" as an exotic word and keep it in a mysterious situation. So there are no detailed requirements imposed on the hearing which should have constituted kernels of a procedural regulation.

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[116] Bryan A. Garner and Henry Campbell Black, *Black's Law Dictionary* (West, 2009), 788-790.
[117] Breyer, 479.

Though we can make references to the Explanations put forward by some of the drafters and use their understanding of hearing as the fundamental requirements, but even these requirements have no mention of detailed procedures.

The authors of the Explanation said there were other forms of collecting opinions that OPFAR had not listed, such as file submissions and collecting opinions through Mass Medias.[118] But whether they constitute some sorts of independent administrative procedures is questionable. For example, notice-and-comment procedures can be conducted in the written form and also can be undertaken on the internet. So how to classify these kinds of collecting opinions is actually depends on their relationship between other procedures in a formulating process.

Therefore, public participation in this phase both in Legislative Law and the OPFAR is just a label without substantive contents. The Explanation in some degree clarified some aspects of the four forms of public participation. For example, the stakeholders' involvement in the rulemaking have been stressed; the requirement of record is also added, and some preliminary identification of three forms of public participation has been made, among which we concluded that panel discussion is a casual way to seek opinions and is limited to certain invited participants, while the feasibility study meeting emphasizes the expertise, so experts will be the main participants. For the hearing, the stakeholders in an antagonist position are expected to be involved. However, no matter on-the-spot investigation, panel discussion, feasibility study meeting or the hearing, no detailed legal participatory procedures were established. They all are just for inputting more information into

[118] *An Interpretation on OPFAR,* 54.

administrative process according to administrative needs. And drafting body has the complete discretion to decide which form it will adopt, whose opinions they will seek and what kind of opinions they will adopt. Though hearing started to bear a little rights and interests protection function, it had not developed yet. And all the public participation institutions lack the democratic profiles. All public participatory forms are discretionary information gathering methods for State Council but not public rights.

1.2.3 Review

The reports on drafting administrative regulation should be delivered to the Legal Institute of State Council for review. According to article 18 of the OPFAR, if the report cannot meet the requirements of article 16 which asks the drafting body to make an explanation on the public opinions, the Legal Institute of State Council can postpone or remand the draft to the drafting body.

Article 19 of OPFAR prescribes in the review phase the Legal Institute of State Council can notice the significant administrative regulation draft to the society and solicit opinions under the State Council's consent. Article 20 requires the Legal Institute to walk into the grassroots for on-the-spot investigation and collect opinions of the relevant agencies, organizations and citizens at the basic level. Article 21 provides that if the administrative regulation draft involves significant and complex problems, the Legal Institute should convene panel discussions or feasibility study meetings made up of relevant unions and experts. And article 22 says, if the administrative regulation draft directly involves the significant interests of citizens, legal persons or other organizations, then the Legal Institute

could conduct hearing to listen to the opinions of the relevant agencies, organizations and the citizens. No further detailed public participation procedures are offered. Both of these articles give the Legal Institute the discretion to decide whether in this phase to employ public participation procedures and what procedures should adopt.

The problems of public participation here are the same with ones in the drafting phase. As some scholars pointed out, Chinese public participation is established as a new added work method for government, but not based on participatory right of the citizens.[119] However, OPFAR extended public participation from only the drafting phase in the Legislation Law to the review phase.

1.2.4 Decision and promulgation

In this phase, no public participation is furnished. Though article 26 requires the Legal Institute or the drafting agency to make an explanation on the draft when the members of the State Council Standing Meeting discuss on draft and review the draft, whether the public opinions in the all above phases should be stated is not clear.

1.3 Evaluation and Conclusion:

From the Legislation Law to the OPFAR promulgated by State Council and to the Explanation on OPFAR, some public participation labels have been tagged in drafting and review phases when formulating an administrative regulation, institutions of public

[119] Wanhua Wang,"Wanshan Zhengfu Juecezhong de Gongzhong Canyu Jizhi de Jidian Sikao [Several Considerations on Improvements of Public Participation in Government Decision-making]," *in International Conference on "Legal Issues of Public Participation"* October 21-22, 2010 (Beijing: Research Center for Government by law of CUPL 2010), 252.

participation in a real sense have not yet effectively set forth in the legal sense. They all used very broad languages, making public participation more like a slogan but not the administrative bodies' obligation and public right. Such broad languages authorized all discretion to the administrative agencies to decide the procedures of public participation. And according to the present prescriptions, it is also lawful for the relevant administrative bodies to choose the feasibility study meeting in rulemaking process, which means only the experts are involved. Additionally, according to Administrative Litigation Law, courts cannot review administrative regulations,[120] so courts have no opportunity to impose essential legal procedural requirements on the administrative regulations.

In sum, public participation institutions in the administrative regulation making process both lack the clear feasible rules, also lack compulsory applicability.

2. Public participation institutions in making agency rules and local government rules (Bumen Guizhang and zhengfu Guizhang, Guizhang is used referring to both)

2.1 Public participation institutions in making Guizhang

Article 74 of Legislation Law delegated State Council to enact an ordinance concerning agency rules and government rules formulating procedures with a reference to the administrative regulations making procedures prescribed in Legislation Law. So State Council promulgated the Ordinance concerning the Procedures for the Formulation of Guizhang (OPFG) in 2001, actually at the same time with promulgation of OPFAR. Compared with OPFAR, OPFG seems stricter. OPFG made no difference between agency

[120] Administrative Litigation Law, article 52.

rules and government rules. They apply the same procedural rules.

OPFG also divides the formulating process into four phases. The same with the phases formulating an administrative regulation, in the first and the fourth phase, no institutions of public participation have been set forth. So I will neglect these two phases. In the drafting and review phases, a bit of different institutions have been introduced.

2.1.1 Drafting

The words of article 14 of OPFG are totally the same with the article 12 of OPFAR which I have analyzed in detail in the above part, except adding a written form of soliciting opinions. The characteristic of public participation in OPFG lies in its proposal of hearing procedures though only in a framework. Article 15 of the OPFG prescribes,

> If the administrative rule being drafted directly involves the significant interests of citizens, legal persons or other organizations, and relevant agencies, organizations and citizens greatly disagree with it, then the administrative rule being drafted should be open to the public, and seek opinions from all sides of the society; The drafting body also can convene a hearing. The hearing is conducted in accordance with the following procedures:
> (1) The hearing is conducted openly; the drafting body should announce the time, place, and the contents of the hearing 30 days before it is going to be held;
> (2) Relevant agencies, organizations and citizens who participate in the hearing have the right to pose questions and comments;
> (3) A record is needed about the hearing. The main viewpoints and reasons of spokesmen shall be recorded accurately.
> (4) The drafting body should thoroughly study on the various viewpoints raised in the hearing and should note how to deal with them and expound reasons when deliver the draft to review.

But even the members who participate in drafting this Ordinance also admitted that the requirements on the hearing are still in principle. They just wanted to refine Legislation Law to some extent and form the fundamental framework of the hearing procedures in the Guizhang making process. So the administrative agencies under State Council and local

governments can conduct the hearing in light of different circumstances.[121] However, at least it established some clear rules for hearing, and reason-giving inside administrative system was also established in legal form first time.

Hearing in OPFG is only one of the methods to seek public opinions, however, in the Explanation of OPFG, the members pointed out more detailed requirements. Concerning the hearing meeting presider, they pointed out the presider should be the internal neutral officer like the staff working in the legal institute of administrative agency or government or the general office; On how to choose the participants, they pointed out participants should be the representative of stakeholders and have enough capacities to express their viewpoints. The drafting body could choose from the applicants in a certain region according to different kinds of interests or they also can designate individuals or organizations which have a direct connection with the drafting rule. After all, who can represent whom and how to define the participants is the drafting body's discretion. On the contents of the fundamental procedures of a hearing, they pointed out it mainly includes: (1) The drafting bodies state opinions and reasons on the drafting rule; (2) The participants state opinions; (3) The drafting body answer the questions put forward by the participants; (4) Under the consent of the hearing presider, the drafting body and participants can make mutual questions and debates.[122]

Hence, hearing in OPFG is a kind of method to seek public opinions. From this point, it is not different from the panel discussion in nature. However, the requirements in the Explanation of OPFG developed the hearing in OPFG into an interest representative

[121] *An Interpretation on OPFAR,* 67.
[122] Ibid., 68-69.

participation and imposed qua-judicial type procedures which mainly embodied in the anticipated neutral hearing presider and opposite roles between the drafting body and the participants. From this point, due process theory and deliberative democracy theory have slight impacts on the Explanation if OPFG.

2.1.2 Review

Both the contents of article 21 and 22 of OPFG are almost the same with the article 20 and 21 of OPFAR which I have analyzed in the above part. However, article 23 clarifies the preconditions when the Legal Institute under administrative agency or local governments can open the draft to the public or host a hearing. Beyond two conditions that should to meet listed in article 15, another two preconditions also have to meet, they are the condition that the drafting body has not open to the public and either hold the hearing meeting, and the condition the Legal Institute should get the permission from the relevant agency or the local government. According to that article, the hearing procedures are the same with article 15.

It is noteworthy that article 2 provides, "the administrative rule that is established by violation of prescriptions of this Ordinance will be invalid."[123]

Above all, compared with OPFAR, OPFG is more detailed and stricter. The biggest feature of the OPFG is its provisions about the hearing procedures. Hearing is located as a method to seek opinions from relevant stakeholders and inside reason-giving institution has also been established. However, the reason is not given to the public or the participants but

[123] Ironically, this article has little meaning, since courts cannot declare administrative rules invalid.

to the review body in the process of rulemaking.[124] This makes the reason-giving institution cannot achieve the function of public responsiveness and accountability. Though the Explanation further anticipated the hearing to assume the function of protecting relevant interests by proposing the interest representative participation and qua-judicial procedures, it has no legal effects although in some degree it reflected some legislators' intention. And relevant administrative bodies can decide on whether to initiate a hearing by discretion.

In sum, though OPFG has more detailed provisions about public participation than OPFAR, administrative bodies still have a lot of discretion. It is still hard to say that public has a right to participate in Guizhang making process.

2.2 The status quo of public participation in agency rule-making

Different from administrative regulations that are promulgated by one subject- State Council, the agency rule-making is conducted by a number of agencies under State Council. Though Constitution only empowers the departments and commissions under State Council to promulgate agency rules, Legislation Law enlarged the agency rule-making subjects into the People's Bank of China, the Audit Office and the direct institutes with administrative functions under State Council.[125] According to the present structure of State Council, totally 44 subjects have the authority to promulgate agency rules.[126] Most of them set their own agency rule-making procedures in an agency rule. I will choose some rules of the agencies to examine to what extent these relevant agencies have tailored the institutions of public

[124] OPFG, article 17.
[125] Constitution, article 90; Legislation Law, article 71.
[126] Concerning the components of the State Council, http://www.gov.cn/gjjg/2005-08/01/content_18608.htm(assessed in June 2, 2011).

participation in OPFG.

For example, in the Measures of Taxation Agency for the Formulation of Rules enacted by the State Administration of Taxation, article 8(1) prescribes that when the drafting body drafts an administrative rule on the taxation, it should consult with other offices within the taxation bureau and other bureaus at the basic level. While the article 14 of OPFG requires the drafting body to collect opinions not only from the relevant agencies but also the relevant organizations and the citizens, the Measures enacted by the State Administration of Taxation seems totally neglect the opinions of the organizations especially the NGOs and the levied objects-some relevant companies in the market and the individual citizens. Though the second clauses copied article 15 of the OPFG, the hearing procedures are also neglected. And no any institution of public participation in the review phase is offered. From the whole Measures of Taxation Agency for the Formulation of Rules, most of the formulating procedures are closed within the tax official system inside. Only in the case that a rule directly involves the significant interests of citizens, legal persons or other organizations, the rule draft will open to the public to collect public opinions and or to convene a hearing.

Another example is the Measures of the Ministry of Science and Technology for the Formulation of Rules. Article 13 only requires the drafting body to solicit opinions from the relevant offices and experts within its own department. If necessary, the drafting body should collect opinions from the local science and technology authorities and research institutions or other agencies under State Council but not the opinions from the general public.

The Measures of the Ministry of Railways for the Formulation of Rules still keeps effective even though it was enacted by the Ministry of Railway earlier than the promulgation of OPFG. Collecting opinions and hearing are mentioned simply in the drafting phases but no other such languages in the internal review phase.

Though not all agencies under State Council enacted their own administrative rules on formulating Bumen Guizhang, from those enacted ones, it seems the agencies are reluctant to adopt public participation institutions required in OPFG. The provisions concerning public participation in the OPFG are the minimum procedural requirements for an agency formulating a rule, but the agencies still made efforts to simplify them and reduce the public participation by their discretion as much as they can.

III. The status quo of public participation institutions in administrative rulemaking at the local level

1. The development of public participation institutions in local government rulemaking-an advanced case of Guangzhou City

According to article 73 of Legislation Law, provincial governments and major cities can enact government rules (Zhengfu Guizhang). In China's mainland, there are totally 82 governmental subjects have the authority to stipulate government rules, including 32 provincial governments and 50 municipal governments. Because of the diversity among different places in China, it is hard to take an overall examination on the development of government rules making procedures about the public participation encompassing all of the 82 subjects. Here, a case of Guangzhou City will be studied in the following part as an

advanced example to explore how the local governments develop public participation institutions beyond OPFG.

The reasons to choose Guangzhou City as an example are as follows: First, Guangzhou City promulgated the first local government rule particularly on public participation in the process of formulating government rules. Second, that government rule tried to introduce some new mechanisms of public participation and information disclosure into the formulating process which have made great breakthroughs, especially the typical American informal rulemaking procedure—notice and comment has been successfully learned.[127] Third, this rule in some degree has paid attention to different scope of participants and different patterns of public participation in different stages. The Guangzhou City government first promulgated the Measures of Public Participation in Formulating Government Rules of Guangzhou City (the Measures) in 2006 and then revised it in 2010. The following will examine the 2010 one.

1.1 The background of enactment of the Measures

Why Guangzhou City specially enacted a rule on the public participation in the government rulemaking process? The director of Legal Institute of the Guangzhou City government said the followings words：

> Since our state has not established uniform norms and institutions on the public participation in the rulemaking process, there are still some problems left in public participation：(1) randomness. According to the present statutes and regulations, the procedures of public participation in the administrative rules making are not compulsory. The government has widespread

[127] Forword to *Gongzhong Canyu Xingzheng Lifa Shijian Tansuo [An Exploration on the Administrative Legislation of Guangzhou City]*, ed. Licheng Chen et al. (Beijing：China Legal Publishing House, 2006). This project cooperated between the Legal Institute of the Guangzhou municipal government and China Law Center of Law School of Yale University and Center for Public Participation Studies and obtained supports of Law School of Pecking University.

> discretion…which limits public participation's application to some extent; (2) lack of democracy. Previous procedures of public participation paint brightly administrative colors. Public has no right to initiate administrative legislation. Administrative organs always deal with the public opinions in a way of internal research and summary, without explanations to the public, without corresponding feedback mechanisms. The process of administrative legislation is opaque; (3) obscurity. One is about the obscurity in the concept of public participation, and participatory channels and scope; another is the obscurity in the procedures, lacking of feasibility.[128]

The reasons why Guangzhou City made such a decision become the most appropriate evaluation of the institutions of public participation furnished at the central level. The institutions provided cannot satisfy the local desire for openness, transparency and democracy. So the local government employed their local government rulemaking authority to enrich the public participation institutions applied in its jurisdiction. Guangzhou City walked at the forefront of this trend.

1.2 The contents of the Measures

There are totally 5 chapters and 37 articles in the Measures. It also divides the formulating process into four steps, but every step was devised with mechanisms of public participation. Before turning to the four steps, it is necessary to mention the definition of public participation and general principles about public participation in the Measures.

1.2.1 The definition of public participation and general principles

First chapter is about the definition of public participation and general principles of public participation. According to the official interpretation on the Measures, the public means all people, legal persons and organizations without any geographic and nationality

[128] Ibid., 163.

restrictions.[129] From this point, we can say the Measures intended to increase democracy in the government-rulemaking process. Public participation is defined as the people's activities of proposing opinions to the relevant administrative body through all the formulating process and then the administrative body decides whether to adopt or reject. In any case of the foregoing situation, the relevant administrative body should give a feedback to the public.[130] The Measures is applied to all administrative rules made by the Guangzhou municipal government no matter whether they involve the citizen's significant interests or not.[131] Public participation should be conducted openly and public opinions should be open except four situations enumerated.[132] And the financial guarantee on the public participation is also institutionalized in the Measures.[133]

1.2.2 The public participation institutions in four phases

1.2.2.1 Public Participation in agenda setting phase

The second chapter of the Measures is about the institutions of public participation in the initiative phase. Article 10 of the Measures provides: "The public can file written opinions to the municipal Legal Institute to purport to stipulate, revise or repeal a government rule by letters, faxes or emails etc. Such a file should include the title of the government rule, the reasons for stipulating, revising or repealing, and the feasibility, necessity and main problems to be solved and main measures etc. … These opinions should

[129] Ibid., 139.
[130] Guangzhoushi Guizhang Zhiding Gongzhing Canyu Banfa (The Measures of Public Participation in Formulation of Administrative Rules of Guangzhou City), article 2.
[131] *Gongzhong Canyu Xingzheng Lifa Shijian Tansuo*, 139-140.
[132] The Measures, article5, 6.
[133] The Measures, article 8.

be published on the website of Legal Institute within 5 days after receiving them."

Next step is that the Legal Institute decides how to deal with these opinions. If the suggestion is reasonable, Legal Institute will adopt it and put it on the annual rules making plan agenda. The noteworthy place is that Legal Institute should publish the results in the office website within a limited time.[134]

The annual rules making plan is also required to be put on the website to seek public opinions. The Measures clearly provides that the contents of the annual rules making plan should be noticed to the public and within a certain designated period the public can make comments.[135] And these opinions also should be published on the website of Legal Institute within 5 days after the deadline of the comments. The Legal Institute studies on these opinions and then to decide whether to revise the annual rules making plan or not. Within 20 days after the annual rules making plan is passed by the municipal governmental standing committee or the plenary session, the Legal Institute should make a uniform feedback about the public comments to the public and give reasons if it does not adopt the opinions.

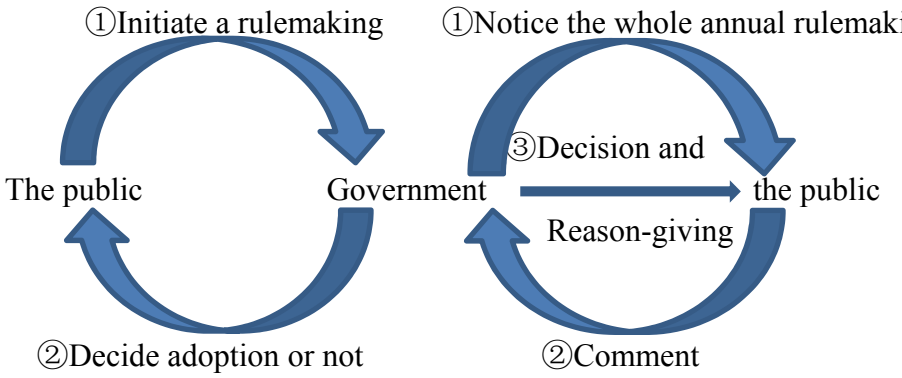
There are two circles of collecting public opinions in the agenda setting phase: First is that public actively propose a motion on a government rule making, then the Office decides whether to put it on the annual rules making plan agenda or not and notices the decision to the public. Second, Legal Institute notices to the public about the annual government rules making plan, public comment, and then the Legal Institute gives a feedback to these comments. The whole process keeps in an open state since both the propositions and

[134] The Measures, article 11.
[135] The Measures, article 12.

comments made by the general public and the outcomes of whether to adopt or not and the corresponding reasons made by the administrative bodies are opened on the website. The interactions between the public and government in the setting agenda phase are as follows:

Table 6.1

The interactions between the public and government in the agenda setting phase in Guangzhou City rulemaking



1.2.2.2. Public participation in drafting phase

The third Chapter is about the public participation in the drafting phase and review phase. I will still divide them into two parts.

After putting relevant rulemaking plan on the annual government rules making plan agenda, the drafting body should draw up a public participation program. The contents of the program should contain the main institutions of the government rule draft and the possible impacts on the relevant persons and groups, the time of conducting panel discussion or feasibility study meeting or other public participation forms. And if necessary, the time and procedures of questionnaire, open forms of collecting opinions and the hearing are also

included.[136]

1.2.2.2.1 The necessary panel discussion and feasibility study meeting

In the Measures, panel discussion and feasibility study meeting are the necessary procedures that the drafting body cannot skip. Now "the drafting body should conduct the panel discussion to collect public opinions about the main problems to be resolved, the main measures to be adopted and main institutions to be established by the draft. If the draft affects industry associations or social groups, then the drafting body should invite the representatives of them to take part in the panel discussion."[137] The late half part is new added, but one problem of the panel discussion is still left, who should participate except the representatives of the industry associations or social groups? The Measures seems to let the government to decide the answer. At least, the stakeholders become the essential participants in the panel discussion, though the other members are open and decided by the drafting body. This means in the drafting phase, the Measures emphasizes on protecting the stakeholders' interests in the drafting phase.

The Measures clarified that the feasibility study meeting is only for the experts to participate in, and this form particularly is adopted when technical problems or legal problems are involved.[138] Therefore, it confirms again that feasibility study meeting is a kind of expert consultation.

The 2006 version required the drafting body to notice the public 5 days before the panel discussion started and put the record of it on the website in 5 days after the meeting's closure.

[136] The Measures, article 15.
[137] The Measures, article 16.
[138] The Measures, article 18.

The report of the feasibility study meeting was also required to be put on the website. But the new revised 2010 version deleted these requirements in the drafting phase. So the 2010 version has not established an immediate feedback mechanism in the necessary public participation institutions.

1.2.2.2.2 The other forms of public participation

Open forms of collecting opinions means the government collects public opinions in a designated place within a designated period without any other limitations. It is a new form of public participation beyond the forms listed in Legislation Law and two Ordinances. According to the official explanation, the open form of collecting opinions is learned from the USA experience.[139]

The Measures also develops the procedures of hearing. Article 21 provides,

> If viewpoints from all sides differ greatly, the drafting body should convene a hearing meeting to collect public opinions. The procedures of the hearing are as follows:
> (1) The hearing meeting should be held openly. The drafting body should announce the time, place, contents and the application method 20 days before the hearing is held;
> (2) The drafting body should consider generally the region, occupation, professional knowledge, ability to express, degree of impacts by the government rule and so on to choose representatives from the applicants reasonably.
> (3) The representatives have the right to pose questions and comments.
> (4) A record is needed about the hearing. The main viewpoints and reasons of spokesmen shall be recorded accurately. The drafting body should put the record on the website within 5 days after the hearing's closure.

From article 21, hearing in the drafting phase in the Measures is not only based on the relevant interests, but also include other factors though interest is also a factor for consideration. Hearing is only a strict way to seek opinions and qua-judicial procedures are not required. But the record of the hearing is required to open to the public, which ensures

[139] *Gongzhong Canyu Xingzheng Lifa Shijian Tansuo,* 154.

the record's accuracy. From this way, except the immediate record open requirement, hearing is not much different from the panel discussion in nature.

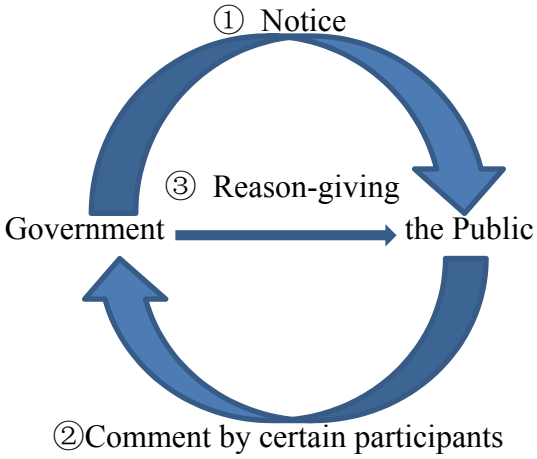
Above all, in the above mentioned forms of public participation in the drafting phase, hearing's application is still limited in particular situations. The questionnaire and the open form of collecting opinions are conducted by government's discretion. But if the open form of collecting opinions is adopted, then some requirements on the notice time and record openness should also be followed. The panel discussion and feasibility study meeting are necessary steps. Stakeholders have to be involved in panel discussion though they are not the only participants. And feasibility study meeting is expert consultation.

According to Article 23, the drafting body should organize, classify and analyze these opinions collected and make an explanation on the public opinions. The explanation should contain: (1) the form of public participation, (2) the summary of public opinions, (3) whether to adopt public opinions and the reasons therefor. If necessary, the drafting body could establish an expert advisory committee to study on these opinions.

Though the drafting body has no obligation to respond immediately to public, from the article 35, the electronic file concerning the public participation should be put on the website of the Legal Institute. The electronic file does not only include the explanation, but also includes all the records and materials concerning the public participation. This means the public can investigate how the drafting body handled the public opinions by looking up the electronic files, though maybe a bit later. The interaction between government and the public in the drafting phase is like table 6.2:

Table 6.2

The interaction between government and the public in the drafting phase in Guangzhou City rulemaking



The formation of above interaction model greatly depends on the openness of the record and materials concerning public participation. Both Legislation Law and the two Ordinances have no such requirements. Making the record and materials open to the public can urge the drafting body to treat the public opinions seriously and give thorough reasons for adopting or rejecting the public opinions proposed. In this way, the public directly could supervise how their input influences the output of the government and increase the responsiveness and accountability to public.

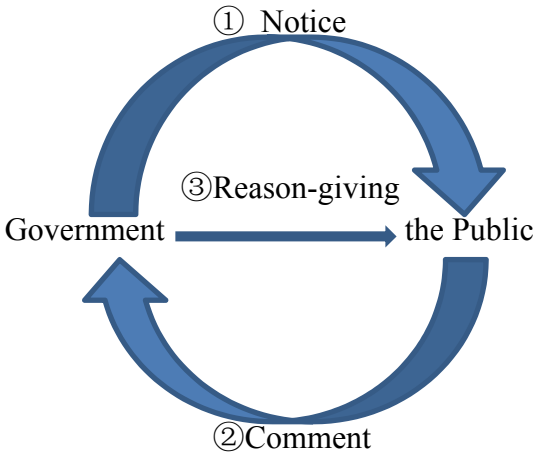
1.2.2.3 Review phase

After the drafting body makes a government rule draft and delivers it to the Legal Institute of the municipal government for review, the Legal Institute of the municipal government should discuss and publish the draft until produce another better draft and then

put such a draft on the website or other Medias to collect public opinions.[140] The public participation procedures in the review phase learned notice-and-comment procedures in USA's APA. And according to article 30, the Legal Institute can additionally adopt the other forms of public participation in the reviewing phase if it thinks there is a need to further seek public opinions. Since article 35 is also applicable in the reviewing phase, we can use table 6.3 to show the public participation institutions in this phase.

Table 6.3

Public participation institutions in review phase in Guangzhou City rulemaking



1.2.2.4 Decision and promulgation phase

According to article 32 of the Measures, the Legal Institute should treat the public opinions fairly and revise the government rule draft according to all collected opinions. The Legal Institute also needs to make an explanation on public opinions when it submits the government rule draft to the municipal government standing committee meeting or the plenary meeting for deliberation. So though there is no public participation in this phase, the

[140] The Measures, Article 26 (2).

public opinions collected will be the background materials for the decision on the government rule.

1.3 Evaluation and conclusion

As the most advanced case of public participation institutions in the government rulemaking process, scholars all gave the Measures high appraise.[141] Compared with the procedures prescribed in OPFG, it makes the following significant breakthroughs:

(1) It extends public participation to all rulemaking stages, especially to the initiative phase, which means the public now have the legal right to make a rulemaking motion to the government. The government can get the information from the public they might easily neglect, and the public can input their preferred viewpoints to get the government support. This initiative right is very important and the other laws and administrative regulations all excluded this right.

(2) It established open reason-giving mechanism. The kernel of public participation institutions in The Measures is to make all materials open to the public and if public opinions are not adopted, the relevant administrative body should give reasons and public could investigate these reasons. The previous norms only require the administrative bodies to solicit public opinions but the public do not know how they deal with these opinions. Even if the OPFG established reason-giving institution in the hearing, it is only conducted inside administrative system. The requirements of openness and reason-giving to public urge

[141] Hong Zhang, "Xingzheng Lifa zhong de Gongzhong Canyu: Zhidu Chuangxin yu Qianzhan [Public Participation in Administrative Legislation: Institutional Innovation and Forward-looking]," *Xingzheng Guanli Gaige [Administration Reform]*, no.7, (2011).

the administrative bodies to handle these opinions seriously, which greatly promote the government's accountability and rationality. This also helps a good interactive relationship between the government and the public.

(3) It increased the forms of public participation, which makes the public participation procedures more flexible. And some guidelines provided for each form make the public participation more feasible. Establishment of some forms of public participation as the necessary process ensures the minimum public participation in the government rulemaking process.

(4) Employing the E-government actively to broaden and deepen public participation, and also greatly promote government transparency.

(5) It established different patterns of public participations in different phases according to different goals going to be achieved. For example, in the agenda setting phase, all people can make a suggestion to the Legal Institute of the municipal government. In the drafting phase, except the open form of collecting opinions hard to define, the other forms of public participation only involve a number of participants. The limited participation contributes to deep and effective communication between the drafting body and participants, which helps for a rational production of a government rule draft. As the panel discussion is the necessary form in drafting a government rule and the Measures requires the drafting body should involve the stakeholders into the panel discussion, the public participation institutions in this phase also stressed the protection of stakeholders' interests. However, the demerit of this kind of limited participation is also obvious, that is it may not fully reflect the public

viewpoints. Therefore after the production of the preliminary draft of the government rule, the Legal Institute of municipal government should undertake the notice and comment procedures in the reviewing phase, which entitles the general public to make comments on the secondary draft.

However, all the public participation forms still only have the advisory function. The fundamental difference between the public participatory forms in Measures and other ordinances is that now the public have the right to actively offer information to the relevant administrative agencies, especially embodied in the motion right in the agenda-setting phase and notice-and-comment procedures in the review phase. This constitutes a great progress for the limited and passive participation under the forms of panel discussion, feasibility study meeting, and even Chinese hearing.

2. The development of public participation in formulating the other normative documents—a case of Hunan province

There is no statute and administrative regulations at the central level regarding procedures of formulating the other normative documents. However, the local governments again stand at the forefront of codification of the procedures for formulating the other normative documents. Here takes Hunan province as an example.

Hunan province is famous for its first local administrative procedure code—Hunan Provincial Administrative Procedure Provisions (HPAPP) in China. And formulating normative documents is one section of HPAPP.

According to Article 48(1) of HPAPP, when formulating the other normative

documents, the formulating body should adopt various forms to seek opinions. But it is not clear whether to seek public opinions or not. Article 48(2) provides that if the normative document involves the significant matters, then the significant decision-making procedures are triggered. Concerning the public participation institutions in the significant decision-making in HPAPP, the next chapter will make a thorough examination. Hence, we left this part to the next chapter.

Generally speaking, public participation institutions in the formulating other normative documents process are inadequate in the present legal system. Though local government began to make efforts to introduce public participation into such a process, the applicable situations are still very unclear like the HPAPP.

Conclusions: This chapter includes three sections. In first section I pointed out two features of Chinese administrative rules. One is the formalist approach, which means an administrative rule's legal effects turn on the undertaking procedures. This approach is described in a comparative perspective with functional approach adopted by American courts. Another feature is the hierarchical approach, which means a rule's legal effects also depend on the position of the enacting subjects in the bureaucratic hierarchical system. Formalist plus hierarchical approaches to administrative rules constitute the fundamental backgrounds for the development of public participation institutions.

The second section is about the status quo of public participation institutions in the present legal system at the central level. From the plain provisions in the Legislation Law to

OPFAR made by State Council to regulate administrative regulation making and OPFG to regulate agency rulemaking and local government rulemaking, they all have some problems in public participation institutions. (1) Obscurity. These provisions required the relevant administrative body to listen to opinions, but do not offer feasible rules. (2) Closeness. Except hearing, all the participatory forms can be conducted in secret. Even the hearing, participants are limited and the reason for whether to adopt the opinions is given inside the administrative system but not to the public. (3) Wide discretion. The relevant administrative body has the overwhelming discretion to decide whether to initiate public participation institution, who can be involved, how to take them in and how to deal with these opinions. And some agency rules also proved how these agencies use the discretion to decrease the application of public participation institutions. The empirical analyses of these legal rules demonstrate that official attitudes and traditional mass line have an overwhelming dominance over public participation institutions at the central level.

The third section is about the development of public participation institutions in local government rulemaking process and the other normative document formulating process at the local level. The Measures made by Guangzhou City is the advanced case of the former, and HPAPP made by Hunan Province is a case for the latter. The Measures made by Guangzhou City expanded public participation into the whole rulemaking process, especially the agenda setting stage. It emphasized the stakeholders' involvement in the drafting phase, introduced notice-and-comment procedures into the review phase, strengthened the compulsory applicability of public participation, and kept the whole

administrative rulemaking process in transparency. The responsiveness and accountability has been stressed too. From these points, it has overcome the dimension of passive participation under the official attitudes, but still kept the advisory characteristic. HPAPP tried to codify the other normative documents formulation procedures. Actually, public participation institutions in it just as the same as the suggestions proposed in State Council's 2008 Decision and is uncertain. Strictly speaking, public participation, no matter which forms, have not seriously been taken into consideration from legal institutional perspective in the other normative documents formulating process.

This chapter revealed the uneven development of public participation institutions in different category of administrative rulemaking processes in China context, most of which reflected official attitudes of working methods. Only very few cases like the Guangzhou City has admitted the participatory right in a limited sense and introduced new models of public participations from the west.

Chapter Three

Public participation institutions in significant administrative decision-making process

I. The concept of administrative decision-making and significant administrative decision-making in China context

1. The proposition and location of administrative decision-making in official documents

In Chinese language, administrative decision is termed as "Xingzheng Juece". Primarily, "juece" only refers to the Party's decision.[142] Along with the advancement of the political reform, the Party conducted administrative reform as pioneers. In 2002, President Jiang's report in the sixteenth National Congress of CCP especially mentioned "we will continue to promote the reform on the administrative system according to the succinct, unitary and efficient principles and the requirement of the collaboration between decision-making, enforcement, and oversight functions." This statement showed that it was the Party first proposed the idea that the administrative power in China context will be divided into three subsections and decision-making is one of them. In 2007, the Party's report more clearly illustrated that the intended administrative power structure is based on the mutual check and mutual coordination between the decision-making power, the enforcement power and the oversight power. CCP's idea is the direct and most important source of other official and

[142] For example, early in 1997, Jiang Zeming's report in the fifteenth National Congress of CCP mentioned that China should make decision-making more scientific and democratic. But in that report, the decision-making only referred to the Party's decision-making.

legal documents. For example, State Council's 2004 Outline particularly emphasized the establishment of scientific and democratic decision-making process. In its preamble, it claimed that the Outline was enacted for implementing the spirits of the sixteenth National Congress of CCP and its third plenary meeting. As the highest administrative organ of the state, this Outline has internal effects within the administrative hierarchical structure. And Hunan Province also unambiguously asserted that the promulgation of HPAPP was to implement the spirits of the sixteenth National Congress of CCP, and HPAPP intended to be the detailed measures for implementing the Outline of the State Council.[143] Actually, the Article 11(2) of HPAPP even completely copied the words of the Party's report in 2007 and prescribed, "The administrative agencies should establish power structures and operative mechanisms based on the principle of the mutual check and mutual reconciliation between the decision-making power, the enforcement power and the oversight power." So we can see, decision-making is located as the first subsection within administrative power inner structure contrasted with the enforcement power and oversight power in official documents and local legal documents. Dividing administrative power as the administrative decision-making power, administrative enforcement power and oversight power is reminiscent of separation of powers between the legislative, executive and judicial power in the political configuration.

[143] *Hunansheng Xingcheng Chengxu Guiding Shiyi*, 14.

2. The definition of administrative decision-making in administrative law theory and official documents

Administrative decision-making is not an administrative law terminology originally. It is the term used in public administrative management discipline. According to Herbert A. Simon's definition, "A decision is not a simple, unitary event, but the product of a complex social process generally extending over a considerable period of time. As noted, decision making includes attention-directing or intelligence processes that determine the occasions of decision, processes for discovering and designing possible courses of action, and processes for evaluating alternatives and choosing among them".[144] And the goal of research on the decision making is to "device tools that will help management make better decisions".[145] This concept has revealed that decision-making is not a linear and stationary concept. It is made up of a series of activities aiming to achieve a final goal. Administrative law scholars and institutional practice both accepted such a dynamic conception of decision-making. But concerning the scope of administrative decision-making activities, their opinions diverge.

2.1 The definition of administrative decision-making by administrative scholars

For administrative law scholars, for example, according to Yin Yang's research, administrative decision-making is "the activity and process of the administrative bodies and the staffs making a decision or plan on public affairs according to their legal authority and legal procedures to realize administrative purposes."[146] He proclaimed that administrative

[144] Herbert A. Simon, "Administrative Decision Making," *Public Administration Review* 25, no. 1 (1965): 31-37, 35-36.
[145] Ibid., 32.
[146] Yin Yang, *"Xingzheng Juece Chengxu, Jiandu yu Zeren Zhidu [Administrative Decision-making Procedures,*

decision-making included administrative final decision making[147] and administrative plan-making. He made strict comparisons between the concept of administrative decision and public policy, between administrative decision and rulemaking and etc., which means though he admitted some relationships between these two couples of concepts, he clearly excluded policy-making and rulemaking from the scope of administrative decision-making.[148]

2.2 The definition of administrative decision-making in institutional practice: HPAPP as an example

The whole third Chapter of HPAPP concerns administrative decision-making. In its official interpretation on the text, administrative decision-making means "series of activities or processes in administrative management when administrative bodies make decisions or choices on an issue".[149] From this article, we can conclude that HPAPP has recognized all decisive actions in administrative process as administrative decision-making actions. Though this general description cannot reveal clear forms of administrative decision-making, article 31 of HPAPP has enumerated some typical significant administrative decision-making actions[150]:

(1) Formulating major policy measures for economic and social development, making master plans

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Oversight and Responsible Institutions]," (Beijing: China Legal Publishing House, 2011), 8.

[147] Yin Yang used the term of "decision-making" referring to a final decision-making compared with the term of plan-making, both of which make up of "Xingzheng Juece". However, since we translate "Juece" as "decision", we will use the "final decision-making" to refer to what Yang Yin called as "decision-making" compared with plan-making.

[148] Yin Yang, 15-19, 25-30.

[149] *Hunansheng Xingcheng Chengxu Guiding Shiyi*, 45.

[150] "Significant" in this article means "the administrative decisions made by the governments above the county level which concern the overall economic and social development within the local region, produce extensive social impacts, involve a high degree of expertise and are link closely to the people's interests, so it is only for describing how important the decision is, but will not impact we analyze the scope of decision-making. In other words, if the following activities belong to the significant decision-making activity, and since significant decision-making of course belongs to decision-making, these activities also belong to decision-making activities.

and annual plans for national economic and social development;

(2) Making all kinds of master plans, important regional plans and plans for special items;

(3) Making fiscal estimates and budges and major financial and capital arrangements;

(4) Making decisions concerning major government invest projects;

(5) Making decisions concerning major matters about the disposal of state-owned assets;

(6) Making decisions concerning major measures in the field of resource development and utilization, environmental protection, labor and employment, social security, population and family planning, education, medical and health care, food and drug, housing construction, production safety, traffic management, etc.

(7) Setting and adjusting important administrative and institutional fees and the prices of key goods and services that are priced by the government;

(8) Making decisions concerning major measures in the reform of the administrative managerial system…

From these listed items, we can see (1) touched both the contents and the forms of the decision. These decisions are so primary and general usually in the form of policymaking statement or government plans.[151] But (2) just touched forms, they are plan-making. Then (3) belongs to the government constitutional authority. It touched the contents of the decision, but did not identify the forms of the activities like the (1) and (2) did. (4), (5) and (6) are the same with (3), but (7) both clarified the contents and forms. Setting or adjusting prices is a specific administrative action claimed in the *Qiao Zhanxiang v. Ministry of Railways* case.[152] (8) belongs to the internal administrative matters, though in China context we are not sure it is in the form of administrative legislation or other forms.

Therefore, we can see these activities are not divided by the same criterion. (1) and (7) are enumerated according to both the contents and forms of administrative decision. These forms include policy-making, plan-making and specific administrative action. (2) is listed only according to the form—plan-making. The left others only accord to the matters they are

[151] *Hunan Xingzheng Chengxu Guiding Shiyi*, 52. For example, decision of guiding the province's economic structure to the new industry-led type belongs to (1). And the (2) is in the sequent form from the most general to a little detailed, but even the plans for special items are the basis for the next government policy-making in that special administrative area.

[152] *Qiao Zhanxiang v. Ministry of Railways*, 149 (1st Beijing Intermediate People's Court, 2001).

involved, regardless of what forms they adopt. And according to the official interpretation of HPAPP, drafting government rule making also belongs to the significant administrative decision-making.[153] HPAPP also put normative documents making activities under the title of administrative decision-making. Here I will not criticize these confusing criteria. What I want to point out is that, HPAPP's legislators did not only include the plan-making and the final decision-making (like the price-setting action), but also include the policy-making and administrative rulemaking and any other kind of decisive actions as the decision-making activities.

The definition of decision-making in the institutional practice has deviated from the official location analogous to the separation of powers but include all possible decisive actions. This thesis will adopt the definition in the institutional sense.

3. The definition of "significant administrative decision" and its meaning to Chinese administrative law

All the above analyzed the proposition and definition of "administrative decision-making". But just like the practical institutions have revealed, if the connotations of "administrative decision-making" are so broad as to refer to any kind of decisive administrative action compared with administrative enforcement, from the policy-making, plan-making to rulemaking and even to final decision-making, then such a concept itself may has little meaning for administrative procedural law. Since such actions are so varied, the concept itself cannot solve any problem. So the concept of "significant administrative

[153] *Hunan Xingzheng Chengxu Guiding Shiyi*, 46.

decision-making" emerged. In the first chapter, we have mentioned both the Party's documents and State Council's Outline all emphasized the institutionalization of public participation in significant administrative decision-making process, but not all decision-making process.

What is significant? HPAPP listed two kinds of standards. One is called the hierarchical standard, which means significant administrative decision should be made by the government above the county level.[154] For Hunan Province, the significant administrative decision-making subjects should be county governments, municipal governments and the provincial government. Another is the content standard. Content standard further include some requirements on the significant administrative decisions. These requirements required significant administrative decision-making should be pertinent to the overall economic and social development within the local region, produce extensive social impacts, and involve a high degree of expertise and link closely to public interests. Though it enumerated eights kinds of significant administrative decision-making activities, they are not the all. (9) of article 31 is a catch-all clause. It admitted other significant administrative decision-making activities in addition to the listed eight ones. In China, local governments having enacted administrative procedural rules on the significant administrative decision-making all laid down their own standards about what is "significant". Generally speaking, the standards in HPAPP are typical.[155]

The proposition of "significant administrative decision" has great meaning in

[154] HPAPP, article 31.
[155] Yin Yang, 91-92. He researched the actual provisions about what is significant in Chinese local places and he concluded seven matters and five criteria, which are also embodied in HPAPP.

administrative law. In traditional Chinese administrative law, administrative actions are generally divided as the specific administrative action and the abstract administrative action. All administrative law institutions are established based on such a classification. Most of participation institutions are also based on such a classification. Chapter One has mentioned participation in specific administrative action as the court-room type participation that only administrative addressees or some limited stakeholders as the third party to be involved. Chapter Two has analyzed public participation institutions in abstract administrative action. However, the proposition of "significant administrative decision-making" broken the traditional classification and brought something brand new into administrative law.

First, the concept of "significant administrative decision" has incorporated a lot of administrative actions once outside the study objects of administrative law, like the policy-making, plan-making, inner actions inside administrative system and etc. into the perspective of administrative law.

Second, the distinction between specific administrative action and abstract administrative action also becomes relative, since both of some specific administrative actions and abstract administrative actions will apply to the same significant administrative decision-making procedures.

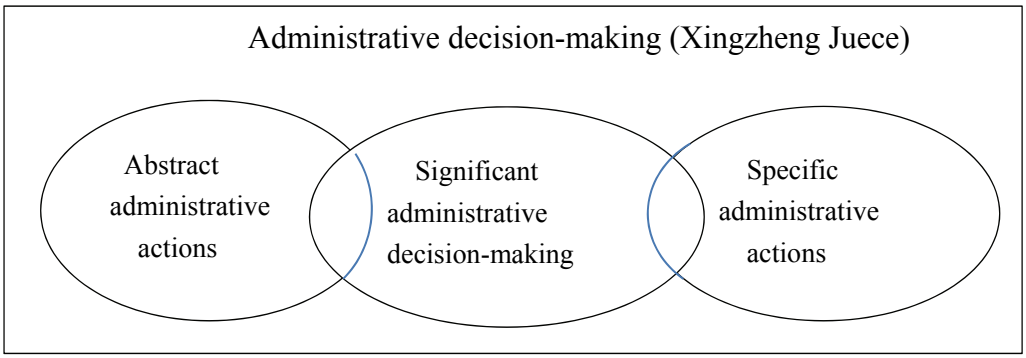
Third, it also breaks the hierarchical division among administrative rules. All administrative rules involving significant administrative matters should apply significant administrative decision-making procedures. For example, HPAPP 48(2) provides if the other normative documents involves significant matters, then significant administrative

procedures should be triggered.

Table 7 is about the relationship among abstract administrative actions, significant administrative decision-making and specific administrative action.

Table 7

The relationship among abstract administrative actions, significant administrative decision-making and specific administrative actions



II. The status quo of public participation institutions in significant administrative decision-making at the central level

Public participation institutions in significant administrative decision-making within Chinese administrative law have developed along two paths in China. At the central level, such development spotted in a few of individual administrative fields respectively, mainly including the price-setting administration, environmental impact assessment administration and urban and rural planning administration. In local administration, local governments mainly tended to stipulate a unitary procedure ordinance for controlling administrative discretion in significant decision-making. Section 2 and Section 3 will make a detailed examination on the two paths separately. Primary, I will analyze public participation

institutions in the three fields that have introduced them at the central level.

1. Public participation institutions in government price-setting

Public participation institutions were first adopted and now are most proliferating in administrative price-setting (including price-fixing and price-guiding) field. By virtue of article 18 of Price Law, government should fix or guide the prices of some commodities and service if necessary. Some individual statutes also make delegations to National Development and Reform Commission (NDRC) and other relevant departments to set the price of a certain commodity.[156] According to these statutes and Price Law, NDRC and State Council issued a government price-setting list, keeping 13 items of commodities and service on the list, price of which should be determined by the government. Local governments also issued the government price-setting lists respectively in terms of local reality within their jurisdiction. The Price Law provides some minimum procedures of government price-setting actions and first time introduces public participation in the price decision-making process.

Both public and administrative law scholars paid great heed to public participation in this field. This is because for the public, price is always a sensitive topic relating closely to their property. Public can feel directly the influences of the decision on them. For the administrative law scholars, price-setting is the most frequently practiced field that the public have participated in. The most important point is that it is the also the most

[156] For example, by virtue of Article 39 of Postal Law, the prices of four kinds of postal services are determined by the NDRC along with the Treasure Ministry and the State Post Bureau. And according to Electricity Law, the electricity fee also should be determined by the government.

controversial field that on the one hand the government claimed to promote public participation but on the other hand the public widely questioned the government' s sincerity.[157]

In order to depict the whole picture of public participation institutions in the government price-setting, the following will analyze the established public participation institutions in the present legal system in the first place.

1.1 Public participation institutions in Price Law

According to Price Law, public participation is necessary when the relevant government sets prices of some commodities and service.[158] Articles 22 requires that the relevant departments should solicit opinions from customers, operators and from other relevant parties. Article 23 further provides, the hearing institutions should be established for seeking the views of the consumers, operators and other parties and discussing the necessity and feasibility when determining the government-setting prices of the public utilities, nonprofit services and commodities under natural monopoly management which involve the vital interests of the public. From these articles, we can infer that seeking public opinions is both the necessary and minimum requirement when the relevant administrative body sets a price. Hearing obviously contains a more stringent set of procedures, or there is no necessity to repeat it in Article 23 if it could be interpreted as the same meaning with only seeking public opinions.

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[157] Xixin Wang, *Gonggong Juece zhong de Gongzhong, Zhuanjia he Zhengfu*, 464.

[158] According to the article 3 of Price Law, Government-guiding price means basic price and the range of fluctuations provided by the relevant departments of the government for guiding the operators. Government-fixing prices mean those prices determined by the relevant departments of the government within their jurisdictional authority.

Qiao Zhanxiang v. Ministry of Railways in 2001 is a case about the application of article 23 of Price Law. The fact of the case is that Ministry of Railways made a notice to require some of its subordinate Railway Bureaus to raise parts of train ticket price up by 20 percent to 30 percent in the Spring Festival period. The plaintiff Qiao Zhangxiang bought a train ticket in this period and he overpaid 5 yuan than the ordinary days. So he brought the case into the court and claimed that the notice made by the Ministry of Railways is unlawful. One of his arguments was that according to Article 23 of Price Law, when the Ministry of Railways performed train ticket price-setting function, it should have held a hearing to seek public opinions. But in his case, Ministry of Railways didn't conduct the hearing. So the notice without undertaking hearing is unlawful. Concerning this point, the Higher Court of Beijing in its final decision holds, "Though article 23 of Price Law prescribes that… Since at the time the Ministry of Railways made the notice, the state had not established any price hearing institutions yet, requiring the Ministry of Railway to apply for an application of the hearing procedures lacks the detailed basis of decrees or administrative rules."

Therefore, the court interpreted article 23 as the requirements of establishing hearing institutions but not applying to hearing procedures directly. Some scholar called this interpretative method as the "legislative obligation theory", compared with the "applicable obligation theory" proposed by the court of first instance.[159] Such a kind of interpretation really gave a heavy hit on the public's expectation on the price hearing.

Though the plaintiff lost this case eventually, but just after half of a year Qiao

[159] Zhu Mang, "Lun Woguo Muqian Gongzhong Canyu de Zhidu Kongjian-yi Chengshi Guihua Tingzhenghui wei Duixiang de Culue fenxi [Institutional Space in Chinese Present Public Participation-a cursory analysis on the hearings in urban planning]," *Zhongguo Faxue [China Law]*, no. 3, (2004):55.

Zhanxiang brought the case, the National Development Planning Commission (the predecessor of NDRC) promulgated an agency rule (Bumen Guizhang) about price hearing procedures and made a revision in 2002. In 2008, NDRC made another revision based on the 2002 revised version and the final version is called Rules on Hearing Procedures of Government Price-setting (RHPGP). We will focus on hearing procedures in the latest version.

1.2 Hearing procedures in RHPGP

RHPGP provides that relevant price-setting administrative bodies should make a list to specify the items, of which the price should be determined after a hearing, or such determinations will be invalid.[160] The hearing institutions mainly include:

1.2.1 The hearing board and participants

According to the RHPGP, the department in charge of price[161] is authorized to conduct a hearing.[162] A hearing board composed of three to five hearing examiners preside the hearing. All the examiners are designated by the department in charge of price. Except the hearing chairman must be the staff of the department in charge of price, the social celebrities also could be invited into the board. The board solicits the opinions of hearing participants

[160] RHPGP, Article 3, 31. However, according to article 31 of this rule, only the corresponding government and the higher price-setting administrative authority can declare administrative setting action invalid in the circumstance that no hearing meeting has been conducted.
[161] Zhengfu Zhiding Jiage Xingwei Guize, article 2. According to that article, the department in charge of price is not always the same with the price-setting or price-guiding body. Sometimes they overlap, sometimes the former is just an inner organ of the latter, sometimes according to some laws and regulation they are both the inner functional branches of the government.
[162] RHPGP, article 6.

and makes inquiries, and then proposes a hearing report.[163]

Hearing participants include consumers, operators, the other stakeholders, experts and scholars in relevant fields and other government officials, social groups and other persons when the department in charge of Price deems necessary to invite. The department also decides the number of the participants and proportions according to the practical state of the hearing item. But in any case, consumers participating in the hearing should not be less than two-fifth of the total number.[164] The Rule also provides the ways how participants are chosen.[165] But it is obvious that the department in charge of price controls the choice and defines who is eligible to represent the consumers, who represent the operators and who should be invited as experts, scholars or other persons.

1.2.2 The detailed price hearing procedures

1.2.2.1 Initiation of hearing

When the department in charge of price is the authoritative body to set the price and the hearing object conforms to article 23 of Price Law, it can initiate a hearing per se. When the price-setting authority is the other administrative body, it could apply to the department in charge of price to convene a hearing.[166] However, the public cannot make such an initiation.

1.2.2.2 The hearing procedures

1.2.2.2.1 Notice

Before 30 days of hearing, the department in charge of price should notice to the public

[163] Ibid., articles 7, 8.
[164] Ibid., article 9.
[165] Ibid., article 10.
[166] Ibid., article 15.

about the specific recruitment procedures, the numbers available and the methods of choice concerning the participants, the allowed observers and the Medias through the government website or Medias.[167] Before 15 days of the hearing, the department in charge of price should notice to the public about the time and place of the hearing, the names of the hearing participants, the hearing examiners, and the key points of the price-setting program.[168] More additional materials should be delivered to the hearing participants, like the whole price-setting program, the audit report on the cost in the proposed price, and the procedures of the hearing.[169]

1.2.2.2.2 Hearing procedures

The hearing is to be undertaken in a very simple order. First, the chairman of the board announces the hearing matter and the hearing disciplines, introduces the hearing participants and hearing board members. Second, the price-setting program proposer states the program. Third, the audit introduces the conclusion of review on the cost and relevant situations. Fourth, hearing participants make comments and inquire on the program. And last, the chairman of the board delivers a conclusive speech.[170]

1.2.2.2.3 Record and decision

After the hearing forecloses, the hearing board should make a record including the basic situation of the hearing, the opinions of the hearing participants on the price-setting program and the recommendation made by the board on how to deal with the opinions of the hearing

[167] Ibid., article 18.
[168] Ibid., article 19.
[169] Ibid., article 20.
[170] Ibid., article 22.

participants. The recommendation should include the reasons of adopting or forgoing the main views of the hearing participants.[171] The department in charge of price should submit such a record to the price-setting agency for making a decision based on the full consideration of it. If the price-setting agency revises the program in terms of public opinions and the price-setting agency deems it is still necessary to hold another round of hearing, then another hearing can be convened, or other forms to seek public opinions can be conducted.[172] After the price-setting agency makes the ultimate decision, it should notice the public about the decision and the reasons why it has adopted or dispensed with the opinions of the hearing participants.[173] By virtue of article 29 of RHPGP, the price-setting agency can solicit opinions from all sides of the society about the hearing on the government websites or Medias.

1.2.3 The criticisms on hearing in administrative price-setting

Before NDRC issued the 2008 Rule, mainly there were two kinds of criticisms on the hearing procedures in the present legal system. One criticism pointed out that in the whole arrangement of hearing procedures, the present legal system authorized too much discretion on the department in charge of price. The way that the department in charge of price chooses participants will produce a lot of problems like the unreasonable proportion of participants, unrepresentativeness of participants and something else. The presiders are designated by the department in charge of price, so they will not be neutral. And the time for the participants to

[171] Ibid., article 24.
[172] Ibid., article 26.
[173] Ibid., article 27.

express their views is too short, the pros and cons of viewpoints could not be debated fully and etc.[174] According to this criticism, actually these problems are still left in 2008 RHPGP.

Another criticism pointed out that hearing was not necessary to be devised as the qua-judicial procedures. Policy of price involves various value preferences. So it is better to coordinate and balance these interests through negotiation and discussion. The problems of present legal institutions on hearing lied in the lack of negotiation procedures among the government, experts and the public.[175] This suggestion has not been adopted in the 2008 Rule either.

These two criticisms on the one hand have reflected the discrepancies between the two attitudes toward public participation in administrative law academia which have been concluded in Chapter one; on the other hand also reflected the gap between the theories and the actual legal institutions. Generally speaking, the present legal system has located hearing as a set of more stringent and cumbersome procedures for seeking public opinions. Since price-setting involves various interests, and these interests are not necessary conflicting with each other, so I agree with the latter criticism that it is not necessary to devise the hearing as judicial procedures. However, I also want to point out further that only communication and negotiation between the government, experts and the public in an abstract sense is not enough. From an ideal perspective, government as the public decision-maker is expected to be impartial to any kind of interest. Experts propose suggestions based on the independent professional knowledge but not their own subjective feelings. It is the group made up of

[174] Wanhua Wang, *Woguo Zhengfu Jiage Juece Tingzheng Zhidu Quexian Fenxi.*
[175] Xixin Wang, Gonggong Juece zhong de Dazhong, Zhuanjia yu Zhengfu.

many roles generally called as the public that engages various interests. And these stakeholders are most in need of communication and negotiation with each other. For example, the interests of operators and consumers are not always incompatible, since the consumers rely on the operators to provide some certain services or products for them and the operators also rely on consumers to seek their profits. Even within the consumers, some may support the operator's program to raise the price because they want the quality of products to become better but others may think the present quality is satisfying and there is no need to raise price. Therefore, the communication and deliberation among participants representing various interests affected by the price-setting decision is most important. Of course, sometimes people split heavily and it seems impossible for them to reach a consensus, but the government has to make a decision. In this occasion, I think it is reasonable for the 2008 Rule to confer the final decisive power on the department in charge of price and put an emphasis on the reason-giving institution in handling the relationship between the public opinions and the final decision which promotes the rationality and accountability of the decision.

Generally speaking, in Price Law, the scope of public is clarified (consumers and operators). But public participation in Price Law only stays at the level of opinions statement in a general way. No feasible rules have been provided. At the same time, because of Qiao Zhanxiang case, hearing cannot be applied directly. Hence, Price law itself offered extremely limited public participation institutions just like the Legislation Law. RHPGP provided normative basis for the hearing. Hearing in RHPGP is also a kind of opinions' expression

with more clear procedures. The participants are not confined to the general public, also including relevant officials and experts. The roles between the officials, experts and the general public are not separated. They are treated as the same in the hearing procedures. And the communications between the participants, especially the public participants are not anticipated. For RHPGP, its emphasis on transparency and open responsiveness is a progress.

Additionally, in China context, there is another problem. Ordinary, public utilities, nonprofit services and commodities under natural monopoly management involving the vital interests of the public which needs to trigger hearing procedures when government set their price are under the state-owned enterprises' operation. Chinese government has a natural tendency to favor state-owned enterprises. Not to mention in some extreme cases, the administrative agency itself is the operator of some certain public service like Ministry of Railways. From the above analysis, we can see only the department in charge of price can initiate the hearing procedures. Moreover, it also has the discretion to decide the participants involved in hearing. These are the deep reasons in China why although many hearings have been held in government price-setting, they still failed to reflect the consumers' opinions.

2. Public participation institutions in environmental impact assessment

The Law on Environmental Impact Assessment (EIA) is another national statute providing the institutions of public participation. EIA provided environmental impact assessment in two areas, one is for plans concerning the use of land, and the other is for construction projects.

2.1 Public participation institutions in environmental impact assessment for plans concerning the use of the land

According to article 11 of EIA, if a special plan[176] may cause adverse effects on the environment and may relate to the rights and interests of the public in respect of the environment，the department that draw up the plan shall adopt some forms of public participation to seek public opinions. And the department also shall attach an explanation on whether to adopt these opinions or not in the environmental impact assessment report when it submits the report for examination and approval.

A review group organized by the environmental protection agency designated by the government or other relevant departments, composed of some representatives chosen from some departments and experts, shall review the environmental impact assessment report. The group shall submit the written review opinions.[177] Both the environmental impact assessment report and the written review opinions will be the basis for the government to make a final decision.[178]

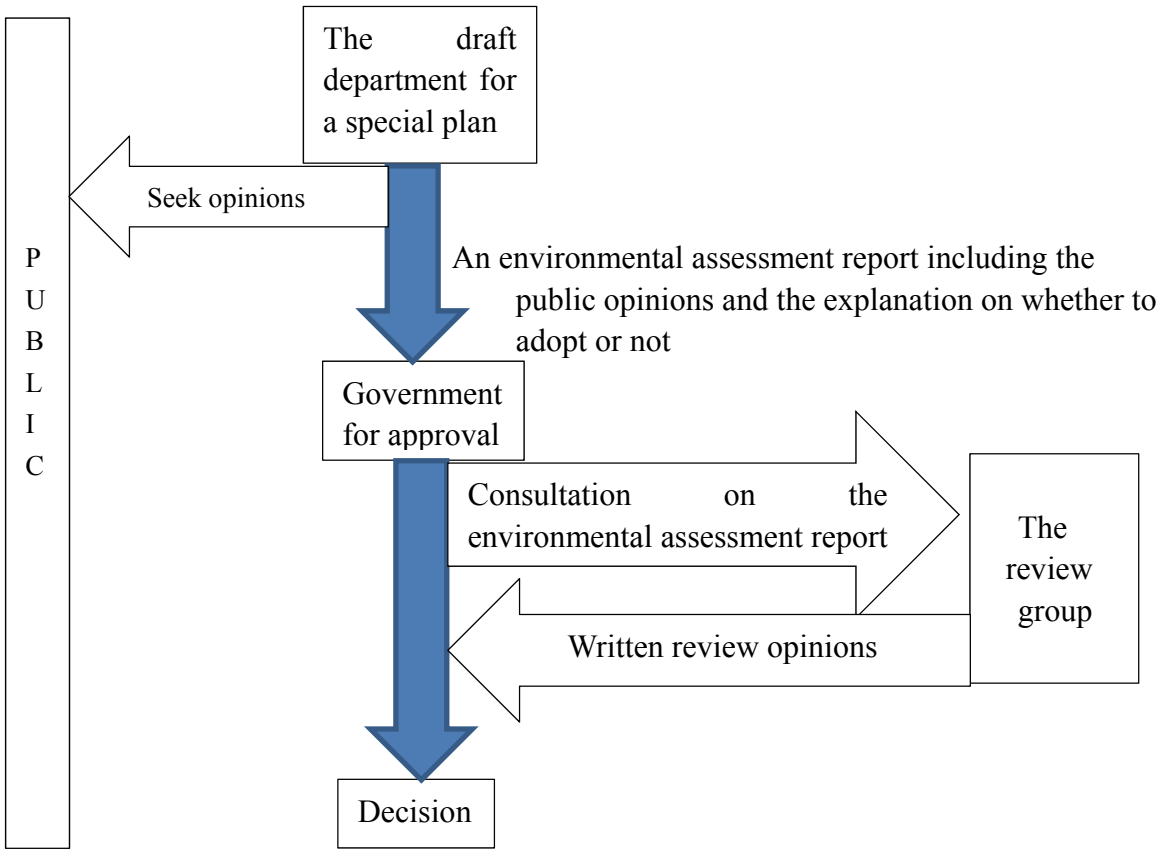
The above provisions are so unclear. Therefore, State Environment Protection Agency issued Interim Measures of Public Participation in Environmental Impact Assessment (IMPPEIA) in 2006 and State Council in 2009 further promulgated the Regulation on the Environmental Impact Assessment for Plans (REIAP). However, except the consolidation of reason-giving institutions,[179] they did not made obvious progresses concerning public

[176] Not all plans concerning the exploitation of the land have to undertake the public participation procedures, only the special plans need. The definition of "special plan" is in the article 8 of the EIA.
[177] EIA, article 13.
[178] EIA, article 14.
[179] For example, article 13(3) of REIPA clarified that attachment of the explanation on whether to adopt the public opinions or not required by article 11(2) of EIA is made at the same time when the draft department submits the environmental

participation institutions. Table 8.1 is the public participation in the environmental impact assessment decision-making process for a special plan in the existing legal system.

Table 8.1

Public participation institutions in the environmental impact assessment process for a special plan



From table 8.1, we can see: (1) The entire assessment process is very closed, only in the phase of drafting a special plan the requirement of seeking public opinions is imposed. But no mechanism is established for the draft department giving a feedback to the public. The explanations on whether to adopt these opinions or not are made inside government system.

impact assessment report for examination and approval. Article 20 of REIPA prescribed that if the drafting body has not attached public opinions and the explanations on the report or the reasons are obviously unreasonable, the review group shall give the recommendation of revising the environmental impact assessment report and needing reexamination.

(2) Only some forms of seeking public opinions are enumerated. Feasible rules have not offered. The drafting department has too much discretion to decide everything concerning public participation. (3) The review group comprises government officials and experts, but excludes the public representatives. (4) The special plan concerning the use of land, may involve a number of people having different interests. The scope of participants that can participate in the drafting plan phase is totally unclear. Hence, public participation institutions are still the traditional working methods in environmental assessment for plans concerning the use of land.

2.2 Public participation institutions in environmental assessment for construction projects

Similar to article 11 of EIA, article 21 of EIA requires the construction unit to seek public opinions and incorporate these opinions into the environmental assessment report when the construction projects may cause significant environmental impacts before the construction unite submits the report to the department in charge of environmental protection for approval.

IMPPEIA mainly focuses on enriching public participation institutions in the environmental impact assessment for construction projects. Its developments of EIA are embodied in the following aspects: (1) IMPPEIA has increased the requirements of environmental information disclosure and required the whole decision-making process to be kept open to the public.[180] These requirements guaranteed the transparency of the

[180] IMPPEIA, Section 1 of Chapter 2 and article 12.

decision-making process and supported public participation effectively. (2) It has extended public participation from the application phase conducted by the construction unite in EIA to the decisive phase by the department in charge of environmental protection[181] and also increased the open feedback mechanism at the same time. (3) Though the range of public is still not clear, at least IMPPEIA provided the indispensable participants-the stakeholders.[182] This means IMPPEIA does not only stress the information gathering function of public participation, but also the interests' protection function. At the same time, it also listed some factors for consideration to guide the election of participants.[183] (4) In the phase that the construction unite drafts the environmental impact assessment report, IMPPEIA stresses public participation particularly and requires the construction unite to add the public participation chapter in the environmental impact assessment report, otherwise the department in charge of environmental protection will not accept the application of the construction unite.[184] (5) IMPPEIA clarified various forms of public participation for the construction unite and provided the minimum procedural requirements for these forms. The forms include questionnaire, expert consultation, panel discussion, feasibility study meeting and hearing. Though these forms have the same function as seeking public opinions, the former four forms are very casual, while hearing is devised with relatively strict procedures. The debate between the public representatives and construction unite or the environmental impact assessment organization commissioned by construction unite is also anticipated in

[181] IMPPEIA, article 13, 14 and 18.
[182] Ibid., article 15(2).
[183] Ibid., article 15(1).
[184] Ibid., article 6.

the hearing.[185] In this term, the opposite roles between the public and the construction unite in the hearing is hypothesized. These rules give feasible guidance for the construction unite or its designated organization to seek public opinions. However, given that production of a report may need flexible forms of public participation to seek the needed information, IMPPEIA does not demand on a particular form of public participation but authorizes the construction unite or its designated organization to choose one. (6) As a way to urge the construction unite to consider the collected opinions seriously, article 18 prescribes that if the public think the construction unite or the environmental impact organization designated by the construction unite has not adopt their opinions and without giving a reason, or the reason is not persuasive, they can reflect such a situation to the department in charge of environmental protection administration, attaching detailed written opinions. This means if the public are not satisfied in this phase, they can claim their opinions in the next stage. (7) In the phase that the department in charge of environmental protection approves the environmental impact assessment report applied by the construction unite, notice and comment procedures are necessary. If the department in charge of environmental protection deems necessary, another round of seeking public opinions in other forms of public participation also can be adopted.[186] According to article 32 of IMPPEIA, if the department in charge of environmental protection decides to hold a hearing, then hearing procedures in the Interim Measures of the Hearing in Administrative License concerning Environmental Protection (IMHALEP) promulgated by the State Environment Protection Agency in 2004

[185] Ibid., article 30.
[186] Ibid., article 13.

and License Law will be triggered. Hearing procedures in IMHALEP is a highly qua-judicial process, including the relatively neutral hearing presider, the statement, debate and cross-examination on the evidences between the construction unite and stakeholders and the binding effects of the hearing record on the final decision and the like. (8) Except the above statutory participatory forms, IMPPEIA also keeps open participation for the public. It prescribes in the period of relevant information disclosure, the public can submit written opinions to the construction unite, the environmental impact assessment organization designated by the construction unite and the department in charge of environmental protection.[187]

Table 8.2 is the main public participation institutions in the environmental impact assessment decision-making process for construction projects in the existing legal system:

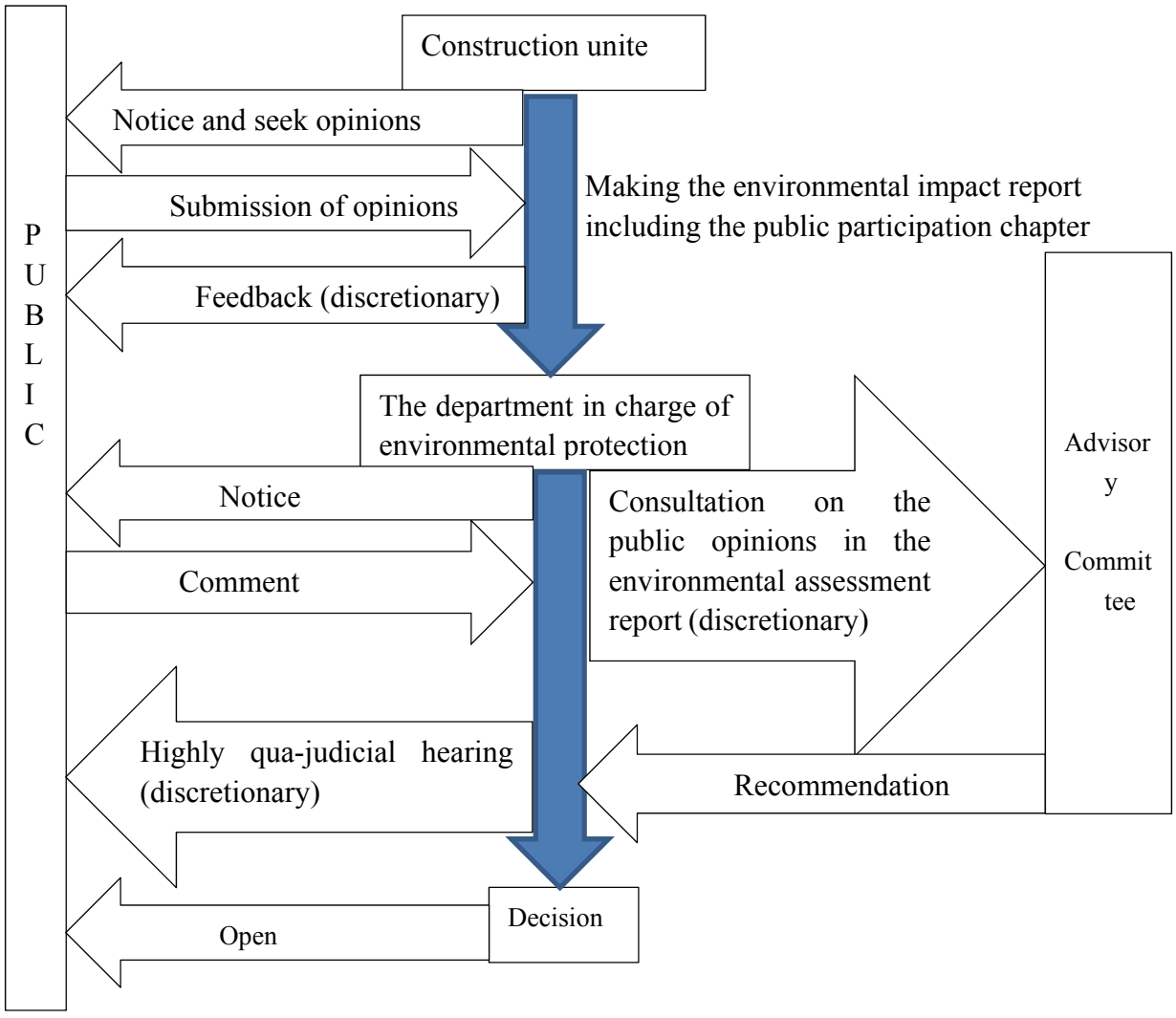
Generally speaking, public participation institutions are relatively satisfying in IMPPEIA in my opinion. The same with The Measures of Guangzhou City, it stresses public participation in the whole decision-making process. It also emphasizes different institutions of public participation in different stages. In addition to the statutory forms of public participation, it also entitles the public to submit their opinions to relevant bodies in the whole process. Moreover, it involves the stakeholders as the essential participants. These characteristics all demonstrate the IMPPEIA is another advanced case concerning public participation along with the Guangzhou City's Rule up to now in China context. It is commendable that this rule does not only put an emphasis on the public participation institutions per se, but also positively highlights the transparency of the decision-making

[187] Ibid., article 14.

process and the importance of information disclosure, which both are significant factors affect public participation.

Table 8.2

Public participation institutions in the environmental impact assessment for construction projects



3. Public participation institutions in urban and rural planning

Another statute at the central level is Urban and Rural Planning Law (URPL) promulgated in 2007. Only two articles concern public participation. However, these two

articles broke the enclosed urban and rural plan making process.[188]

Article 22 provides, "The town government drafts the township plan and village plan, and shall submit the plan to the higher government for approval. The village plan should be discussed and assented by the villagers' assembly or the representative villagers' conference before the submission." The villagers' engagement provided in this article mainly reacts to the village autonomy principle in the Organic Law of Villagers Committee. Village plan should have belonged to the village autonomous affairs since it only involves the interests of the relevant village and its villagers and from whether to plan, how to plan, to what the plan contains should have been decided by the villagers, but this law authorized the town government to deal with these matters. However, since such a plan should gain the consent of the villagers' assembly or the representative villagers' conference, the support of the plan by the majority of villagers is anticipated. Therefore, this article has reflected a certain degree of democracy.

Article 26 of URPL provides, "Before the submission of the rural and urban plan for approval, the draft agency should publish the plan draft and adopt feasibility study meeting or hearing or other forms to seek opinions of experts and public… the draft agency should adequately consider these opinions and state whether to adopt these opinions or not and attach the corresponding reasons in the file for submission." This article has all the problems the same with the other statutes concerning public participation, like the generality, the lacking of feasible rules and the closed reason-giving institutions and etc.

[188] Concerning the procedural characteristics in the urban planning administration before revision in 2007, see Mang zhu, "Cyūkoku no Toshi Keikaku Sakutei ni okeru Shimin Yiken no Cyōsyū [Seeking citizen opinions in deciding on urban plan]," in *Machidukuri· Kankyōgyōsei no Hōteki Kadai [The Legal Problems in City Making and Environmental Administration]*, ed. Yoshikazu Shibaike et al. (Tokyo: Nippon Hyoronsha, 2007), 216-223.

Different from the preceding two fields, up to now there are no administrative regulations and agency rules to enrich public participation institutions in URPL at the central level. The local places did pass government rules or some decrees made by local conferences to add more requirements beyond URPL, but the breakthrough points in public participation are very few. For example, though Shanghai Urban and Rural Planning Decree promulgated in 2010 strengthened the local conferences and advisory committee's involvement, the procedures of public participation are not added much.

Generally speaking, Public participation institutions in urban and rural planning are still in the preliminary state and far from immature. It needs more development.

III. The status quo of public participation institutions in significant administrative decision-making at the local level

Since every individual statute corresponds to a particular administrative decision-making process in the particular administration field, administrative decision-making process in other administration fields have no legal procedural provisions at the central level. Therefore, the local governments began to codify the unitary administrative procedures in making significant administrative decisions.

1. The local status quo of codification of public participation institutions in significant administrative decision-making process

Though Party's documents and State Council's documents asserted to promote public participation in the significant administrative decision-making process, no legal unitary

institutions have been established at the central level. However, local governments have made great efforts to codify public participation institutions in significant administrative decision-making process. According to Yin yang's statistics, up to October, 2010, totally 9 provincial governments, 17 municipal governments and 3 county governments promulgated government rules about procedures in the significant administrative decision-making process, among which 74% devised public participation as the necessary step.[189] Analysis on all of them is impossible. Here, I will take the Hunan Provincial Administrative Procedure Provisions (HPAPP) as an example.

2. A study on the case of Hunan Provincial Administrative Procedure Provisions (HPAPP)

As the other local places, HPAPP does not impose a uniform set of procedural requirements on all administrative decision-making processes. It only regulates the significant administrative decision-making process. HPAPP prescribed public participation institutions mainly in initiative phase and drafting the scheme's draft phase in the significant administrative decision-making process. After these two stages, no public participation institutions are equipped.

2.1 Public participation institutions in the initiative stage

According to article 32 of HPAPP, apart from the chief executive of a government, the government official in charge of a particular matter, administrative agencies under the

[189] Yin Yang, 130-140.

government and the government at lower levels, the citizens, legal persons or other organizations can put forward decision-making suggestions if they believe there are significant matters needed to be decided by the government. However, contrary to the descriptions of article 33 on how to deal with such suggestions proposed by the aforementioned four kinds of official subjects, no provisions in HPAPP exist about how to deal with the suggestions proposed by the public. According to the official interpretation on the HPAPP (the Interpretation), the suggestions put forward by citizens, legal persons or other organizations should first be submitted to the relevant administrative agencies or government. And if they are mature enough, the relevant administrative agencies or government submit these suggestions to the chief executive of a government to decide whether to initiate significant administrative decision-making procedures.[190] Obviously, the decision whether the suggestions raised by the public should be accepted is not only judged finally by the chief executive, but also screened by the other relevant official subjects. But there are no requirements on the chief executive or the relevant agencies to open these suggestions and give reasons for declining these suggestions.

Compared with the Measures of Guangzhou City, the safeguard mechanisms to guarantee public initiative rights in HPAPP are extremely thin.

2.2 Public participation in drafting the scheme's draft

2.2.1 Public participation in drafting the scheme's preliminary draft

In the production of a scheme' preliminary draft concerning the significant decision

[190] *Hunan Xingzheng Chengxu Guiding Shiyi*, 57.

matter, HPAPR requires the drafting undertaking department to carry out in-depth research on the proposed decision-making matter, accurately master the information needed, and seek the opinions of relevant parties within the scope of those affected by the decision, carry out full consultation and coordination, then the scheme's draft comes into being.[191] "In-depth research" is usually described as a kind of paralleled form with public participation.[192] But some scholars pointed out, "in-depth research" also may involve public participation:

> HPAPP established five steps in the significant administrative decision-makings. Those are in-depth research, expert consultation, public participation, lawfulness review, and research collectively. Among these, both the in-depth research step and public participation step are concerning public participation. In-depth research means drafting undertaking department accurately gathers and masters information, and seeks the opinions of relevant parties within the scope of those affected by the decision, carry out full consultation and coordination before producing the draft plan. This step involves the surveys on the public opinions. Nevertheless, the initiative authority is in the hands of the undertaking department.[193]

However, public participation in this phase is very obscure. The text uses the term "seek the opinions of relevant parties within the scope of those affected by the decision". It is not clear who can be fallen into the scope of "relevant parties". That is to say, in the drafting phase, seeking whose opinions will be decided by the drafting undertaking department.

After the "in-depth research and before the scheme's preliminary draft is produced, there are other necessary steps like the lawfulness review and other discretionary steps like consultation on professional organizations and cost-and-benefit analysis. Then undertaking department ascertains the scheme's draft concerning the significant administrative decision.

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[191] HPAPP, article 34.

[192] Scholars of administrative law usually regarded that HPAPP required five necessary procedures when making the significant administrative decisions which are in-depth research, expert consultation, public participation, lawfulness review, and research collectively. Yin Yang and Xinping Di, "Woguo Zhongda Xingzheng Juece Chengxu Lifa Shijian Fenxi [An Analysis on Legislation of Significant Administrative Decision-making Procedures in China]," *Faxue Zazhi [Law Magazine]*, no. 7 (2011): 35; Songnian Ying, "〈Hunansheng Xingzheng Chengxu Guiding〉 Zhiding he Shiyong Qingkuang de Diaocha Baogao [The Report on the Enactment and Implementation of HPAPR]," *Guojia Xingzheng Xueyuan Xuebao*, no.5, (2009): 37.

[193] Wang Xixin and Yongle Zhang, 6.

Therefore, in the initial drafting phase, at least, public participation is not stressed very clearly.

2.2.2 Public participation institutions after the production of preliminary draft

HPAPP arranged ordinary public participation institutions and hearing institutions after the preliminary draft is produced according to the importance of the issue involved.

2.2.2.1 Ordinary public participation institutions— Notice and sought of public opinion procedures

Notice and sought of public opinion procedures are regarded as the typical public participation institutions in HPAPP. Article 35 requires the drafting undertaking department to notice the ascertained scheme's draft to the public. The notice should contain the contents of the draft and its explanation, the channels how people make comments. The legislators further clarified the explanation's contents in the its official Interpretation: (1) the necessity and feasibility of making the significant administrative decision, (2) the process of drafting the scheme, (3) the proposed measures for significant administrative decision-making, (4) the other matters that needed to explain.[194]

Article 37 provides the forms of public participation and participatory outcome's effects on the significant administrative decision-making:

> After publishing the draft scheme concerning the significant decision, the undertaking department should, in light of the scope and degree of impact the significant administrative decision-making will have on the general public, adopt methods such as panel discussion, negotiation meetings, or an open form, etc., to extensively listen to the opinions and suggestions of the general public and people from all walks of life. The scope of participants and the selection of them should be determined to ensure fair expression of opinions by those who would be affected by the

[194] *Hunansheng Xingzheng Chengxu Guiding Shiyi*, 61.

decision-making within the general public.

The undertaking department should classify and organize the public opinions and suggestions and adopt the reasonable ones. For those are not adopted, the reasons should be given. The opinions of the public and the situation regarding their adoption should be published to society.

The legislators claimed that this article mainly made a reference to the experience of USA.[195] However, the sentence that "the scope of participants and the selection of them should be determined to ensure fair expression of opinions of those who would be affected by the decision" indicates that participants may only include the stakeholders. In this term, notice-and-comment in USA's APA is not adopted. According to the Interpretation, "the process of public decision-making is a process of interests' coordination, the purpose of which is to get the benefits from the administrative decision for social groups and individual persons as much as possible and suffer losses as little as possible."[196] From these words, we can infer HPAPP was intended to transplant the representative participation model and reg-neg methods of USA experiences. However, no deliberation and negotiation procedures among the participants are devised. The undertaking department is the subject that reconciles different interests reflected in the gathered opinions. On this point, reg-neg is not adopted either. Even the communication between the draft department and participants is not anticipated. Hence, public participations institutions in this phase only stays at the level of seeking opinions just like other public participation institutions in China context that we have analyzed. The most progress in this phase is that HPAPP established the public reason-giving institution.

[195] Ibid., 66.
[196] Ibid., 66.

2.2.2.2 Special public participation institutions—hearing

2.2.2.2.1 The scope of hearing's application

Not all significant administrative decisions should be made through hearing, only when the decisions involve significant public interests or strong different opinions on the decision-making scheme exist among the public or the decision involving something that could affect social stability and other statutory matters, hearing shall be conducted.[197] Except the last item, the other three like the "significant public interests", "major differences" or "social stability" are all abstract concepts. The government has an overwhelming saying on whether to trigger hearing procedures or not.

2.2.2.2.2 Hearing procedures in administrative decision-making

The characteristics of hearing in HPAPP are mainly embodied in the following dimensions:

(1) It stresses the neutrality of the hearing presider. HPAPP have stringent requirements on the neutrality of the hearing presider. It forbids the staff engaged in the scheme's drafting to be the hearing presider.[198] It also prohibits hearing presider's ex parte communication with hearing participants.[199] According to the legislators' interpretation, these requirements followed the principle of "separations of functions", which were also learned from the experience of USA.[200]

However, just as the interpretation invoked the administrative law judge institution of USA, the rigorous "separation of functions" and forbidden of ex parte communication

[197] HPAPP, article 38.
[198] HPAPP, article 131(2)
[199] HPAPP, article 134.
[200] *Hunansheng Xingzheng Chengxu Guiding Shiyi,* 182-183.

requirements mainly apply to the court-type formal hearing procedures. In this kind of hearing, the recommendation or the initial judgment made by the administrative law judges has legal effects on the final agency decision.[201] However, in HPAPP, the functions of the hearing in the significant administrative decision-making is mainly for seeking opinions but not fact-finding. And the functions of the presider are only to advance the hearing proceeding and make records. He (She) has no authority to make a fact-finding by his or her own judgment. In this way, the function of hearing presider is totally different from USA's administrative law judge. In my opinion, the purpose of hearing in this phase is just to get comments from the public, so the stringent requirement on the hearing presider's neutrality is unnecessary.

(2) In the hearing procedures, HPAPP has not only arranged opinion statement, but also the debates among the participants and the debates between the participants and the drafting undertaking department.[202] All the public participation institutions that have been analyzed before only stressed that the administrative bodies should listen to public opinions. Qua-judicial type hearings only stressed the debates between the participants and relevant administrative bodies. But both of them haven't anticipated debates among the participants. Therefore, debate between participants could be deemed as the creative place of HPAPP. However, HPAPP has not devised any mechanism for guaranteeing full debates among participants. And if we make a reference to article 139, it provides that the administrative body should fully consider the opinions raised by the participants. It seems HPAPP does not

[201] *Universal Camera Corp. v. NLRB* 340 U. S. 474 (1951). In that case, the Court held that if a final agency decision disagrees with the report made by the hearing examiner, such a decision may be less supported by the "substantial evidence" required by the APA.
[202] HPAPP, article 137(5).

require the administrative agencies to care about both the debates among the participants and the debates between the participants and the drafting undertaking department. And qua-judicial type hearing is always along with the requirement that the record of hearing is the exclusive basis for the administrative agency to make a decision. Though HPAPP does have the hearing record institution,[203] article 38 allows the participants who cannot fully express his (her) opinions within the set period of hearing to submit his (her) opinions to the drafting undertaking department. Those articles all showed that the real purpose of hearing in HPAPP is only for seeking public opinions.

Up to this point, we can conclude that hearing procedures in HPAPP mixed some procedures aiming to achieve different functions. If we use the "function-procedures" perspective to evaluate those procedures, some of them are strange and superfluous. They are far from reasonable.

(3) On the election of hearing participants, it stressed the random selection from the voluntary applicants. Only when the applicants are very few, the administrative body can invite the public representatives to take part in.[204] Compared with wide discretion of the administrative agencies in picking up participants in other legal rules that have been analyzed , HPAPP heavily decreased administrative body's discretion through such a clear provision and increased the independency of the participants. It also can prevent the present widespread problem of "capture representative participants by the government" in hearing process.

[203] Ibid., article 139.
[204] HPAPP, article 136.

(4) In order to ensure all participants can fully express their opinions, article 138 allows the participants who cannot fully express his (her) opinions within the set period of hearing still can submit his (her) opinions to the drafting undertaking department. This article itself was intended to correct the drawback of the hearing since usually hearing is required to be finished within a set period,[205] while on the other hand it produces a problem. If the participants still have other ways to reflect their opinions after hearing, what is the meaning of hearing? This article is good for seeking public opinions comprehensively, but at the same time it also weakened the effectiveness of hearing.

(5) HPAPP stressed open reason-giving institution, through which it can make sure the government to take public opinions seriously.[206] From this point, we can say HPAPP also emphasized on responsive mechanisms.

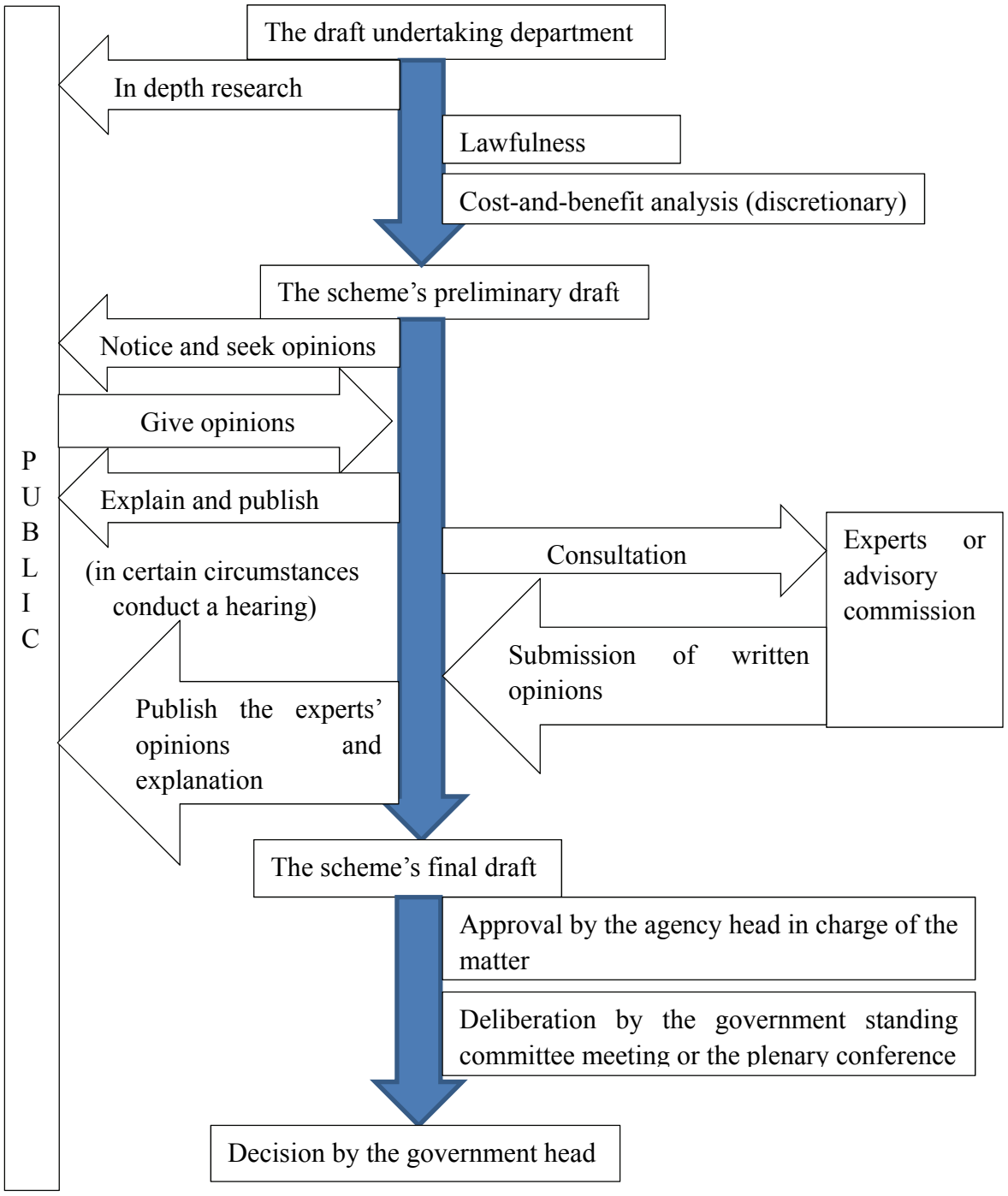
Generally speaking, hearing in HPAPP is a method to seek pubic opinions. Though HPAPP also introduced some qua-judicial procedures，which can react to the "due process" theory, these measures are not necessary. It also provided communication among participants, which I think is important that I have proposed in assessing the public participation institutions in price-setting administration. And HPAPP only required the relevant administrative body to consider the opinions put forward in the hearing. All these have revealed that hearing in HPAPP is only a method for seeking public opinions.

Now we can display the whole picture about public participation institutions in the significant administrative decision-making process in HPAPP by table 9.

[205] *Hunan sheng Xingzheng Chengxu Guiding Shiyi*, 192.
[206] HPAPP, article 139 (2).

Table 9

Public participation institutions in the significant administrative decision-making process in HPAPP



From all the analyses above, it is hard to say that HPAPP made great progresses compared with the other advanced cases which have been analyzed in the previous parts. The initiative right of public to trigger public participation institutions is inadequate. In drafting the preliminary scheme draft, the relevant administrative body decides all things about public participation. After the production of the preliminary scheme draft, though a round of notice-and-sought of opinions are required, it is within a small circle of people which means it is different from the notice-and-comment procedures that everybody could make a comment. Hearing in this phase is a special method to seeking opinions. But after analysis, it is not different from the other forms to seek public opinions in nature. And though HPAPP devises stricter procedures for hearing institutions, the government will decide whether trigger the hearing.

From this point, HPAPP is limited in providing public participation institutions, both in administrative stages within the decision-making process, but also in the scope of participants. But this phenomenon also manifests that since administrative decisions vary a lot in different administration fields, HPAPP as a uniform administrative procedure act is only possible to afford minimum procedures on public participation that all significant decisions-making could apply to. Therefore, how to fully and appropriately develop public participation institutions in different administrative-making fields needs more explorations in respective fields. Reliance on an administrative procedure act solely is not enough.

Conclusions: This chapter has analyzed public participation institutions in significant

administrative decision-making process in China context. First section is about the concept of “significant administrative decision-making”. I have decomposed the concept into two parts, one is the “administrative decision-making” and the other is “significant”. “Administrative decision-making” could be understood from two perspectives. One is from the official documents. These documents divided administrative powers as administrative decision-making power, administrative enforcement power and oversight power, which mimicked the separation of the legislative power, executive power and judicial power in political configuration. The other is from administrative law theories and actual legal institutions, but they diverged on the scope of decision-making actions. This paper will take the actual legal institutions as the study objects. The definition of “significant” is also made reference to the actual legal institutions. Therefore, significant administrative decision-making in this thesis refer to any decisive activities that involves the matters enumerated by a statute. The proposition of the concept of “significant administrative decision” has great meaning for Chinese administrative law. It brought some administrative actions once excluded from administrative law, like policy-making, plan-making in China context into the vision of administrative law. It also broke the traditional distinction between specific administrative action and abstract administrative action and the hierarchical division among administrative rules.

The institutionalization of public participation in significant administrative decision making developed along two paths. One developed in individual administration fields at the central level. This is the content of the second section. The analyses on legal institutions

have revealed that a considerable gap exists in public participation institutions among different administrative decision-making fields. For example, in the environmental impact assessment for the construction projects field, public participations institutions are relatively developed, while in the urban and rural plan, there are only unfeasible framework prescriptions. The analyses also have revealed that public participations institutions in the individual administrative decision-making field at the national law level are all using the general, abstract and abroad languages. These languages only provide a kind of principle rather than the feasible procedural rules. Consequently, all meaningful rules have to be pursuant to the relevant agency rules. But on the other hand, it also manifested the wide discretion of the agencies in developing public participation institutions. For example, IMPPEIA developed public participations institutions in the environmental impact assessment for the construction projects greatly, but not much for the plan concerning the use of land. In sum, obscure and unfeasible national laws, heavily dependence on the agencies rules and the broad discretion of agencies caused the uneven status quo of public participation institutions in the individual decision-making administrations at the central level.

Compared with the path at the central level, the local governments made efforts to lay down unitary procedures for significant administrative decision-making process. The third section of this chapter took HPAPP of Hunan Province as an example to study the local situation. After analysis we can find that actually HPAPP has made little big breakthroughs compared with all the public participation forms that we have analyzed before.

Generally speaking, most of public participation institutions in administrative decision-making are not fully developed yet. From the HPAPP case we can know, an administrative procedure act only can offer minimum procedures for the all significant administrative decision-making process. But different significant administrative actions have different characteristics. Full and deep development of public participation institutions in significant administrative decision-making process needs more explorations in the individual administrative fields.

Part Two: Public participation Institutions in Japanese administrative law

Chapter Four

Public participation institutions in Japanese administrative law

I. A general theory and historical development about public participation institutions in Japanese administrative law

1. A general theory about public participation in Japanese administrative law

1.1 The concept of public participation in Japanese administrative law

Both Japanese administrative law scholars and legal provisions rarely employ the term of “public participation”. The most frequently used words are “resident participation”. That is because many participatory institutions are for the local residents to engage in local public affairs. However, the scope of residents after all is limited. Therefore, the concept of resident

participation cannot cover all the topics that I am going to discuss in the following parts. Here, I still use the language of public participation.

Regarding the concept of public participation in Japanese administrative law, I will adopt the definition made by Professor Narufumi Kadomatsu. According to Professor Kadomatsu, public participation institutions mainly refer to the institutions about some entitlements that private persons can input some individual or general information, as well as the entitlements that they can handle, manufacture these information in the process of making certain public decisions.[207] Three kinds of relationships are excluded from the study scope：First is the relationship between only public entities, for example, the dialogue between state and local public entities. Second is political participation, for example, the election. Third is about the two-sided relationship between administrative agency and the administrative addresses in the administrative disposition. Participation in the third kind of relationship is the individual participation, but not the public participation.[208]

1.2 The functions of public participation

Public participation in administrative process can play a lot of roles.[209] Generally speaking, in ex ante administrative process, scholars mainly focus on two functions. One is

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[207] Narufumi Kadomatsu, "Tetsuzukikatei no Kōkai to Sanka[The Disclosure of Administrative Process and Participation]," in *Gyōseihō no Sinkōsō II: Gyōseisayō· Gyōseitetsuzuki· Gyōseijyōhōhō [New Concept of Administrative Law II: Administrative action·Administrative Procedure·administrative Information Law]*, ed. Tsutomu Isobe et al. (Tokyo：Yuhikaku Publishing, 2008), 290.

[208] Ibid., 290-291.

[209] Professor Tsuyoshi Kotaka summarized them as (1) negative aspects: ①Question of the public interest representative ability of administrative agencies, ②Administrative decisions captured by enterprises, ③Lack of weighing public opinions, ④The limits of judicial remedies; (2) positive aspects: ①Security of procedural formalities, ②Information gathering function, ③Persuasive function, ④The function of protecting rights and interests, ⑤Function of pointing out issues, ⑥Function of promoting administration. Tsuyoshi Kotaka, *Jyūminsanka no Hōri [The Legal Theories of Resident Participation Procedures]* (Tokyo: Yuhikaku Publishing,1977), 178-194.

the defense of rights and interests, and the other is democracy.[210] However，there are other scholars also particularly attribute public participation to the requirements from democracy.[211] But from the point that three-sided relationships among administrative agency, administrative addressee, and the relevant stakeholder can also be counted as public participation pursuant to the definition above, especially the relevant stakeholders may involve a great number of people, public participation of course has the function of defense of rights and interests.

Actually, regarding the relationship between these two functions, on the one hand, the scholars stress the difference;[212] on the other hand also emphasize the overlapped aspects.[213] This concerns the relationship between the rule of law and democracy in nature. Rule of law, which is for protecting legal rights and interests, is the substantive goal, while democracy is the formality, and the understanding of democracy also varies. Hence, the two functions are not at the same level. So it is possible to integrate these two functions through the devise of administrative procedures. For example, Professor Yoshikazu Shibaike regarded that in administrative legislative procedures (public comment procedures in Japan) the function of defense of rights and interests is also enclosed by the democracy function.[214] Professor Naofumi Ota also thought that public participation institutions have the elements from both the two standpoints. He even thought that there are no such participatory procedures that

[210] Naofumi Ota, "Machidukuri to Jyūminsanka [City Making and Resident Participation]," in *Machidukuri· Kankyōgyōsei no Hōteki Kadai* (see note 188), 157-159.
[211] Hiroshi Shiono, *Gyōseihō I: Gyōseihō Sōron [Administrative Law: General Remarks on Administrative Law]* (Tokyo: Yuhikaku Publishing, 2009), 269.
[212] Ibid.
[213] Ota, *Machidukuri to Jyūminsanka*, 157.
[214] Yoshikazu Shibaike, "Gyōsei Teitsuzuki to Kokumin no Kenri [Administrative Procedures and Rights of Citizens]," Jurist 859, (1986)：82, quoted in Naohumi, *Machidukuri to Jyūminsanka,*157.

have only one function in administrative process in fact.[215]

1.3 The scope of participants and participatory patterns

1.3.1 The scope of participants

Who can participate in administrative process is also a key aspect of public participation institutions. In Japanese administrative law, some scholar emphasized on the interested parties,[216] some focused on the universal citizens,[217] and other focused on the residents.[218] I think these propositions are put forward mainly from the perspective of two aforementioned public participation functions. If one person regards the main function of public participation as the defense of rights and interests, he (She) will prefer the scope of participants limited to stakeholders or relevant residents. However, if one regards the main function of public participation as democratization, he (She) will naturally prefer the universal citizens.

Here is another perspective, from the actual administrative needs of information. According to Professor Kadomatsu, institutional design should focus on the private persons' capability of information production and burden of information cost, the private persons' standing at various positions. And various interests and capacities should not be treated equally with the obscure term of "civil society" or "citizens". He further argued that attention should be paid to difference in the distance from every person to the information

[215] Ota, *Machidukuri to Jyūminsanka*, 157.
[216] Masashi Kaneko, *Gyōseihō Sōron [General Remarks on Administrative Law]* (Tokyo: Chikumashobo, 1983), 119, quoted in Kadomatsu, 293.
[217] Hideo Fukui, *Shihō Seisaku no hō to Keizaigaku [Law of Judicial Policy and Economics]* (Tokyo: Nippon Hyōronsha, 2004), 154, quoted in Kadomatsu, 295.
[218] Motoo Ando, "Jyūmin Undō ni okeru Jyūmin no Riron [The Theories on Resident in residents movements]," *Tomon* 87, no. 10, (1996): 15-16, quoted in Kadomatsu, 295.

and the difference in the cost of information production, in terms of the actual private attributes (positions, interests and abilities).[219]

1.3.2 Participatory patterns

Professor Kadomatsu concluded public participation patters as two types generally according to the scope of participants. One is the type like public comment that all people could submit their opinions. The other type is the mutual rounded communication type, which means the numbers of participants should be limited. He further divided the latter into two categories according to the selection criteria. One focus on the rights and interests affected by the relevant administrative decision, the other takes advantages of samples that produced in a random way.[220]

In legal institutions, for the different expected functions of public participation, the scope of participants and participation patterns also vary a lot.

1.4 Public participation and the final decision

Most of Japanese administrative law scholars advocate for the separation of public participation and the final decision. The arguments are mainly as follows: (1) Public participation only input information into the administrative process. The administrative agencies keep the final authority on determination.[221] (2) Public participation mainly aims at finding a public problem needed to be resolved, but it is better for the administrative

[219] Kadomatsu, 295-296.
[220] Ibid., 296-299.
[221] Yoshimoto Yanase, "Jyūmin Sanka no Teigi [The definition of resident participation]," *Jiken* 50, no. 2 (1974): 52, quoted in Kadomatsu, 299.

agencies or relevant experts to be involved when deciding how to deal with such a problem.[222] (3) After all, public participation is not the political system to make authoritative decisions. If the result of public participation becomes the final decision, it also becomes the political system simultaneously.[223]

2. The historical development of public participation institutions in Japanese administrative law

According to the relationship among state, market and society, Professor Katsuya Ichihashi divided the historical development of public participation institutions embodies in Japanese administrative procedure law into three generations.[224]

The first generation reacts to the state-centered period. Public participation institutions in this period also conform to the characteristics of this generation of administrative procedural law. These characteristics include: (1) Administrative procedures focused on individual decisions; (2) Administrative agencies are the protagonists when making individual decisions and administrative agencies are organized in pyramid shape and hierarchy; (3) The purposes of administrative procedures are for protecting rights and interests and preventing arbitrary and capricious administration. Procedures are approximate to adversary judicial procedures; (4) Strict, limited and formal communications exist between administrative agencies and participants. Scholars call the communicative process

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[222] Takahiro Hisa, "Atalashii Jidai no Syakai Shisutemu toshite no Shimin Sankagata Machizukuri [Resident Participatory Urban Planning in the New Epoch-making Society]," *Toshi Keikaku [Urban Plan]* 50, no. 5 (2001): 27-32, quoted in Kadomatsu, 301.

[223] Naoyuki Mikami, "Shimin Sanka ron no Mitorizu [The Map of Citizen Participation]," *Kōkyō Kenkyū [Study on Public]* 2, no.1 (2005): 222, quoted in Kadomatsu, 302.

[224] Katsuya Ichihashi, "Public Participation in Japan: Considering the Relationship among State, Market and Society," in *International Conference* (See note 119), 154-160.

as a round trip starting from administrative agencies. (5) Though administrative agency has the obligation to involve the stakeholders into administrative process and should listen to their opinions, administrative decisions are not bound by these opinions. Administrative agencies monopolize the decisive power.

The second generation reacts to the market-centered period. Public participation institutions manifested in this generation mainly as public comment procedures. Characteristics of public participation institutions in this generation include: (1) Administrative procedures focus on administrative orders; (2) Administrative agencies are also organized in pyramid shape and hierarchy; (3) The purposes of public comment procedures are not only for protecting rights and interests, but also for promoting democracy. Public comment procedures are approximate to legislative procedures. (4) The scholars called the communicative process between administrative agencies and the public as one and a half round trip. (5) Public comments cannot bind the final decision, but the administrative agencies have to assume the explanation responsibility.

The third generation reacts to the period that the common space and civil societies are emerging and expanding between the state and individuals. Administrative procedures in this new domain are called process-oriented democracy model. This model has the following characteristics: (1) this model as a new governance type is adopted in individual legal ordinances but not in APA; (2) it breaks the distinction between different administrative stages in a whole process but focused on the dynamic interactions among them as a whole; (3) not only the administrative bodies but also the other actors like the civil sectors or

supranational organizations work together in a network way for solving an issue at best. These actors produce the final decision and enforce it commonly and interactively; (4) usually citizens start this model as the two-way round trip and it runs through all stages.

Historical division of the development of administrative procedures from the perspective of relationship among state, market and society on the one hand reveals that status quo of power has the overwhelming influence on administrative procedures, but on the other hand also shows that different functions of public participation call for different procedures. For example, in the first generation of administrative procedures, public participation institutions serve for protecting rights and interests. In the second, they are for democracy, and to the third, for solving a problem better. And the second dimension of the historical development of public participation institutions in Japanese administrative law is exactly the meaningful point for China to reflect on its own theories and institutions.

The following parts will observe the detailed public participation institutions in Japanese administrative law. However, using the same methodology to analyze public participation institutions against the rulemaking and significant administrative decision-making as the Chinese part is difficult since Japanese administrative law has no concept and conception of "significant administrative decision-making" and Japan has enacted Administrative Procedure Act to regulate relevant administrative actions while leave others regulated by relevant individual statutes and local decrees. I will use this Japanese thinking for organizing the contents of the following parts. First is to study on the public participation institutions in Administrative Procedure Act (APA) and the relevant

development in local entities; second is to study on public participation institutions in Urban Planning Law (UPL). Urban planning administration is the most important example of planning administration. Because of the complexity and diversity of planning administration, APA has not provided generally applicable procedures for all planning administration. Therefore, UPL has become a significant window for observing public participation institutions in planning administration; third is to study two special forms of public participation—resident referendum and process-oriented democracy model which have been developed by local public entities without being pursuant to national statutes. I will analyze public participation institutions in all these aspects intertwined with theoretical criticisms to explore the status quo of public participation institutions in Japanese administrative law.

Though finding a corresponding "significant administrative decision-making" is difficult in Japanese administrative law, it still could be concluded that rendering dispositions upon application in Japanese APA may fall into "significant administrative decision-making", urban planning definitely is, while the matters that resident referendum and process-oriented democracy applies to in the local public entities also fall into "significant administrative decision-making" in Chinese administrative law sense. Therefore, the following parts will use Japanese administrative law system to organize the contents of public participation institutions while at the same time keeping in mind the corresponding parts within Chinese administrative law.

II. Public participation institutions in Japanese Administrative Procedure Act (APA)

The Congress of Japan passed APA in 1993 and it came into effect in 1994. From its

establishment to present, Congress has revised it five times. The latest one is in 2005. Both the original version and the revised version provided the public participation procedures. But the functions and contents are different.

1. Public hearings, etc. in rendering dispositions upon application in APA

1.1 Public hearings, etc. in rendering dispositions upon application in APA

Article 10 of APA provides, "Administrative agencies, when rendering dispositions upon applications, and where applicable laws and regulations provide that the interests of persons other than the applicants be considered in granting the relevant permission, etc., shall, where circumstances make it necessary, endeavor to provide opportunities for the opinions of such persons other than the applicants to be heard, by holding public hearings or by other appropriate methods." The original version in 1993 created the above article. Compared with the other contents in APA at that time, this article first time expanded the traditional two-sided administrative relationship only between the administrative agency and administrative addresses to three-sided relationship by involving the third party into administrative process. However, the article also has its limitations. From the purpose of the whole act at that time, Professor Hiroshi Shiono regarded it as reinforcing the information-gathering function for administrative agencies to ensure the rationality of administrative decisions rather than recognizing public participation based on democracy.[225] Indeed, from the contents, this article only requires the agencies to hear the relevant stakeholders' opinions. In this light, it did lack of the aspect of democracy.

[225] Shiono, *Gyōseihō I*, 285, 296.

However, is it really impossible to contain some democratic elements? After all, this article started to require the administrative agencies to consider the third party's interest. Professor Yoshikazu Tamura once pointed out, "Even if the initiation of administrative authority is for the particular person, the range of effects also could expand, or it also could affect an unspecified number of peoples. In these circumstances, the relevant administrative agencies usually adopt public hearing procedures for coordinating various interests and ensuring the fairness of the administrative disposition. And in this circumstance this process is not the simple fact-finding but an introduction of expected procedures with new functions."[226] Hence, though originally the legislators only expected the public hearing and the like to diversify administrative agency's information, with the expansion of the range of the third party, it is also possible to contain some democratic elements such as the process of coordination of interests depending on how to organize the public hearing beyond only hearing public opinions.

1.2 The criticisms on public hearing in APA

Criticisms on article 10 of APA concerning the public hearing mainly are from two aspects. One aspect is about the discretionary initiative of public hearing. Article 10 only imposes administrative bodies an endeavor obligation. Some scholars hoped to develop compulsory public participation institution through the Courts' expansion of standing to seek judicial review.[227] And the courts did some endeavors to include certain of interests as the

[226] Yoshikazu Tamura, *jyūminsanka no hōteki kadai [Legal Problems of Citizen Participation]* (Tokyo: Yuhikaku Publishing, 2006), 87.
[227] Ibid., 164.

legal protected interests and then the relevant stakeholders were entitled the standing to seek judicial review.[228] However, the endeavor obligation in this article to some degree limits such an expansion's implication in promoting public participation. Since although the relevant people may get the standing to seek judicial review which means their interests should be considered by the administrative agencies, there is no legal compulsory obligation for administrative agencies to consider their interests by seeking their opinions. The standing's expansion can only solve the problem that the third party's interests should be considered. When the administrative agencies do consider, but not adopt the way of seeking opinions from the relevant parties, the decision still could be sustained by the court. So under this article, the expansion of standing does not mean more public involvement in the administrative process necessarily. In order to solve such a problem, either amending this provision from the endeavor obligation to the compulsory obligation or adding more requirements into the individual statutes is needed.

Another criticism is about the inadequate procedures for defending the third parties' rights and interests. According to the content of public hearing, it actually only stays at the level of seeking opinions. Therefore, from the viewpoints of defense of rights and interests, introduction of parts of court-type procedures is advocated.[229] Nevertheless, qua-judicial procedures may fit the case when very limited participants are involved. If the interests involved are complex and the stakeholders are also various, the court-type procedures become unsuitable and impractical. In such an occasion, reg-neg or the other like procedures

[228] For example, concerning the interests protected legally in the approval of application for development, see Norio Yasumoto, *Toshihō Gaisetsu [An Overview of Urban Law]* (Kyoto: Hōritsu Bunkasya, 2008), 78-83.
[229] Ibid., 179.

may be more available. So whether the qua-judicial is suitable to be introduced depends on the complexity of an individual case. In sum, public hearing institution in APA is inadequate.

1.3 Local public entities' improvement of public participation in addition to article 10

Some local public entities enriched public participation institutions beyond article 10 in their local administrative procedure ordinances.[230] For example, the 10th article of Fukuoka Prefecture Administrative Procedure Ordinance added the procedure of negotiation at the council (kyougikai ni okeru kyougi) in addition to the public hearing and the submission of the written opinions. The purpose of negotiation is for the applicants and relevant stakeholders to exchange information and knowledge frankly and try to promote common understanding in a position of mutual respect. This procedure is not limited to the discussion between the applicants and relevant stakeholders, but also tries to reconcile the interests between them, simultaneously defending their rights and interests.[231] Through introduction of such procedures, the procedures similar to reg-neg have been established, which supplemented the single information gathering function of public hearing in APA.

2. Public comment procedures in administrative orders-making

2.1 The contents of public comment procedures in administrative orders-making

In Japanese administrative law, public participation institutions in the democracy sense in APA mainly means the public comment procedures in making administrative orders in

[230] According to Article3③ of APA, APA is not applicable to the acts of local public entities pursuant to local ordinances or regulations, though the public entities has an endeavor obligation to follow the goal of APA. So the local places made a lot of explorations to enrich this article in their own administrative procedure ordinances.
[231] Ota, *Machidukuri to jyūminsanka*, 169.

Chapter 6. The whole chapter was added into APA in 2005. The contents of public comment procedures in APA are as follows:

(1) The applicable objects of this chapter are the administrative orders (meirei). In addition to the rules established under the statutes, the review standards, disposition standards and the administrative guidance guidelines are also included.

(2) Public comment procedures in APA mainly focus on four steps. First step is notice. Pursuant to Article 39(2), APA requires the administrative agencies to notice the "clear and concrete contents" of the proposed administrative order to the public, which include "the title and the specific provisions of the laws and regulations which shall be the grounds for the anticipated administrative orders, etc." and "any material relating to the proposed administrative order". Second step is public comment. There is no restraint on the scope of the commentators except special requirement demanded in the individual laws. In respect of the unlimited commentators, Professor Hiroshi Shiono once pointed out, "[public comment procedures] are the procedures not just for the limited relevant stakeholders to participate in but open to all citizens. In this light, we can say the democratic ingredients have been added into our administrative procedures."[232] The third step is the consideration of the submitted comments. APA requires the relevant administrative agency to adequately consider all comments submitted and publish these comments and the results after consideration of the submitted comments as well as the reasons.[233] This step has a feature. It does not require the final order has to follow the majority's opinions. Even if just one piece of opinion, it also

[232] Shiono, 317.
[233] APA, article 42 and article 43①.

could lead to the revision of the proposed order as the result of consideration. When two kinds of opposite opinions exist in the submitted opinions, the relevant administrative agency may adopt the overwhelming minority views.[234] The amount of pros and cons of the proposed order itself is not the weighing element.[235] Therefore, Professor Akiko Toyoshima concluded, "It is better to say that public comment is a kind of means to promote the rational explanation of administrative decisions rather than a kind of measure to reflect public opinions as much as possible when administrative agencies decide relevant policy. It is an institution attaching importance to the explanation. It focuses on the criticisms on the proposed order but not the settlement of affairs."[236] The fourth step is to publish. According to Article 43(1), the matters needed to be published include the title of the administrative order, date of publish, submitted opinions, and results after consideration of the submitted comments (including any differences between the proposed administrative order, etc. upon which the public comment procedure was implemented and the established administrative order, etc.), and the grounds for this. The importance of this step lies in its imposition of explanation on the relevant administrative decisions as a way to ensure the implementation of article 42 of APA. And publishing all submitted opinions not just the abstract opinions can make the process of handling submitted information more transparent.

2.2 Plural rounds of public comment

The provisions in APA do not impede several rounds of public comments. If the result

[234] Akiko Toyoshima, "Paburiku·komento no Yigi to Kadai [The Meaning and Problems of Public Comment]," in *Jyūminsanka no Shisutemu Kaikaku [Systematic Reform of Resident Participation]*, ed. Tsutomu Muroi and Hidenori Sakakibara (Tokyo: Nippon Hyoronsha, 2003), 189.
[235] Shiono, 317.
[236] Toyoshima, *Paburiku·komento no Yigi to Kadai*, 177.

of the public comment indicates that the orders-making agency has neglected significant issues, or the facts as the ground of the proposed order has been overthrown，which amounts to the extent that the anticipated order has lost the same identity to the previous proposed order, and no public comment procedures have been implemented for the anticipated order, then a new round of public comment should be carried out. This consideration is regarded as the interpretation of the contents in the brackets of paragraph 4 of article 43 of APA.[237] At the same time, the academic theories also think in the period of public comment, if the facts have changed, which amount to the extent that the anticipated order has lost the same identity to the previous proposed order, a new round of public comment is also needed.[238] And even the preceding circumstances do not happen，no restrictions are supposed to impose on the administrative agencies to carry out several rounds of public comments.[239]

2.3 Academic criticisms on public comment procedures

Academic theories on the one hand affirmed the merits of public comments on the mutual rich communication between administrative agency and the public, on the other hand also pointed out that such procedures have not offered communicative forum among the public.[240] From this point, public comment procedures also have its limitation in the democracy meaning.

In sum, Japanese public comment procedure actually is the same with notice and

[237] Katsuya Uga, *Gyōseitetsuduki to Gyōseijyōhōka [Administrative Procedure and Digitization]* (Tokyo: Yuhikaku Publishing, 2006), 92.
[238] Ibid.
[239] Ibid.
[240] Takayoshi Tsuneoka, *Paburiku·komento to Sankaken[Public Comment and Participatory Right]* (Tokyo: Kobundo, 2006), 226.

comment rulemaking procedures in APA of USA except the applicable scope is wider.[241] The characteristic of such procedure is that it limits public participation in the phase after the production of the proposed rule. Just as some Japanese administrative scholar has pointed out, this procedure put an emphasis on the reason-giving but not the reflection of the majority's wills.

III. Public participation institutions in urban planning administration

APA regulates the relevant administrative procedures in respective administrative process, while some individual laws deal with the relevant procedures in particular administrative areas. Urban Planning Law (UPL) is a very important object for the study on public participation institutions in urban planning administration. It is not only because it concerns procedures in a particular administrative area, but also because APA has not provided unitary procedures concerning the administrative planning.

Administrative planning is a unique concept in Japanese administrative law. It means the plans and the plan-making when administrative agencies engage in some activities, which usually include the identification of the target to be achieved, the formulation of means needed to achieve the end, and arrangement of the processes which could achieve the end.[242] Since the administrative planning is a complicated system and the public participation forms of existing regulations in the present laws are also differentiated, it is difficult for APA to provide unitary procedures for administrative planning process.[243] But it

[241] Uga, 55.
[242] Katsuya Ichihashi et al., *Akucyuaru Gyōseihō [Actual Administrative Law]* (Kyoto: hōritsu bunkasya, 2010), 79.
[243] Shiono, 318.

does not mean the procedures of administrative planning are unimportant. There is broad discretion in planning administration and usually the influences are also wide. Public participation institutions, no matter from rule of law respective or democracy respective, have essential importance in planning administration.[244] UPL is the main statute in urban planning area, and its provisions are also comprehensive. Hence, it is an ideal window to study on the public participation institutions in planning administration.

1. The features of public participation institutions in urban planning administration

Before moving to the specific public participation institutions in UPL, it is necessary to point out two features of public participation institutions in urban planning administration.

First, with the 1999 local decentralization reform, most of affairs concerning urban planning have been distributed to the local public entities as local autonomous affairs, though some strong controls from the state are still left.[245] Hence, public participation in urban planning administration mainly means the resident participation. Resident is a concept more regional than the general public, usually including: (1) people living in the area or the companies locating in the area, (2) people who are working though not living in the area; (3) the stakeholders who have legal rights and interests concerning the land in the area; (4) besides (1) to (3), any people who has involved in anything in the area (such as users or beneficiaries of the social facilities or natural resources in that area or people who have interests in the conservation of the social facilities and natural resources.[246] Overall, resident

[244] Ota, *Machidukuri to jyūminsanka*, 159-161.
[245] Yasumoto, 24.
[246] Ota, *Machidukuri to jyūminsanka*, 155.

participation is a concept linking closely to the local decentralization reform in Japan.

Second, urban planning administration is not a stationary point, but made up of a series of activities. Every step may turn towards different ends. According to Professor Takahiro Mikami, administrative decision on making city could be divided into three stages. They are decision on the basic policy-making, decision on plan-making and individual decisions to specific administrative addresses.[247] We will follow this order to analyze public participation institutions in urban planning administration.

2. Public participation institutions in UPL

2.1 Public participation institutions in basic policy-making (Kihonhōshin) stage in UPL

According to article 18(2)② of UPL, "Municipalities (shicyousonn), when in the process of stipulating the basic policy, shall perform any required measures, such as convening public hearings, in order to reflect the opinions of residents." Different from the public hearing or the similar measures in the plan-making stage, it is the obligation for the relevant administrative agencies to take such a measure. But the public participation only limits to such a prescription. The basic policy should accord with the municipality's basic plans for construction stipulated upon the deliberation of the municipal assemblies.[248]

There is a problem here. When the opinions of the residents sought by the municipality are in conflict with the basic plan for construction stipulated by the assembly, how the basic policy should be enacted? On the one hand, the UPL requires the basic policy should follow

[247] Ibid., 164.
[248] UPL, article 18(2)①.

the basic plan, on the other hand, it also requires the basic policy to reflect the residents' opinions as much as possible. When the two have a tension, from the legal languages in UPL, it seems the basic plan for construction stipulated by the assembly takes precedence over the opinions of residents. Actually, the nature of this problem is the tension between the representative democracy and direct democracy embodied in public participation. From the existing legal prescriptions regarded, public participation has only a supplementary function of representative democracy.

In traditional administrative law theories, public participation in this stage is not taken seriously. The basic policy-making is regarded as the topic belonging to the scope of political democracy and political participation.[249] Recently, public participation is usually mentioned in the sense of activating the traditional political representative democracy but not displacing it. The anticipated function of public participation in this stage is to find the public interest and legitimize the decision concerning public affairs.[250] From these desired functions, the public comment procedures in APA have been recommended and other improvements, like the disclosure of advisory council, even the resident referendum is also discussed in this phase.[251]

2.2 Public participation institutions in plan-making stage in UPL

Public participation institutions in UPL center on the residents and relevant stakeholders' involvement in plan-making made by prefectures or municipalities. These institutions

[249] Ota, *Machidukuri to Jyūminsanka*, 164.
[250] Ibid., 165.
[251] Ibid., 166.

mainly include convening the public hearing[252], public inspection and comments on the plan[253] and decision upon the deliberation of the Prefectural or Municipal City Planning Councils[254]. The following table 10 shows the entire process of the city plan-making, and it can clearly identify the different public participation institutions in different steps.

2.2.1 Main forms of public participation in urban plan-making stage

2.2.1.1 Public participation in drafting the proposed plan

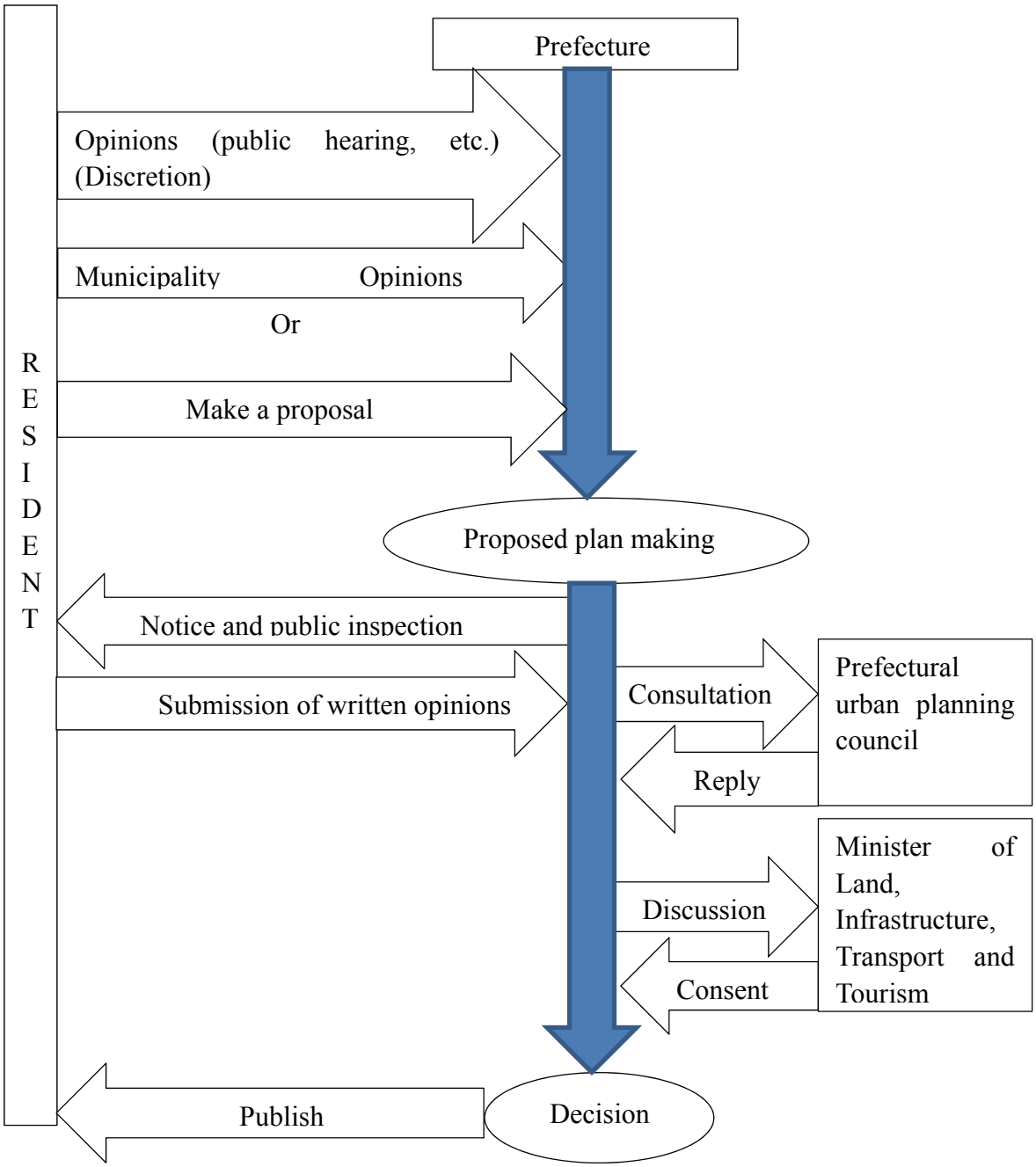
2.2.1.1.1 The first form—public hearing in drafting the proposed plan, etc.

According to Article 16① of UPL, when the prefectures or municipalities are going to stipulate an urban plan and if they deem necessary, they should adopt any measure like the public hearing to reflect the opinions of residents. Public participation in this stage is not necessary. Whether to seek public opinions depends on the discretion of the relevant prefecture or municipality. The purpose of public hearing in this stage is to reflect the opinions of the residents as much as possible and decrease the unacceptability of the proposed plan. But there is an exception. In terms of Article 16②, when proposals of district plans to be stipulated in city plans, pursuant to provisions of Prefectural or Municipal Ordinance on methods for submitting opinions and other matters stipulated by Cabinet Order, the opinions of the owners of the land within the areas pertaining to said proposal and other stakeholders stipulated by Cabinet Order should be sought.[255] That is to say, this clause particularly emphasizes on the stakeholders' involvement when making the district plan.

[252] UPL, article 16(1).
[253] Ibid., article 17(1)(2).
[254] Ibid., 18(1)(2), 19(1)(2).
[255] UPL, article 16②.

Table 10

The main process of decision-making on the prefectural or municipal urban plan



Source: Norio Yasumoto, *Toshihō Gaisetsu[An Overview of Urban Law]* (Kyoto: Hōritsu Bunkasya, 2008), 34.

Note: when the municipality makes the plan, "municipality" supersedes "prefecture", "municipal urban planning council" replaces "prefectural urban planning council", and "prefectural head" takes place of national minister.

And in this clause, seeking opinions of residents and the relevant stakeholders is not discretionary, but compulsory. That is because the district plan is the urban plan concerning small areas, having the most direct impacts on residents and relevant stakeholders. So the importance of resident participation in the early stage in this kind of urban plan is more remarkable than in other kinds of plans.

No responsive requirement and explanation obligation on the relevant administrative agencies are imposed in this phase.

2.2.1.1.2 The second form—Residents' right to make proposals

UPL has also allowed some relevant people and groups to propose an urban plan. When individuals propose a plan to the prefecture or municipality, the legally recognized people limit to the land owners, the holders of surface rights or leasehold rights with perfection requirements for the purpose of owning buildings.[256] For groups, mainly non-profit organizations, the organizations with experiences and knowledge designated by relevant ordinances and similar organizations designated by the prefectural or municipal ordinances can propose a draft urban plan to the prefecture or municipality.[257] Therefore, the local public entities can involve more people in proposing the urban plan through ordinance by designating the groups that can represent the opinions of residents and relevant stakeholders. In practice, for example, in Mitaka City, there is a group called "Mitaka citizen plan 21 Council". This council involves all the citizens in discussing issues (the method of workshop) concerning the urban development from as early as the initial stage to the final stage of

[256] UPL, article 21(2)①.
[257] UPL, article 22(2)②.

making proposals to the mayor.[258] However, according to UPL, whether to adopt the proposal still depends on the relevant administrative agencies.[259] From this point, the groups or organizations still work as the advisory organizations no matter to how great extent they can represent citizens' opinions. But if the relevant administrative agency decides not to adopt such a proposal, it must notify the individual or organization that has made the plan proposal.[260] Since UPL has prescribed the responsive obligation and also the ways of response, some scholar regarded the right of proposal has been established in UPL.[261]

While proposing the district plan or revision on the old district plan in city plan, the people having the right to make proposals have been recognized widely. According to Article 16③ of UPL, municipalities, in the municipal ordinance may stipulate the methods by which residents or stakeholders can make proposals concerning the decision or revision of city plans concerning district plans etc. or concerning the items that should be included in proposed city plans.[262] This means any resident has the right to make a district plan proposal. .

2.2.1.2 Public inspection and public comments on the proposed plan

According to article 17 (1) (2) of UPL, when the prefectures or municipalities are deciding on city plans, prior to the decision, the proposed city plan shall be made available for public inspection for two weeks from the day of public notice. And during this period, any resident or stakeholder can submit written opinions pertaining to the proposed city plan.

[258] Akiko Toyoshima, "Singikai ni okeru Jyūminsanka no Kadai [The Problems of Public Participation within the Administrative Council]," in *Jyūminsanka no Shisutemu Kaikaku* (see note 234), 202.
[259] UPL, article 21(3)
[260] UPL, article 21(5)①
[261] Yasumoto, 38.
[262] UPL, article 16③.

Again, no responsive requirement is imposed

2.2.1.3 The deliberation of prefectural or municipal City Planning Council

According to article 18(1)①②, 19①②, when the prefectures or municipalities decide on a city plan, they should consult on the City Planning Council and decide on its deliberation. The abstract of the written opinions submitted by the residents and stakeholders mentioned in the previous part also should be submitted to the City Planning Council. From these provisions, we can say UPL requires the opinions of the residents and stakeholders to be reflected through the deliberation of a third organization-City Planning Council. However, (1) Only submission of the abstract of these opinions is required. This is different from the public comment procedures of administrative orders-making in APA which require all opinions available to the public, by which ensures the abstract of these opinions consistent with the real contents of the submitted opinions. (2) The opinions are only as the reference materials for the deliberation of City Planning Council. There is no requirement to explain the reasons for whether adopt the opinions or not to the public. This is also the different point from the public comment procedures of the administrative orders-making in APA. (3) The deliberation on the proposed plan of the City Planning Council cannot revise the plan, but only can make recommendations to the relevant prefecture or municipality as a reference.[263] (4) Whether the prefectures or municipalities follow the deliberation of the City Planning Council belongs to the discretion of the public entities.

In summary, UPL mainly focuses on the above public participation institutions. Most of

[263] Kosuke Nishida, "Keikakusakutei Tetsuduki to Sanka: Toshikeikaku wo Sozai toshite [Plan-making Procedures and Participation: Urban Planning as a Subject]," in Machidukuri· Kankyōgyōsei no Hōteki Kadai (see note 188), 173.

them are discretionary procedures. And no detailed institutions provided to ensure the opinions of residents and stakeholders can get an effective reflection in the final plan. From these points, public participation institutions have limitations in UPL.

2.2.2 Supplements to public participation institutions in UPL by the local public entities

Since UPL established inadequate public participation institutions, local public entities made various efforts to overcome these deficiencies.

2.2.2.1 Adding responsive mechanisms

After all, the plan-making procedures in UPL are the minimum procedures. According to article 17(2) of UPL, the prefectures and municipalities can lay down by Ordinance (Jyōrei) the necessary provisions for items concerning the procedures for deciding city plans pertaining to residents or stakeholders, as long as those items do not violate the article 16 and 17(convening the public hearing, etc. procedures and the public inspection and public comments on the proposed plan procedures). So it is lawful to add more procedures by the ordinance of the local public entities. In practice, some local public entities increased some procedural requirements by ordinance to enrich public participation. For example, in Ooyiso Municipal Urban Development Ordinance, the Mayor should make a “written reply” to the submitted opinions on the draft plan and proposed plan and make the “reply” available for public inspection. And in the Niseko Municipal Fundamental Urban Planning Development Ordinance, when the resident submits a piece of opinion, the relevant administrative

agencies are bound to respond to resident.[264]

2.2.2.2 Improvement on the Urban Planning Council

Reform on Urban Planning Council is also an effective way to promote resident participation. According to UPL, necessary matters concerning the organization and operation of Local City Planning Councils shall be provided by prefectural or municipal ordinances in accordance with the standards specified by Cabinet Order.[265] According to the Cabinet Order of the Standard concerning the Organization and Operation of the Prefectural and Municipal City Planning Council, the residents can become members of Municipal City Planning Council.[266] Though the residential members have to be appointed by mayor, but there are no provisions about how they are generated. Obviously, according to the Cabinet Order, the fundamental rationale of the establishment of the City Planning Council lies in its expertise. The administrative agency can promote its decision's rationality by introducing professional knowledge through consultation on the Council. However, the involvement of residential members in the Council is possible to enlarge the public participation. Although this practice is still not mature enough in theory.[267] And in the urban planning administrative practice, the Cabinet Order also forbids open recruitment of all members of City Planning Council, but the allowed residential representatives can be generated by open recruitment or elected by the residents to promote public participation.

According to Professor Tsutomu Muroi, advisory council mainly could be divided into

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[264] Ibid., 179-180
[265] UPL, article 77(1)③, 2③.
[266] UPL, article 2(1) (2), 3(1) (2).
[267] Akiko Toyoshima, "Singikai ni okeru Jyūminsanka no Kadai (Problems of Resident Participation in Councils)," in *Jyūminsanka no Shisutemu Kaikaku* (see note 234), 205-208.

two categories, one is the democratic, comprehensive and interests' coordination type and the other is the professional, technical type.[268] The residential member represents the former type, and the Cabinet Order focused on the later type. How to reconcile these two types still needs more study and exploration. Of course, residents are not totally equal to the stakeholders. In order to perform the function of interests' coordination of the council, the involvement of relevant stakeholders is also indispensable.

A necessary precondition for promoting public participation is to open the meetings of the City Planning Council. This has been developed in local public entities by enacting information disclosure ordinances on the basis of Act on Access to Information Held by Administrative Organs stipulated in 1999. In the local Ordinances, more and more local public entities claim the principle of open meetings clearly. Even in the exceptional circumstance that the meeting cannot be opened to the public, the explanation should be noted.[269]

2.2.2.3 Constructing a partnership in excising the right to make proposals

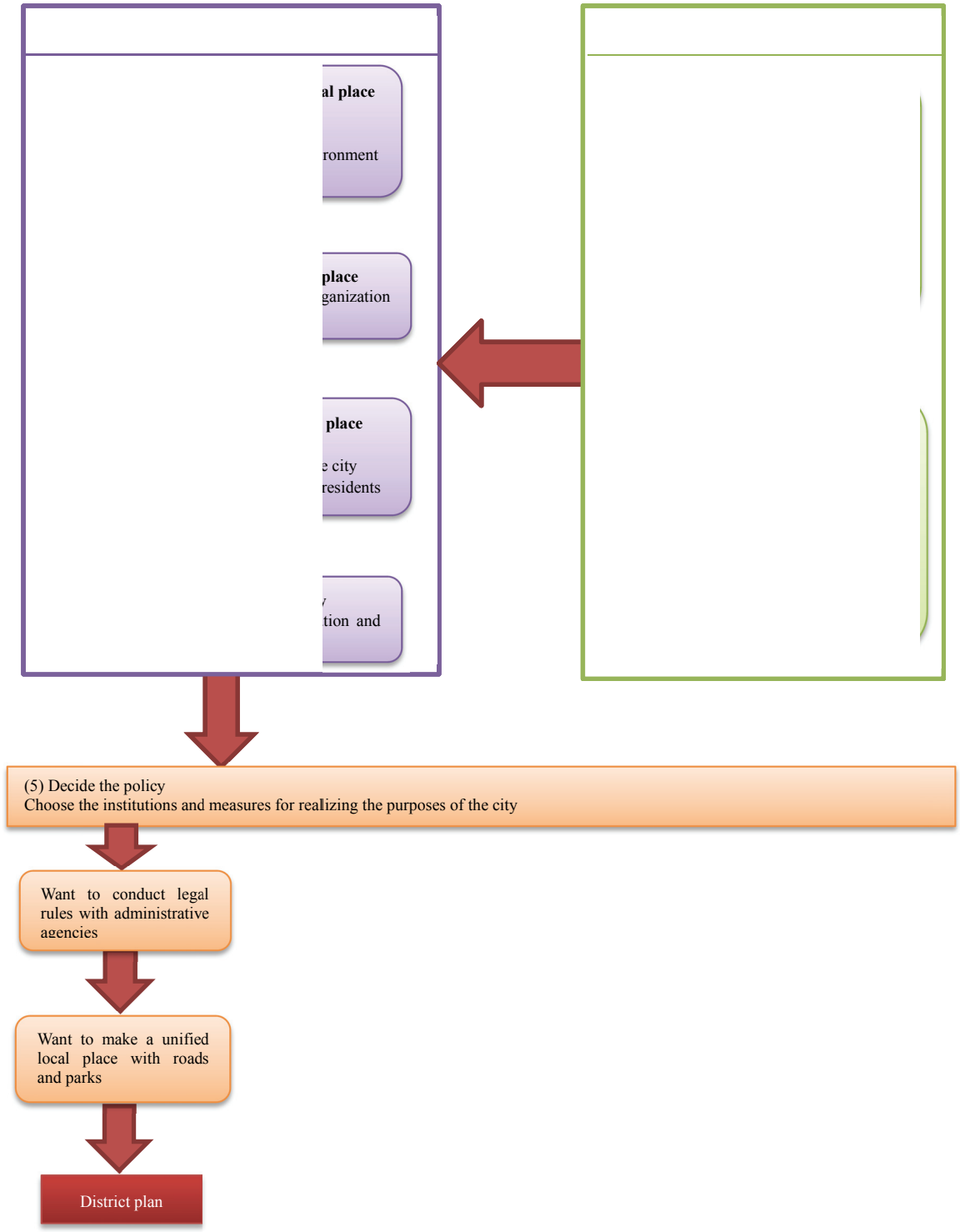
Speaking of the public participation in proposing the district plan, a kind of partnership between the local residents and administrative agencies has emerged in local public entities. Take Kyoto City as an example, this interactive relationship works as the following table shows:

The cooperation among residents, constructors and the administrative forms this kind of partnership. From table 11, we also can see the cooperation among local residents is also

[268] Tsutomu Muroi, *Gyōseikaikaku no Hōri [Legal Theories of Administrative Reform)* (Tokyo： Gakuyōsyobō, 1982], 96.
[269] Toyoshima, *Singikai ni okeru Jyūminsanka no Kadai*, 200.

included as a key element.

Table 11
Proposal by cooperation among multiple actors



Sources: Kyoto City, *Kyotoshi no Keikan [The landscape of Kyoto]* (Kyoto: Kyoto Urban Planning Bureau, 2009), 89.

In sum, the existing public participation institutions in the plan making stage conferred extensive discretion on the administrative organs to decide the initiation of public participation and the effects of public participation. No matter public hearing, public inspection and comments, or the submission of public opinions to the Urban Planning Council, none of them require the relevant administrative body to respond to the gathered opinions. Therefore, along with the urban planning falls into the local autonomous affairs, the local public entities have been trying within the legal bounds to enlarge public participation by adding responsive requirements or increasing residential representatives in the Urban Planning Council or developing a new cooperative relationship between the local residents and administrative agencies and among residents.

Most Japanese administrative law scholars maintained that the existing procedural requirements in the UPL were not enough, so they also agreed to add stricter procedural requirements.[270] But on the Urban Planning Council, opinions are different.[271]

2.3 Public participation in disposition stage

Individuals' participation in this stage traditionally does not belong to the study object of public participation, since in traditional administrative law it only involves two-sided relationship between the administrative agency and the administrative addressee. However, because the administrative disposition in urban planning usually engages various interests, usually the procedures of public hearing or etc. in article 10 of APA to protect the third

[270] For example, Ota, 167.
[271] There are some disagreements on the reform of Shingikai. For example, Professor Kaneko preferred the interest representative model, while Professor Kadomatsu thought the interest representative model is infeasible in practice. At the other hand, although open recruitment can enlarge public participation, but Professor Toyoshima took a skeptical and cautious approach.

party's interest are triggered. Here I will not repeat public hearing in APA again.

From all the public participation institutions in the UPL, another three conclusions also can be drawn except the inadequate procedures: (1) The smaller area is involved in the urban plan, the scope of participants is wider. For example, for the submission of the proposed district plan, not only the stakeholders but any resident can make such a proposal. (2) The smaller area is involved in the urban plan, the stage of public participation is earlier. For example, only in municipal basic policy making for urban plan the residents can participate. (3) Public participation institutions in different stages react to different desired functions. Therefore public participation institutions vary in these stages. I will develop this point again in the last chapter. (4) Given the regional disparities, the UPL only provides the minimum procedural requirements for the public participation with an advisory function. It doesn't impede the local public entities to improve and enrich these procedures and even to inject rule of law or democratic elements. And all the experience of the local public entities which has been described in above parts demonstrates that diversification of participatory models is significant.

IV. Public participation institutions developed by local public entities

1. Resident referendum

1.1 The history of the development of resident referendum

The institutions of resident referendum in the national statutes rarely exist, besides the

ones about the personnel affairs.[272] Resident referendum in administrative public affairs developed in local public entities in the late 1990s. At that time, resident referendum mainly targeted at the problem of nuclear power plant, industrial waste treatment facilities and the U.S. Military bases and the like junk facilities.[273] The background is that when the assembly, administration and the business tried to establish those junk facilities, the residents who question such a movement sought resident referendum to clarify the will of the whole residents.[274] In the beginning, resident referendum institutions all targeted at a particular object pursuant to local ordinances. Later, the standing resident referendum ordinance gradually appeared.[275]

1.2 The features of resident referendum in local public entities

The features of resident referendum in local public entities are as follows:

(1) Resident referendum generally is pursuant to local ordinances. This makes resident referendum have limitations. Concerning this feature, Professor Naoki Oda indicated, "In practice, in the case that the local public entities face the matters on which they have no special authority like the nuclear power plant, industrial waste treatment facilities and the U.S. Military bases etc., and the entire local public entity resists such matters, it is not less that the local assemblies pass the ordinance concerning the resident referendum. On the other hand, assemblies usually veto the proposal concerning resident referendum when the

[272] For example, article 81(2) in Local Autonomy Law concerning the dismissal claim of local officers.
[273] Naoki Oda, "Gyōrei ni motoduku Jyūmintōhyō：Deita kara Miru Genjyō to Kadai (Resident Referendum pursuant to Local Ordinances: The Status quo from the data and Problems," in *Machidukuri·Kankyōgyōsei no Hōteki Kadai* (see note 188), 185.
[274] Ibid., 185
[275] Ibid., 185-186.

head of public entities or the assembly try to promote something while the residents oppose….”[276]

(2) The results of the resident referendum have no legal bindings on the head of local public entities or assembly. It only has the advisory function. Concerning the legal bindings of the resident referendum, three types of theories exist in Japanese administrative law. One type rejected the existence of resident referendum, thinking it has infringed on the system of responsibility assumed by the head of local public entities and the assembly. The other type preferred that the result of resident referendum binds legally on the head of local public entities or assembly, since the scholars endorsing this proposition argued that the Constitution allowed direct democracy in local public entities. The mainstream opinions regarded the introduction of direct democracy is unconstitutional, but if the local ordinances devise the resident referendum only as advisory, it is lawful.[277]

Since many local ordinances provided that the head of local public entities or assembly should respect the result of resident referendum, how to explain the “obligation of respect” becomes a more practical problem. According to the mainstream opinions, even the respect obligation is imposed, the result of residents’ referendum is still advisory. The head of local public entities or assembly only assume the political responsibility.[278] But Professor Hidenori Sakakibara argued that in some circumstances, it is possible to require the head of local public entity or assembly to give a reason if they make a decision which doesn’t follow

[276] Ibid., 190-191.
[277] Ibid., 195-199.
[278] Ibid., 200.

the result of the resident referendum.[279]

1.3 The conditions for implementation of resident referendum

Not all matters are suitable for resident referendum. According to Professor Kadomatsu, "since the advisory resident referendum is pursuant to local ordinances, it is better to set two choices in order to prevent various outcomes. That is to say, resident referendum is a system that can function meaningfully in the stage that the controversies have been discussed fully and reduced to only two alternative issues."[280]

From the above description, it means before the resident referendum, it is better that residents have fully discussed the problem. Fully discussion needs: (1) full disclosed information, (2) plenty of time for discussion, (3) a suitable forum for discussion. Otherwise it will produce the problem of premature initiation.[281] On the other hand, if the resident referendum is sought when the relevant project is in construction, then the problem of late initiation produces.[282]

2. Process-oriented democracy model

The previous section has mentioned a kind of cooperative model among multiple actors when proposing the district plan. Though such a mechanism has established a partnership model, it is still only a circle of stage administration. Therefore, it is not the process-oriented democracy model in the pure sense according to Professor Ichihashi's definition. However,

[279] Hidenori Sakakibara, "Jyūmintōhyō Seido: Jyūmin no Giron ni motoduku Tasūyiken no Sonchyō (The Institutions of Resident Referendum: Respect of the majority's opinions based on the discussion among residents," in *Jyūminsanka no Shisutemu Kaikaku* (see note 234), 225-227.
[280] Kadomatsu, 304.
[281] Sakakibara Hidenori, 228.
[282] Ibid.

local public entities did establish the process-oriented democracy model which can support Professor Ichihashi's third generation of administrative procedures. Take Kyoto city as an example in landscape administration.

In Kyoto city, if the residents want to grapple with the landscape problems in a certain area but are reluctant to propose a district plan or completely deal with the problems by themselves through private pacts among residents, they can take the following measures and cooperate with other actors to improve the landscape:

(1) Create the Regional Landscape Making Council (RLMC)

By virtue of article 43 (1) of Kyoto City Landscape Maintenance Ordinance (KLMO), regional residents including the people living in that area, people operating the business, or landholders and building holders can organize a group-RLMC, and request the certification of RLMC from mayor. And according to article 43 (2), when certain listed requirements are met, the mayor has to approve. These requirements include: (1) The main purposes of the activities of RLMC are maintaining or generating landscape; (2) RLMC should notice the residents about the contents of its activities and listen to their opinions; (3) No harmful activities to particular persons or any activities might have harms have been conducted; (4) Any other requirements are met. From these requirements, we can see KLMO requires RLMC to contact residents consistently to keep its representative qualification and to follow rule of law without invading particular person's interests.

(2) Recognition of the plan concerning the maintenance and generation of landscape

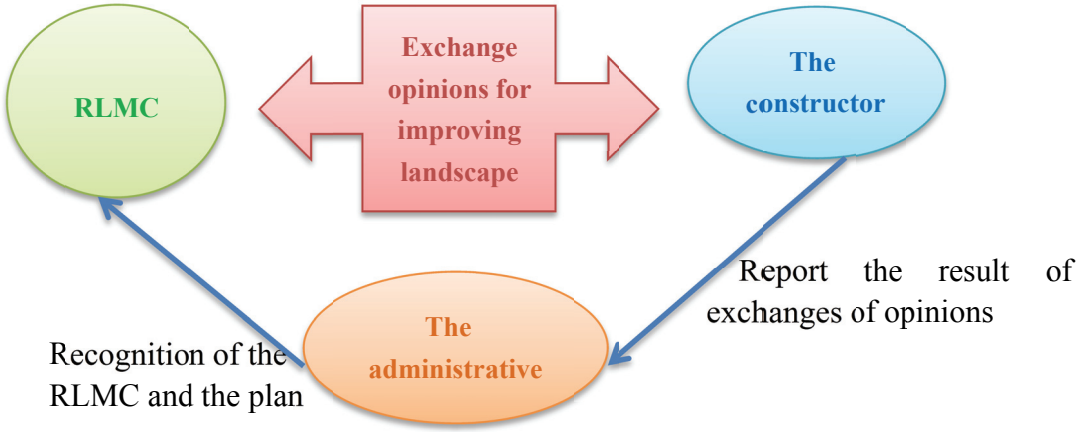
By virtue of article 46(1) of KLMO, the representative of RLMC can ask for mayor's

recognition of the plan stipulated for the maintenance and generation of landscape in RLMC's activity area. And according to article 46(2), in the plan, RLMC can designate all its activity area or some parts as the places where applicants have to listen to RLMC's opinions before they apply for doing something to the mayor and also have to report RLMC's opinions to mayor.[283] If the applicants have not sought RLMC's opinions, the mayor can advise the applicants to do so.[284]

The urban planning agency of Kyoto City described the institutions as table 12 shows.

Table 12

Public participation institutions in maintaining good landscape in Kyoto



Sources: Kyoto Urban Planning Bureau, *Keikan Seisaku no Shinka [The Improvement of Landscape Policy]* (Kyoto: Kyoto Urban Planning Bureau, 2011).

In table 12, administrative agencies have no priorities. They work together with RLMC and the constructors. And no substantive outcomes have been arranged in KLMO, rather the KLMO arranged the procedures for the multiple actors working together for improving the landscape as the common interest shared by themselves all.

[283] KLMO, article 47 (2).
[284] KLMO, article 47 (3).

The well-operation of process-oriented democracy in reality depends on two important factors. The first is about fostering civic spirits of citizens. People in this model as the actors assuming public affairs must be the citizens not only caring about their own things but also caring about others' things beyond "I" and "us".[285] The second is about the development of social society. The example happened in Kyoto is not contingent. The numbers of NPO versus population in Kyoto occupies the top-class nationwide. And citizen activities are very active in Kyoto.[286] I think these two elements are very important, since only mature citizens and civil societies have the real equivalent strength to dialogue with the government. Otherwise, facial equal cooperation will lead to the real coercion in the communication instead.

Conclusions: This chapter includes four sections. The first section is about the general theory and historical development regarding public participation in Japanese administrative law. A general theory discussed five aspects including the concept, functions, the scope of participants and participatory patterns, the relationship between participation and final decision of public participation. Then the historical development of public participation embodied in three generations of Japanese administrative procedure law was also introduced to give a profound understanding of institutional development embedded in the economic and social development. All of these theories have revealed flexible and contextual approaches to public participation in Japanese administrative law theory and evolving

[285] Ichihashi, 160.
[286] *Toshi no keikan*, 89.

process.

The second section is about public participation institutions in APA, mainly including public hearing in rendering dispositions upon application and public comment procedures in administrative order making process. The original intention of establishment of public hearing is the same with administrative disposition procedures to protect the relevant stakeholders' rights and interests. But in administrative practice, along with the expansion of the effects of administrative license, some scholars thought it is possible to introduce other expected functions of public participation. There are some limitations in the public hearing procedures in APA, mainly embodied in the discretional application and inadequate procedures. Some local places introduced reg-neg methods to supplement the procedural inadequacy. Another public participation institution in APA is the public comment procedures in administrative orders making process. Public comment procedures are open to all people without limitation, but the public only can take part in after the proposed rule has been published.

The third section is about public participation institutions in urban planning administration, focusing on Urban Planning Law (UPL) of Japan. Public participation institutions in this area are characterized by different participatory models reacting to different expected functions. In the policymaking phase, public participation is anticipated to find public interest and legitimatize the policy. So UPL directly provides that the purpose of public participation is to reflect people's wills. Since this phase usually belongs to the political decision-making in the traditional perspective of separation of politics and

administration, UPL also has arranged parliamentary intervention, and required public participation to follow the parliamentary policy. This obviously shows that democratic aspect of public participation in basic policy-making stage in UPL lies in its supplementary function to the representative democracy but not displacing it. In the plan-making phase, from proposal to the final decision on the plan, public will participate in all phases through different channels. But UPL has limitations on public participation, so local public entities increased some responsive mechanisms and involved residential representatives into Urban Planning Council to promote the effects of public participation. Particularly, it is worth mention that a kind of partnership among residents and administrative agencies, even experts and business operators while making a proposal to local public entities has been developed in the local place. The institutional arrangements of public participations in UPL and the development in local public entities also demonstrates that when the plan involves more small-scale affairs, the public can participate in making it earlier and more comprehensively.

The fourth section is about resident referendum and process-oriented democracy model developed by local public entities without the basis of national statutes. Resident referendum is an extreme type of public participation as the political model. However, in administrative law theories, the mainstream viewpoints think the result of resident referendum only has the advisory effects without legal binding effects on the final decision. Administrative law theories also think resident referendum only works well in limited circumstances. Therefore, resident referendum's application in administrative process has strict

preconditions. Process-oriented democracy model is another new participatory model. This model in a true sense has overthrown the tradition that decisive power rests with the administrative side and developed the model of solving a common problem through interplaying among residents, relevant operators, experts and administrative agencies. The application of this model also has some social conditions.

All the above illustrated the flexibility and diversity of public participation institutions in different contexts in Japanese administrative law.

Part Three: Lessons from Japanese Experience

Chapter Five

Lessons from Japanese experience

I. Summaries of Chinese and Japanese experience

1. A summary of Chinese experience

The rise of public participation in China has its deep social backgrounds. It is a call both from the need to transform the traditional political configuration and react to the diversified society along with the market-oriented reform. Various functions of public participation can respond to these social needs. Therefore, both the official and academic advocated the introduction of public participation into legal systems. However, official statements of public participation after all are on the basis of the traditional Party's leading principle— the

mass line. Under the mass line, public participation is only a working method for gathering useful information. Public participation in this sense is discretional, passive and advisory. Academic theories in administrative law are still thin. One tried to analogize judicial process to understand administrative process and the other tried to analogize political process. No matter which understanding, they all cannot master the nature of public participation in the administrative process. And the understanding of political models in the second academic theory is also very limited.

Under the influence of the official and academic approaches, there are significant deficiencies in public participation institutions in Chinese administrative law. Though the applicable scope of public participation institutions are continuously enlarging, especially from rulemaking to the significant administrative decision-making, this trend cannot cover the following serious problems inherent in the status quo of public participation institutions in Chinese administrative law: (1) Most of public participation forms are monotonous, emphasizing the traditional working methods like the panel discussion, feasibility study meeting, in-depth research and so on. These forms of public participation have conferred broad discretion on the administrative bodies, including choosing the participants, procedures and deciding whether to adopt or reject their opinions. And usually these forms of seeking opinions are conducted closed to the public. Moreover, these forms of public participation do not identify the different roles among the public (except the Price Law identifying consumers and operators) and in some statutes even treat the public and relevant experts as equal. The hearing can reflect the influence of due process theory in some degree,

but in nature, is a kind of methods seeking public opinions openly with more clear procedures. These limited public participation forms can hardly respond to all the functions expected to be realized in the transitional background. (2) In the processes establishing public participation institutions, hierarchical color is still bright. For example, in the rulemaking process, the public participatory requirements on State Council and the relevant central agencies are very weak, most of them employing the working methods under the mass line. On the contrary, some local governments began to introduce western type of public participation institutions like the notice-and-comment procedures to overcome the inadequacy of traditional participatory forms. (3) Negligence public participation institutions in individual administration fields. At the national statute level，there are only three individual statutes concerning public participation institutions in administrative process, and all of them are general and unfeasible. Feasible public participatory rules depend on the enrichment of central administrative agencies. On the other hand, though local governments have made great efforts to promote public participation through unitary procedures ordinances, analyses show the effects are weak. (4) Ignorance of promotion of public participation at the basic level of administration. For example, rulemaking at the basic level falls into the category of the other normative documents formulating, and the policymaking at the basic level are excluded from the concept of significant administrative decision-making according to the hierarchical requirement. So there is no public participatory institutional requirement on the basic governments' activities.

These phenomena on the one hand demonstrate that public participation institutions in

Chinese administrative law are far from blossom, on the other hand also reflect the present political configuration's constraint on the development of public participation institutions. CCP's leading principle directly confined the institutional depth of public participation. Administrative authoritarian state system makes the administrative agencies powerful and the legislative weak. That is why the public participation institutions established by legislation are general and mild, sometimes even unfeasible. Bureaucratic ranking thinking has also been penetrated into the institutionalization process of public participation. The practice showed that within the pyramid-shaped administrative structure, more upper more refusals of active public participation institutions. Disregard of public participation institutions at the basic administrative level only shows that the basic administrations have no powerful voices within the pyramid-shaped governing structure.

In the first Chapter, I analyzed the social background of the rise of public participation institutions and expected to change some outdated systems within Chinese political configuration through introduction of public participation. But the analysis of the status quo of public participation institutions also showed the development of public participation institutions per se is also subject to this configuration.

2. A summary of Japanese experience

Japanese administrative law theories adopt an open approach to public participation institutions in administrative law. The scholars admitted different functions that public participation may perform, and the function also decides the scope of participants and participatory patterns. They advocated the separation of public participation and the final

administrative decision, which unambiguously rejected the ideal that administrative process equals to political process. The development of public participation institutions in Japanese administrative law also closely connects to Japanese social backgrounds, which can be seen in the division of three generations of administrative procedures made by Professor Ichihashi. If we use another criterion, which is who will be the final decisive subjects to classify public participation, public participation institutions in Japan only can be classified into two categories. One is the advisory public participation and the other is public participation sharing decisive power. Professor Ichihashi said there is no essential difference between the first generation and the second generation of administrative procedures is just in the sense that they all fall into the advisory public participation category. But for the third generation—process-oriented democracy model, no subjects have the sole power to decide an issue, rather multiple actors who care about the common interest interplay together through communications and dialogs to promote the realization of the common interest. This model needs necessary social preconditions like the active social society and mature civility, which makes it hard to be transplanted from one country to another which lacks the same social environment.

Different from China, Japan enacted Administrative Procedure Act. This avoided the unequal application of public participation institutions among different hierarchical administrative bodies. Additionally, Japanese local autonomy system makes the local public entities have enough room to explore various patterns of public participation in administrative process. Therefore, in institutional practice, even if public participation

institutions only play the advisory role, the forms of them are pretty flexible and diverse, more than the defense of interest type and public comment type in the first and second generation of administrative law procedures. For example, the local public entities gave full play to the residents' rights to make proposals established in UPL and developed a new kind of partnership between local residents and the relevant administrative bodies for better proposals. And resident referendum, originally a form of direct democracy, is employed to master the tendency of the public opinions without legal binding effects. And the range of participants will also vary along with the forms.

On the administrative fields in which public participation has been institutionalized, besides the unitary administrative procedures in administrative rulemaking process provided in APA, Japanese administrative law emphasized the introduction of public participation institutions in individual law in respect of a particular administrative field, UPL for example. UPL divides the whole administrative process into three stages, and devised different public participation models for different expected functions. In the basic policymaking stage, public's intervention is expected to find the public interest and supplement the inadequacy of representative democracy. In this phase, public and local congresses are the protagonists. In the plan-making phase, interactive processes among the public, government and experts are expected. Though in institutional practice, UPL itself has some institutional deficiencies which impede the adequate communications among the three actors, but the local public entities try to add new institutions to overcome these deficiencies. Then in the administrative disposition stage, the main function of public participation is to protect stakeholder's rights

and interests.

II. Lessons from Japanese experience

If one thinks legal institutions are deeply embedded in its society and have a strong path-dependence, then it is hard to make the institutional borrowing possible since no society in the world is the same as the other. But if we also admit that even in the diverse societies, we still share some similarities and common values, and then we will recognize that legal institutional borrowing is not only possible but also beneficial. Both of Chinese and Japanese experience has proved the persuasiveness of the former, but the introduction of public participation per se into administrative law in China context also illustrated the instrumental meaning of legal institutions. It is just on the bases that legal institutions could have instrumental meaning and common values could be shared by different societies, I try to draw some lessons from public participation institutions in Japanese administrative law. And given the part of persuasiveness of the former, I also try to guarantee that the borrowed institutions will not contravene Chinese fundamental political principles and could be admitted in China context.

1. A lesson from Japanese public participation institutions in administrative rulemaking

According to what we have analyzed in the second section of Chapter two, effective public participation institutions in administrative rulemaking are inadequate at the national statutory level in China context. Because of lacking feasible rules and the existence of

widespread administrative discretion in the established institutions, public participation is easily evaded by administrative bodies and becomes a formality. From this point, introduction of public comment procedure in Japanese APA into the review stage of administrative rulemaking is an available choice. The merits of public comment procedures are that the proposed rule is open to the general public and everyone has a right to comment on it. This puts the proposed rule under the inspection of the public. And multi-rounded conduction of public comment could absorb the public opinions into administrative rules to the maximum extent. The most important point is that public comment procedures are advisory. The decisive power is still in the hand of the government. So it won't conflict with the official declaration of "public participation, expert consultation and government decision". Actually, Chinese scholars have recommended the public comment procedures.[287] However, their suggestions are only for certain particular types of rulemaking on the basis of Chinese classification criteria.[288] Given the other normative documents formulating process has not been regulated by any legal rules, China has two ways to introduce public comment procedures. One is to make a unitary procedure act on all administrative rulemaking actions and in the internal review phase to introduce public comment procedures. The alternative is to keep the present fragmented situation but introduce the public comment procedures into the reviewing phase in all types of administrative rule-making process.

The advanced point of Chinese present public participation institutions in administrative rulemaking at the central level is that public participation is particularly emphasized in the

[287] Xin Liu, 132.
[288] Ibid. Usually limited to the administrative legislation.

drafting phase. Legislation Law even imposes public participation requirement only in the drafting phase when State Council enacts administrative regulation. However, the present participation institutions also have the problem of infeasibility and widespread administrative discretion. How to improve public participation institutions in the drafting phase is need more explorations.

Based on the above two aspects, the Measures laid down by Guangzhou City is a recommendable case (See the third section of chapter two). It provides public participation in a very early stage. In the agenda-setting phase, it provided public's motion right and public comment procedures (See table 6.1). In the drafting phase, it required necessary public participation form (panel discussion) and expert consultation form (feasibility study meeting). In the review phase, public comment procedures in Japanese APA sense as the minimum necessary procedural requirement has been established (See table 6.3). The Measures has't only introduced public comment procedures into the review phase, but also adhered to public participation in the drafting phase, even expanded it to the agenda-setting phase.

2. Two lessons from Japanese experience in significant administrative decision-making

The status quo of public participation institutions in individual administrative fields at the central level are sporadic, general and abstract, lacking feasibility. This makes the agencies under State Council get the wide discretion to develop public participation by stipulating government rules. Only three individual laws in respective administrative fields established public participatory requirements. After analysis on actual participatory

institutions in these three fields, we can find that except the public participation institutions in the environmental impact assessment for construction projects, other institutions are all very immature. In such a circumstance, the local governments hurried in promulgating unitary public participation procedures for the significant administrative decisions. Compared with Chinese local places, Japan takes totally opposite ideas. For Japan, even for planning administration, because of the varieties in respective administrative fields, Japanese scholars thought it is hard to enact a set of unitary procedures for them, not to mention for the cover-all significant administrative decisions. Under such considerations, Japan explored a set of public participation procedures in individual administrative fields respectively. For example, public participation institutions in UPL (See the third section of Chapter 4). Resident referendum is another example in the administration about junk facilities. And process-oriented democracy model developed in the landscape administration. We can learn two lessons from Japanese experience:

2.1 A lesson from UPL

There is a need to say more about public participation institutions in UPL.

The most prominent characteristics of UPL are its division of urban planning administration into three main stages and the device of public participation institutions according to different expected functions. The detailed contents of every stage have been summarized in the previous part, so here I won't repeat. What I want to point out is my opinion that the division of public participation's functions in different administrative stages is kernel to coordinate the political values and other values in administrative process.

The rise of public participation in administrative law is against western background of legislative delegation with broad, framework statutes to administrative agencies. Traditional countries commitment to separation of powers will question such a kind of phenomenon which makes the administrative bodies now assume political tasks. This calls for injection of democratic elements to legitimize administrative process.[289] On the other hand, expertise and efficiency are the fundamental characteristics of modern administration and they are also the basic rationales for administration' emergence in some countries. And it calls for the reemphasis on the independent and professional aspect of administration.[290] At the same time, rule of law as the mainstream value in legal system has always been emphasized since the emergence of administrative law. How to balance these three values coexistent in administrative process?

The case of UPL reveals that the importance of the three values is not always the same in the whole administrative process. And public participation could play different roles reacting to these varied needs. In the policymaking, public participation aims to the supplement the inadequacy of representative democracy for legitimizing public policy. Political consideration is expected to be the leading one. In the plan-making phase, experts are involved, but the public are still very important. Except the normal public hearing procedures, UPL particularly provides the residents' right to make proposals, especial concerning the district plan, every resident has the legal standing to make a proposal. And in

[289] For example: Stewart, 1670-1671; Susan Rose-Ackerman, "Regulation and Public Law in Comparative Perspective," *University of Toronto Law Journal* 60, no. 2 (2010): 519-535.

[290] For example, William Funk, Public Participation and Transparency in Administrative Law: Three Examples as an Object Lesson; Edward Rubin, It's Time to Make the Administrative Procedure Act Administrative.

practice, local places have formed a partnership among multiple actors including the resident, experts and the relevant administrative bodies while making a better proposal. Hence, in the plan-making, three values interplays through communication among different actors have been emphasized. In the last phase, rule of law becomes the main value to pursue. This model denies the extreme claims of politicizing administrative process or judicializing administrative process, but takes a more pragmatic attitude.

If we use the three−stage model (policymaking, plan making, administrative disposition making) in UPL to evaluate HPAPP's concept of "significant administrative decision", we will find HPAPP did not employ the dynamic approach to the administrative process but adopted a stationary one. HPAPP's approach will produce a problem. When an administrative process is conducted from policymaking to plan-making, and to the final decision, and even some actions that all conform to the definition of significant administrative decision-making according to HPAPP, does the same public participation procedures need to be performed repeatedly? Moreover, according to Japanese experience, public participation' expected functions are different in the three stages, so the participatory procedures are not the same. On the contrary, HPAPP established the same public participation institutions for different administrative actions which may aim at different goals.

Therefore, the establishment of a unitary procedure act for significant administrative actions covering a wide range from the beginning to the last may produce some problems in logic. Provisions of unitary public participation institutions for these actions also neglected

the varied values pursued by these actions. From Japanese experience, China could pay more attention to the individual administrative field and learn UPL model's dynamic approach to explore the different public participation institutions in the whole administrative process. Of course, that is not to say that all institutional devices in every stage in UPL are perfect. Actually they are far from perfect. For example, it lacks the important responsive institution, which is very important for effective public participation and it keeps the Urban Planning Council closed to the public, without giving a reason for the adoption or rejection of public opinions in the plan making phase. When China borrows Japanese experience, it is better to notice these inadequate places and local public entities' development.

2.2 A lesson from flexible participatory forms

Public participatory forms in Japanese individual administrative laws in Chinese significant administrative decision-making sense are flexible and various, like public hearing, resident right to make proposals in UPL, resident referendum in junk facility administration and process-oriented democracy in local landscape administration and so on. Others belong to advisory public participation, while the latter is a new partnership one. The variety and flexibility on the one hand can explain why Japan refused to make a unitary procedure act for the so-called significant administrative decision in China sense, on the other hand also can deny the single participatory model advocated by academic theories in Chinese administrative law.

Since the Party's leadership is Chinese fundamental political principle and the State Council also required "public participation, expert consultation and government decision",

which decide that public participation in China only can have the advisory function. But it doesn't mean public participation can only adopt monotonous and passive forms like panel discussion and so on. As long as the decisive power being kept in the hand of the government, the government can adopt more progressive institutions like the residents' right to make proposals to promote active public participation, or resident referendum to grasp the tendency of public opinions. Even the process-oriented democracy model could be adopted in some areas that civil society is relatively mature in China context. Exploration of a variety of public participation forms in specific administrative fields will be an important issue for Chinese administrative law since both individual statutes in which public participation has been institutionalized are sporadic and the established institutional forms are very limited.

But is there any general guideline for identifying a particular participatory form in a particular context? I try to give my opinions with four pre-conditional conclusions: (1) Administrative process is different from judicial process and political process. This conclusion has been drawn both in the assessment of Chinese academic theories and Japanese academic theories and the Japanese practice of resident referendum. (2) Administrative process needs to balance three values— political democracy value, expertise and rule of law. Western theories admitted such a conclusion. Chinese official statements about the democratization and rationalization of administrative process also reflected the former two values. And administrative law as the legal discipline cannot refuse the value of rule of law. (3) In stage administration, the importance of the three values is not always the same. This is the conclusion from UPL. (4) Various political models also can be considered

in administrative process with advisory effects in particular circumstances. This is the conclusion from local referendum in Japanese administrative law. Based on the four pre-conditional conclusions, I claim the two dimensions that I once proposed in Chapter One again as the general guideline for identifying public participation forms. The first dimension includes the consideration of public participation's expected functions and these functions' importance compared with other values in the whole administrative process. The other dimension is that when the political element dominates the administrative process, various democracy models can be considered according to different contexts.

3. A lesson from Japanese local autonomy reform

All above has analyzed the lessons from Japanese public participation institutions. This part will analyze another lesson from Japanese experience connected with public participation-local autonomy.

When I analyzed the public participation institutions in the urban planning administration of Japan, I repeatedly mentioned that public participation in Japan mainly means resident participation, and resident participation links closely to the local decentralization reform. According to UPL's institutional arrangement, actually, not all residents can participate in all stages. For example, only municipal residents can involve in the basic policymaking when a municipal plan is made. When prefecture makes an urban plan, no legal requirement imposes on the prefectural government to listen to opinions from all residents within the said prefecture. Though ordinary public hearing procedure is discretionary in drafting the urban plan, stakeholders' involvement is compulsory when

drafting the district plan. And residents or stakeholders all have proposal right for a district plan according to municipal ordinance. All these examples can reveal that the smaller areas are involved in the urban plan-making; the public can participate earlier and deeper. This kind of institutional arrangement conforms to the idea of the local decentralization reform pertaining to the urban planning administration that the municipalities should be the main planning subjects and prefectures should be limited to the fundamental plan-making within wide areas.[291] Of course this does not mean all the institutional arrangements can reflect the idea of local autonomous reform. According to table 10, the final decision on the urban plan should be consented by the higher government but without giving a reason to the public. The institutional deviation from the initial ideas has been criticized by the scholars.[292]

However, Japanese experience at least demonstrated an idea that only when a decision-making subjects have the autonomous authority on a particular issue, public participation may function meaningfully and well. It is not difficult to understand this point. If a decision maker' decision has to be subservient to other subject, public opinions are not important. In this circumstance, rather to say, inputting public opinions into the controlling subject but not the decision maker has more fundamental meaning. That is why Japan's UPL promoted public participation in urban planning administration in tandem with the prompt of local autonomy reform. On this matter, China is still facing some impediments. For example, the relationship between the central government and local government has not be legally institutionalized, the relationship between the Party and government either, and even the

[291] Yasumoto, 32.
[292] Ibid., 32-33.

relationship within the bureaucratic system is also unclear. How to control irrational interventions is still a serious problem left in China.[293]

Another political factor that could affect public participation in administrative process contained in the local autonomy is the relationship between the local public entities and residents. According to article 93② of Japanese Constitution, the chief executive officers of all local public entities, and other local officials as may be determined by law shall be elected directly by residents within their several communities. This means the decision-making subjects in UPL assume a direct political responsibility to the residents. The democratic political system can make sure the decision not to deviate too far from the residents' wills since even if in legal sense public opinions cannot bind the determiner, but when the decision deviates too far from the public opinions, the political responsive mechanism will be trigged which can supplement the inadequate weight of public opinions in the legal system. This does not mean public participation in administrative process is the same with political participation. But at least, it signifies that political participation is an important supporting background of public participation in the administrative process.

From the above point, in Chinese present political system, it is more available to promote public participation in administrative decision-making process in local small areas, since villages are the autonomous unites in the law and some places began to elect the

[293] For example, Article 30 of HPAPP provides that administrative decision-making should adhere to the Party's leadership and the official interpretation on this article as "Respect the Party Organization in local places fully and implement Party's decision, requirements and instructions in the government decision. Government should ask for Party's instructions before decision-making and report to Party after decision-making. " See Hunansheng Xingzheng Chengxu Guiding Shiyi, 48-49. Some scholars have realized this problem and suggested that the principle of public participation should apply to Party's decision-making. See *Fazhi Zhengfu yu Xingzheng Juece, Xingzheng Lifa[Administrative Decision-making and Administrative Rulemaking under Government Ruled by Law]*, ed. Xiu Liu, (Beijing: Pecking University Press, 2006),79.

leaders of the town (the basic government) directly by all Party members from the candidates recommended both by the Party and the public. But public participation in these small areas has not developed yet, both in theory and legal institutions. For example, in the urban and rural planning law, the town government made the village plan. How to make villages involve into the whole process needs more explorations. And in HPAPP, significant decision-making subjects limited to the government above county level. Administrative actions at the village and town level usually are beyond the perspective of Chinese administrative law. The development of public participation institutions at the grassroots level will be another new topic for Chinese administrative law.

The factors that could affect the effectiveness of public participation also include the information disclosure institutions, corresponding judicial review systems, and even the social association institutions and the others. All these institutions have been discussed widely in China and Japan and this thesis will not touch these topics again.

Conclusions: This chapter is about the lessons that China can learn from Japanese experience. In the first section, I try to point out four problems of public participation institutions in Chinese administrative law: (1) most of public participation forms are monotonous, regarding the public participation as the traditional leading methods; (2) in the processes establishing public participation institutions, hierarchical color is still bright; (3) neglect public participation institutions in individual administration fields; (4) ignore the development of public participation institutions at the basic level of administration. Contrary

to China, Japan established public participation institutions in APA to avoid hierarchical color in administrative rulemaking process. It also furnished pretty flexible public participation forms in administrative law corresponding to different functions, from discretionary public hearing to resident referendum with advisory effects to process-oriented democracy model. On the administrative fields where public participation has been institutionalized, Japanese administrative law put an emphasis on the particular administrative field.

Based on the Chinese problems concerning public participation institutions, I draw four lessons from Japanese experience in the second section. The first lesson is for introducing public comment procedure in Japanese APA into Chinese administrative rulemaking in the review phase. And then two lessons have been drawn from Japanese public participation institutions in significant administrative decision-making. One is particularly about Chinese local tendency toward a unitary administrative procedure act in making significant administrative decisions. Japanese experience showed that developing public participation in varied administrative fields is more rational than codifying it in a unitary act in significant administrative decision-making process. The other is about the importance of diversifying public participation forms in different administrative contexts. And I try to conceive of a general guideline for identifying public participation forms. The guideline includes two dimensions. The first dimension includes the consideration of public participation's expected functions and these functions' importance compared with other values in the whole administrative process. The other dimension is that when the political element dominates the

administrative process, various democracy models can be considered according to different contexts. Finally a lesson is from the Japanese local autonomy reform, which gives a hint to China that Chinese administrative law needs to pay more attention to the construction of public participation institutions in local small areas.

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