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Administrative Reconsideration's Erosion of Administrative Litigation in China

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Abstract

Based on an analysis of national statistics and fieldwork interviews, this article argues that administrative disputes have been channelled in two ways: first, administrative reconsideration is used to resolve disputes that the court is incapable of handling and, second, a large volume of highly influential cases are ending up in administrative reconsideration. The development of judicial power and judicialization is thus substantially constrained. The seemingly favorable outcome for the plaintiffs in administrative litigation does not reveal a process of judicialization; rather, it is a result of the corrosion of administrative reconsideration on administrative litigation.

Keywords: *administrative erosion; administrative litigation; administrative reconsideration; judicial power; judicial reform; institutional constraint*

Chinese national statistics in recent years seem to indicate a trend that favours the plaintiffs in administrative litigation. As seen in Figure 1, the percentage affirming the decision of administrative agencies in first instance administrative litigation has substantially decreased since 1987, from nearly 60 per cent in the 1980s to below 20 per cent after the late 1990s.[1] Since 2010, the affirmation rate has dropped further to around 10 per cent. If such success of the plaintiffs includes litigation that is withdrawn, usually after administrative agencies revise their acts, and those striking out administrative actions, this

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1 Statistics are drawn from *Law Yearbook of China 1988–2013* (Law Yearbook of China Press 1988–2013).

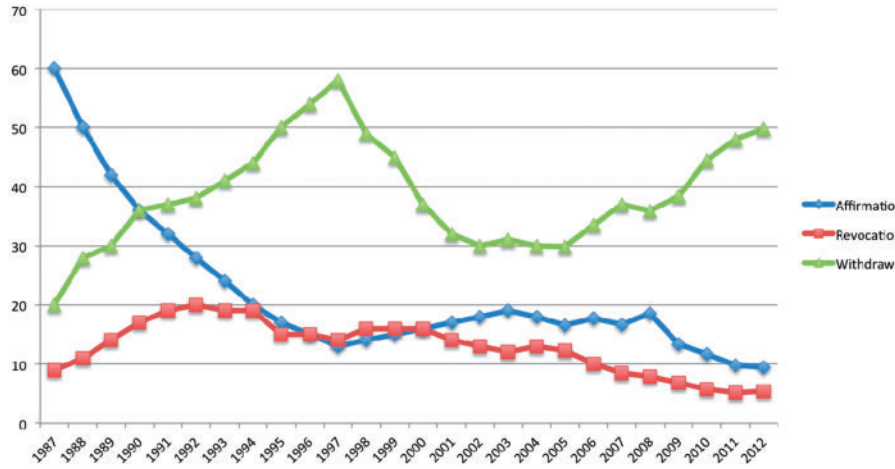

Figure 1. Outcome of administrative litigation, 1987–2012
Notes: Affirmation refers to the percentage of cases in which the challenged administrative decision is affirmed by the judiciary. Revocation refers to the percentage of cases in which the judiciary orders the decision-making institution to revocake the challenged administrative decision. Withdrawal refers to the percentage of cases in which the private party withdraws its litigation.

success rate varies between 40 per cent and 45 per cent from 2001 to 2004, which is much higher than it is in the USA (12 per cent), Taiwan (12 per cent), and Japan (4–8 per cent) during the same period.[2] In recent years, the percentage of judicial revocation of administrative acts has declined steadily from 13 per cent in 2004 to 5 per cent in 2012. It seems that it is becoming more and more difficult to win against administrative institutions. However, the withdrawal rate is soaring, from 30 per cent in 2004 to 49.8 per cent in 2012. The overall success rate for plaintiffs, therefore, is on the rise.

If the number of administrative litigation cases is a reliable indication of the relationship between the court and other political authorities, it can be questioned whether this change suggests that China, like many other transition countries, is moving towards the judicialization of administrative disputes?[3] Recently, scholars have heatedly debated the changing roles of Chinese courts.[4] Some argue that the judicial power in China has expanded since the

[2] Randall Peerenboom, *China's Long March toward Rule of Law* (Cambridge University Press 2002) 400.

[3] Cf Ran Hirschl, *Towards Juristocracy* (Harvard University Press 2004); Tom Ginsburg, *Judicial Review in New Democracies* (Cambridge University Press 2003); Tom Ginsburg and Tamir Moustafa (eds), *Rule by Law* (Oxford University Press 2008).

[4] See 'China's Changing Courts: Populist Vehicle or Party Puppet?' New York University Conference, 2009, <http://www.law.nyu.edu/news/CHINA'S.CHANGING.COURTS> accessed 7 April 2014.

courts and judges are playing an increasingly important role.[5] However, others contend that China is moving towards dejudicialization since the court is often not the appropriate party and is in fact never permitted to deal with many of the important disputes.[6] Looking at seven years of provincial statistics, Ji Li has found that the administrative litigation rate is positively associated with the level of urbanization or wealth and is negatively associated with lawyer density.[7] His findings partly explain the trend towards which administrative dispute resolution is moving. However, his research falls short in explaining the institutional influences on the judiciary in resolving administrative disputes.

Comparative studies have shown that although most authoritarian countries have, for various reasons, established judicial review and offered the judiciary certain independence, they have also taken measures at the same time to curb the development of the judicial power. Among these measures, the establishment of fragmented judicial systems, as opposed to unified judicial systems, is definitely a crucial one.[8] This article will focus on how the State in China has eroded the judicial power via an institution that 'parallels' the judiciary.

Since the 1990s, China has launched a huge campaign it bring its administration into line with the law.[9] After being admitted into the World Trade Organization, China further committed to bring all of its administrative acts under judicial review—that is, the judiciary was given the finality over these acts by means of administrative litigation, which is a Chinese version of judicial review. However, as this article shall argue, administrative disputes have been channelled into two institutions: first, administrative reconsideration has been used to resolve disputes that the court is incapable of handling and, second, a large volume of highly influential cases have ended up in administrative reconsideration. As a result, the development of judicial power and judicialization has been substantially constrained. The seemingly favourable

5 Zhao Yi, 'The Expansion of Judicial Power in China,' PhD dissertation, Department of Political Science, Yale University, 2003; Yu Xiaohong, 'Rise of Local Courts in China: Judicial Hierarchy, Institutional Adaptation and Regime Resilience,' Conference of Chinese Changing Courts, New York, 19 February 2009.

6 Randall Peerenboom, 'More Law, Less Courts: Legalized Governance, Judicialization and Dejudicialization in China' in Tom Ginsburg and Albert HY Chen (eds), *Administrative Law and Governance in Asia* (Routledge 2009) 175.

7 Ji Li, 'Suing the Leviathan: An Empirical Analysis of the Changing Rate of Administrative Litigation in China' (2013) 10 J Empirical Legal Stud 815.

8 Tamir Moustafa and Tom Ginsburg, 'Introduction: The Functions of Courts in Authoritarian Politics' in Tom Ginsburg and Tamir Moustafa (eds), *Rule by Law: The Politics of Courts in Authoritarian Regimes* (Cambridge University Press 2008) 1, 14–21.

9 To launch administration in accordance with laws, the State Council issued Decision to Comprehensively Facilitate Administration in Accordance with Laws (关于全面推进依法行政的决定) (November 1999) and Implementing Outlines for Comprehensively Facilitating Administration in Accordance with Laws (全面推进依法行政实施纲要) (March 2004). See also Office of Legislative Affairs (OLA), *Undertaking Administration According to Law: Review and Prognosis* (2008).

outcome for the plaintiffs in administrative litigation does not reveal a process of judicialization, but, rather, has resulted in the corrosion of administrative reconsideration in comparison to administrative litigation.

The relationship between administrative reconsideration and administrative litigation

In the current system, one can choose from two routes to solve administrative disputes. First, a person may apply for administrative reconsideration. If she is still unhappy with the reconsidered decision, she can file an administrative lawsuit in court. Second, with the exception of rare situations, she may take the dispute directly to court. Theoretically, administrative reconsideration would have no effect on the finality of the judiciary, regardless of which route is adopted. However, the more important thing is to understand how the systems operate in reality.

Looking at the historical development of the two systems, it is self-evident that the introduction of administrative reconsideration is a response to administrative litigation. Less than two months after the promulgation of the Administrative Litigation Law of the People's Republic of China in 1990, the State Council issued the Administrative Reconsideration Regulations.[10] The administrative reconsideration system has been further revised with the Administrative Reconsideration Law of the People's Republic of China, which was promulgated in 1999, and the Regulations for the Implementation of the Administrative Reconsideration Law, which were passed in 2007.[11] In the words of the legislators, the administrative reconsideration system is 'a control mechanism that allows internal self-correction by administrative agencies'.[12]

To achieve the goal of 'internal self-correction by administrative agencies' and to lure affected private parties to apply for administrative reconsideration before filing lawsuits, 'the principle of convenience' (便民原则) was introduced. This principle is reified in the following measures. First, the agencies of administrative reconsideration significantly outnumber the courts. In each region, only a basic-level court has jurisdiction over administrative disputes, whereas numerous administrative agencies are empowered to take on reconsideration. In addition to the reconsideration centre that is set up by the county government, many government agencies have also established reconsideration offices. Second, the process of filing reconsideration has been so

[10] Administrative Litigation Law of the People's Republic of China (1 October 1990); Administrative Reconsideration Regulations (December 1990).

[11] Administrative Reconsideration Law of the People's Republic of China (1999); Regulations for the Implementation of the Administrative Reconsideration Law (2007).

[12] Jingyu Yang, 'The Explanations on the Administrative Reconsideration Law' (关于《中华人民共和国行政复议法(草案)》的说明) in Jun Fang (ed), *Interpretations on the Administrative Reconsideration Law (中华人民共和国行政复议法条文释义)* (Industry and Commerce Press 1999) 1.

simplified that 'application for reconsideration can be conducted orally.'[13] Moreover, administrative reconsideration is cheaper in terms of transportation costs. Originally, the 1990 Administrative Reconsideration Regulations provided that only the higher administrative agencies, which were usually located in the administrative centre of a given area, could take reconsideration complaints. After realizing that this arrangement may be inconvenient to the affected private parties because it would require them to travel, the 1999 Administrative Reconsideration Law required all local government agencies to set up administrative reconsideration centres or offices to facilitate such application. Third, administrative reconsideration is free of charge, whereas administrative litigation is not. Finally, 'the proposed scope of administrative reconsideration is much wider than that of administrative litigation.'[14] Administrative reconsideration allows for challenges on the issues of reasonableness (合理性), whereas administrative litigation is limited to legality (合法性).

Related to the 'principle of convenience,' administrative reconsideration clearly states that it opposes judicialization. In an open statement, the legislators of administrative reconsideration have made it clear that the system is meant to filter disputes within the administrative system. While administrative reconsideration may provide a certain amount of protection for the affected private parties, dejudicialization, as far as the administrative agencies are concerned, would allow them to 'conveniently' resolve disputes, free of the restrictions imposed by the judicial procedures due to the principle of due process.

The key question, again, is how these arrangements operate in reality. Some suggest that administrative reconsideration serves as a gatekeeper and filter before cases reach the court by arguing that the popular use of administrative reconsideration has turned it into a main forum for rights protection. An article published by the state-run Xinhua news agency reads:

> The administrative reconsideration mechanism resolves administrative disputes in the embryonic stage, at the lower-level of government, and within the administrative agencies. It prevents disputes from escalating and thus helps maintain social stability and promote social harmony. This mechanism scrutinizes the concrete acts of administrative agencies. Its advantages include easy filing, simplified procedures, wide coverage of issues, and free of charge. It is thus regarded by the masses as the cost-free avenue of 'citizens vs. mandarins.'[15]

Alternatively, many scholars believe that administrative reconsideration has not served its intended purpose of filtering litigation.[16] They contend that

[13] Ibid.

[14] Ibid.

[15] Wei Lin and others, 'Villagers Beat the Provincial Government: Administrative Reconsideration Has Gradually Become the Dominant Forum for Rights Protection' (村民告赢省政府：行政复议渐成群众维权干道) (2007), <http://www.ha.xinhuanet.com/xhzt/2007-07/03/content_11129236.htm> accessed 6 July 2014.

[16] See generally Zhou Hanhua (ed), *The Judicialization of Administrative Reconsideration* (*行政复议司法化*) (Beijing University Press 2005).

the disputes resolved by administrative reconsideration are far fewer than expected. For example, it has been expected that the number of disputes resolved through administrative reconsideration would be two to three times the number that is resolved by litigation.[17] However, in reality, the number of disputes resolved by each of the two avenues does not differ very much. In addition, compared to the total number of administrative acts, the percentage of reconsideration is also far below expectations. From 1995 to 1999, for instance, the ratio of reconsideration cases to the total number of administrative penalty decisions in the Industrial and Commercial Bureaus was less than 0.11 per cent.[18] In 2006, the number of environment-related penalties reached 92,404, but the cases of administrative reconsideration were only 208 (or 0.22 per cent).[19] Further, while the growth of administrative reconsideration has been very slow, the number of 'petitions' (上访 or 信访) has increased drastically. For example, in just the first half of 2001, the party and government agencies at the township level or higher had received 137,500 collective complaints and 3,375,300 individual complaints—a 12.2 per cent and 13.8 per cent increase, respectively, compared to the same period in 2000.[20]

However, neither of these two opposing viewpoints is based on empirical evidence. The first viewpoint generally provides the total number of cases of administrative reconsideration and the advantages of the mechanism. It never addresses in depth the relationship between administrative reconsideration and litigation and, thus, is little more than a means of propaganda for the government. The second viewpoint does not provide the basis for the expected quantities and ratios. It is unknown what the ideal quantities and ratios should be and why. The assertion that administrative reconsideration has failed to meet the expectation seems to come from nowhere. Moreover, it is unclear how many of the petitions have originated from administrative disputes and why and to what extent the reconsideration and litigation mechanisms have failed.

Analysis of statistics

Drawing on statistics that are available publically, this article shall examine the different cases administered under each of the two systems, thereby exploring their inter-relationship. National statistics on administrative reconsideration

[17] Jun Fang, 'Updating the Views and Reconstructing the Structure of Administrative Reconsideration in China' (论中国行政复议的观念更新和制度重构) (2004) 1 Beijing U LJ 39.

[18] Xuezheng Wang, 'The Innovation of Administrative Litigation and Administrative Reconsideration in China' (论我国行政诉讼与行政复议制度之创新) (2001) 4 China Legal Science 67.

[19] See the *Environmental Annual Reports in China 2007* (China Environmental Science Press 2007) 237. There were only 253 related administrative litigation cases in 2007.

[20] Xing Ying, 'Petitions As a Remedy for Affected Private Parties in Administrative Disputes' (作为特殊行政救济的信访救济) (2004) 3 Chinese JL 58.

and administrative litigation originate mainly from the *Law Yearbooks of China*. Regretfully, although the Law Office of the State Council requires local governments to enhance their statistical work on administrative reconsideration, only some fragmentary information has been posted on the Internet by provincial governments and ministries. In addition, not all provinces or agencies have publicized their relevant statistics, and the standards of categorizing statistics are inconsistent. From what can be gathered, the *Law Yearbooks of China* and the Ministry on Public Security have provided relatively comprehensive statistics on administrative reconsideration, litigation after reconsideration, and litigation without reconsideration.

Over the years, the numbers of cases of administrative reconsideration and administrative litigation show a general trend. Before the promulgation of the 1999 Administrative Reconsideration Law in 1999, administrative reconsideration had rarely been used by affected private parties. Between 1991 and 1998, for example, there were a total of merely 240,000 cases, averaging about 30,000 cases annually.[21] After the introduction of the Administrative Reconsideration Law, with all of the incentives mentioned earlier, the number of reconsideration complaints increased noticeably, to an average of 80,000 to 90,000 per year since 2008. In the same period, the number of administrative litigation cases rose steadily from 100,000 in 2007 to around 130,000 in 2012.[22] In more than half of the administrative reconsideration cases, the challenged administrative decisions were affirmed. In 2012, for example, 58 per cent of the challenged decisions were affirmed, and only 9 per cent were declared invalid (see Figure 2).[23]

A comparison of the statistics on administrative reconsideration and administrative litigation reveals a number of clear patterns. First of all, the affirmation rate of administrative reconsideration, which refers to the ratio by which the original administrative decisions were affirmed, is higher than it is in administrative litigation. As shown in Table 1, for example, the affirmation rate of administrative reconsideration in 2012 is 57.7 per cent, whereas the affirmation rate of administrative litigation is only 9.4 per cent.[24] The difference is 48.3 per cent. In 2011, this difference amounts to 49.4 per cent. Other years also report similar differences.

Second, the affirmation rate of administrative litigation with prior reconsideration is surprisingly higher than it is without reconsideration. National statistics indicate that the difference is 16 per cent, 17 per cent, and 23.61 per cent in 2003, 2004, and 2006, respectively. For public security bureaus, the affirmation rate for administrative litigation with prior reconsideration ranges from 64 per cent to 69 per cent, which is 12 per cent to 15 per cent higher

[21] OLA, *Undertaking Administration According to Law: Review and Prognosis* (2008).
[22] *Law Yearbook of China 2008–13* (Law Yearbook of China Press 2008–13).
[23] *Law Yearbook of China 2013* (Law Yearbook of China Press 2013) 1237.
[24] Statistics are drawn from *Law Yearbook of China 2010–13* (Law Yearbook of China Press 1988–13).

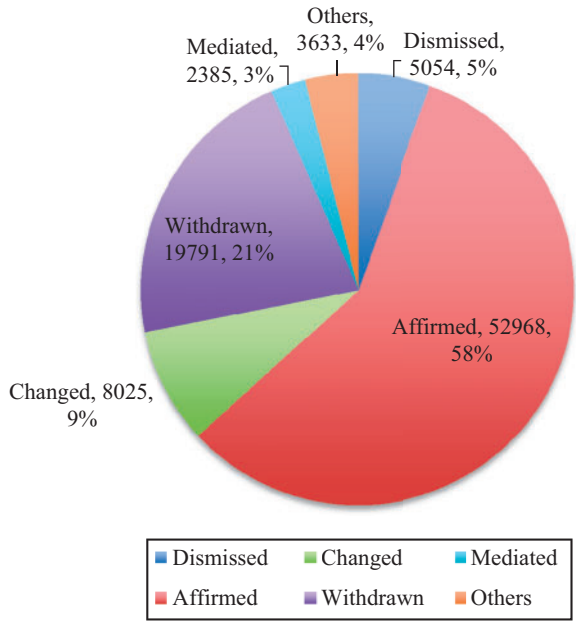

Figure 2. Administrative reconsideration cases, 2012
Note: 'Changed' includes the revocation and amendment of concrete administrative acts, reconfirming the illegality of concrete administrative acts and compulsory performances, and so on.

Table 1. Affirmation rate of administrative acts, 2009–12

	2009	2010	2011	2012
Administrative reconsideration	62.2%	58.8%	59.2%	57.7%
Administrative litigation	13.3%	11.7%	9.8%	9.4%

than the affirmation rate in direct litigation.[25] As seen in Table 2, the affirmation rate for the overall number of administrative litigation cases in 2009 is 13.3 per cent, which is only about one-quarter of the affirmation rate for litigation with prior reconsideration.[26]

[25] Xuwen Gao, 'Statistical Analysis on Administrative Reconsideration and Administrative Litigation, 1999-2003' (1999-2003年全国行政复议、行政诉讼统计分析) in Zhou Hanhua (ed), *The Judicialization of Administrative Reconsideration* (*行政复议司法化*) (Beijing University Press 2005) 199. *Law Yearbook of China 2007–13* (Law Yearbook of China Press 2007–13).

[26] Statistics are drawn from *Law Yearbook of China 2010* (Law Yearbook of China Press 2010) 920, 948. There is a need to differentiate between administrative litigation cases (行政诉讼案件) and administrative responses to litigation (行政应诉案件). In 2006, the former numbered 95,617, while the latter numbered only 52,792, which was 55 per cent of the former. Lin

Table 2. Administrative litigation with and without prior reconsideration, 2009

	Total	Affirm	Withdraw
Administrative litigation cases with prior reconsideration	12,306	52.73%	6.85%
All administrative responses to litigation	43,853	32.05%	6.87%
All administrative litigation cases	120,530	13.28%	6.84%
All administrative reconsideration cases	64,668	62.22%	21.25%

Third, although the ratio of affected private parties receiving favourable judgment through administrative reconsideration is relatively low, only a small percentage of them enter into litigation afterwards. As shown in Table 2, for example, a total of 12,306 cases in 2009 entered into litigation after going through administrative reconsideration, which amounts to 19 per cent of all of the reconsidered cases. Finally, the rate of withdrawal in administrative litigation after reconsideration is clearly lower than it is without prior reconsideration (more than 10 per cent).[27] Referring to the numbers in Table 2, the withdrawal rate in 2009 is only 13.6 per cent for litigation with reconsideration, but 38.4 per cent for the overall administrative litigation withdrawal rate.

Some speculations

To what extent can the patterns revealed by the data answer the earlier question: does administrative reconsideration filter or divert administrative disputes? If the majority of administrative disputes have entered into reconsideration before reaching litigation, it would be clear that the filtration function is occurring. On the contrary, if the majority of disputes do not flow between

and others (n 15). An explanation for this discrepancy is that the latter was collected by various administrative agencies, and many may not be accurately reported. The former was more reliable because it comes from the judiciary system. Interview with Yue Zhang, the Administrative Reconsideration Department, the State Council (11 July 2009).

[27] This difference may come from the reconciliation effort by the administrative agencies. If the efforts were already made in administrative reconsideration, they would not be very effective when repeated in administrative litigation. By the same token, reconciliation efforts may be effective in administrative litigation without reconsideration. This point can be seen in the withdrawal rate of administrative litigation, which is well above 30 per cent and even 50 per cent in some years. See Zhu Jingwen (ed), *China Legal Development Report (中国法律发展报告)* (Renmin University Press 2007) 227.

administrative reconsideration and administrative litigation, then the two systems have more of a relationship of diversion. Judging from the available statistics, the proportion of cases that first entered into reconsideration and then into litigation is very low, which indicates that a large number of disputes never move into administrative litigation once they are reconsidered. Since we do not know how many of these disputes were successfully resolved, we cannot conclude how effective administrative reconsideration has been as a tool of dispute resolution. We can only make the observation that, as soon as disputes flow into the channel of administrative reconsideration, it is unlikely that they will later enter into litigation.

Further, in the rare occurrence that cases do enter the litigation process after reconsideration, the affirmation rate (that is, the outcome for the government) is far higher than it is for cases that enter directly into litigation without reconsideration. This result shows that for cases that have been through administrative reconsideration, the affected private parties have less of an opportunity to win. In other words, administrative agencies basically have the final say on cases of administrative reconsideration. Finally, national statistics indicate that administrative litigation with a prior history of reconsideration constitutes less than 20 per cent of the total amount of administrative litigation, meaning that more than 80 per cent of them are without prior reconsideration, as shown in Table 2. Putting all of these observations together, one can fairly safely conclude that the relationship between these two institutions is more of diversion than of filtration.

One might then reasonably raise the question: since administrative reconsideration is free and convenient for the affected private parties, why do most of them not adopt this option? There are several competing explanations for this rather puzzling question. First, it is suggested that only when affected private parties are not confident that they will have a case would they choose administrative reconsideration just to test the water. Otherwise, they would proceed directly to litigation. This hypothesis is plausible in that it helps to explain why the affected private parties do not take legal proceedings after reconsideration. After the mediation and explanation by the administrative agencies in reconsideration, the private parties better understand the basis for the agencies' decisions and, thereby, no longer wish to seek recourse.

However, the problem with this hypothesis is that it cannot explain the low withdrawal rate in administrative reconsideration. Compared to administrative litigation, the withdrawal rate in reconsideration has become progressively lower.[28] If disputes were resolved after administrative reconsideration, following a satisfactory explanation of the legal basis and evidence provided by the agencies, the private parties would have no reason to proceed with the reconsideration process and should be inclined to withdraw their complaints. Furthermore, the cost of administrative litigation is relatively low and should

[28] For example, the withdrawal rate in administrative reconsideration was 19.2 per cent, while the counterpart in litigation was 48 per cent in 2011. See *Law Yearbook of China 2012* (Law Yearbook of China Press 2012) 1066, 1094.

not be a consideration in affecting the choices. Other than disputes concerning properties, almost all litigations are charged on a per case basis, and the fees are usually below 100 yuan. The fee for even the most expensive cases on patents is still merely 400 yuan.[29] However, the large number of petitions shows that many people attempt at all costs to resolve disputes. Many of the petitioners actually raised funds in order to travel the long distance to their provincial capitals or even to Beijing in order to seek 'a few words' with the authorities. These expenses are far higher than the administrative fees charged by the dispute-resolving institutions.

The second explanation suggests that affected private parties seldom seek litigation after reconsideration for fear of reprisal by the administrative agencies that have made the original decisions. This might be true, but filing reconsideration complaints would upset the original decision-making agencies. Once the private party makes the first step to protest, albeit lawfully, he or she can never take it back. Stopping midway would not ingratiate the administrative agencies. As noted earlier, 80 per cent of administrative litigation is brought to court directly without reconsideration. This statistic shows that many affected private parties are not concerned about antagonizing the administrative agencies by going to court. The key issue is whether the disputes are worth the effort.

These two explanations share a common disregard for the nature of the cases undertaken by the two institutions. Taking a different nature into account, a third explanation suggests that the disputes submitted for administrative reconsideration usually are cases that the court is powerless to step into. In a circumstance in which administrative agencies are much more powerful than the affected private parties, reconsideration organizations most often simply affirm many of the original administrative decisions, thus resulting in a higher affirmation rate. In contrast, most private parties, having been denied in administrative reconsideration, also realize that litigation is unlikely to reverse the decisions they have been given. As a result, these cases result in administrative reconsideration with a generally unfavourable outcome for the private parties. In other words, it is because of the special nature of the cases that the private parties lack the power to adjudicate with the administrative agencies in court. At the same time, the court can also exclude such cases from administrative litigation by constraining access to justice.

Statistics from public security bureaus seem to support the third hypothesis. It is widely acknowledged that public security bureaus are the most powerful administrative agency. The head of a public security bureau is usually the head of the local Political and Legal Committee, whereas the president of the court is merely a member. Statistics from the public security system indicate that from 2000 to 2002, the affirmation rate in public security-related

[29] See Measures on Litigation Fees in the People's Courts' (人民法院诉讼费收费办法) and Supplementary Stipulations on Litigation Fees (诉讼费收费办法补充规定), both were issued by the Supreme People's Court on 19 January 1999. As we focused on the situation before 2007, there is no need to examine the impact of the new rules effective on 1 April 2009.

administrative reconsideration exceeded the national figure by an average of 5 per cent. The ratio of filing administrative litigation after administrative reconsideration is also far less in cases involving public security (8–9 per cent) than the national average (16–17 per cent). For public security-related cases that do go to litigation after reconsideration, the affirmation rate is at least 65 per cent, exceeding the national average by 10 per cent. Further, the total number of cases of administrative litigation involving public security has decreased continuously, whereas the number of administrative reconsideration cases has increased steadily.[30]

In stark contrast to the national statistics, the affirmation rate of public security-related administrative litigation cases has increased substantially. For example, from 1999 to 2003, this rate averaged 58.8 per cent, whereas the national average dropped to 17.3 per cent. From the perspective of public security bureaus, this figure could be interpreted as an indication of their continual improvement of their administration by law. However, a more plausible explanation is that as administrative agencies increasingly regard the outcome of their administrative litigation—that is, the high affirmation rate and the low withdrawal rate—as an indicator of their performance, those agencies with more authority, such as public security bureaus, have had much more influence on the court's ruling on relevant cases.

Statistical data also indicate that there is a different focus between cases channelled in administrative litigation and those channelled in administrative reconsideration. Statistics show that cases of administrative reconsideration greatly involve the systems of public security, land resources, and labour and social welfare.[31] Public security-related cases have always topped the list. The other main contributors to administrative reconsideration are all powerhouses.[32] This same observation can also be drawn from the issues in dispute in administrative reconsideration. In recent years, administrative penalties have accounted for approximately 30 per cent of the cases of administrative reconsideration nationwide. In 2012, among the different categories of cases of administrative reconsideration, administrative penalties topped the list at 30.28 per cent, which is a higher percentage than any of the other categories.[33]

Why do administrative penalties always top the categories in administrative reconsideration? One reason is that administrative penalties are an absolute power of the administrative agencies. As mentioned earlier, under the current laws, administrative litigation addresses only the legality, but not the reasonableness, of a concrete administrative act. Affected private parties, therefore, can never challenge the reasonableness of an administrative act in court. Thus, most of these disputes can only be resolved via administrative

[30] Gao (n 25).

[31] *Law Yearbook of China 2007–13* (n 25).

[32] The increase of labour and social welfare disputes is clearly related to the recent reforms. These categories are not the main dispute areas for administrative reconsideration as is the public security system.

[33] *Law Yearbook of China 2013* (n 23).

reconsideration. Subsequently, even though private parties often lose in administrative reconsideration, they are unlikely to seek litigation after failing in reconsideration because they are unlikely to win against the administrative agencies, which hold authority over the interpretation of the reasonableness of the relevant acts.

The distribution of administrative litigation also provides further evidence for such speculation. Since 2001, the largest categories of administrative litigation have been related to urban development, such as housing demolition (approximately 20 per cent), resources such as lands and forestry (approximately 20 per cent), and public security, such as neighbourhood security and labour re-education (approximately 10 per cent). Unlike the situation in administrative reconsideration, the issues in dispute are scattered across these different agencies.[34]

Empirical data from fieldwork investigations

To explore the relationship between the two systems, we conducted field investigations in southern China. We examined a number of cases in different areas that were handled by both administrative reconsideration and administrative litigation. We also conducted random telephone interviews with many private parties who had taken legal proceedings with or without prior administrative reconsideration. The fieldwork investigations reveal that the disputes in administrative reconsideration often involve a large number of affected private parties, with far-reaching social implications. Many of these cases affected social stability and, therefore, involved significant administrative decisions. Subsequently, any mishandling of these types of disputes put the performance of the government at risk. From 2006 to 2008, the main types of cases accepted for administrative reconsideration included '*waijianv*' (women married away from the local township), the 'forbiddance of electrified bicycles', and the 'compensation for appropriation, demolition, and removal'. These are all controversial cases that have affected the livelihood of a large number of people. These three categories together account for about 70 per cent of all reconsideration cases.

Our interviews, however, indicate that when the affected private parties were faced with the choice of administrative reconsideration or administrative litigation, few of them could distinguish the legal difference between the two. Most of them did not know about 'administrative reconsideration' until the administrative penalties were handed down to them. Even after finding out about this recourse, most of them dismissed it as just another *modus operandi* of the government. The major concern of the interviewees was that 'the Government has taken care of my matters in an acceptable way'. Many of them did not know the technical term for 'administrative reconsideration',

[34] *Law Yearbook of China 2007* (Press of Law Yearbook of China 2007) 161.

even after having experienced the process. Most of them believed that the government officials and the judges were in collusion, and they had little faith in administrative litigation or reconsideration. They had much more confidence in measures such as collective petitioning, visits to the governments, and pledging with the Communist Party's bosses, in the hope that some high-ranked officials would be able to assist them. In the words of some interviewees, 'regardless of what procedures … you would just pick the quick method of resolution, and the quickest of all are petitioning, finding the clean officials, and to stir up some turmoil.' With this belief firmly ensconced, the private parties usually presented themselves as a crowd in rage when submitting their issues to the government. And they would attempt to have their actions coincide with major local events or with the official visits of party leaders and government officials. They believed that a 'penalty shall not be imposed on a crowd' (罚不责众), and that local governments, having other issues in hand, would refrain from suppressing collective actions.

Our interviews also indicated that 80 per cent of the affected private parties had obtained information on administrative reconsideration or administrative litigation through 'educational propaganda on law', which was provided by government officials or through guidance provided by legal service organizations comprising qualified lawyers or legal workers with little formal training. Further, the selection of reconsideration or litigation by the plaintiffs in administrative litigation may be affected by other factors, such as the outcome of similar cases, certain characteristics of their cases, cheap legal services, connections with the administrative agencies, and cost. No clear pattern emerges from the investigations.

The private parties' ignorance and undifferentiated views towards the administrative litigation and administrative reconsideration have allowed room for the government to manipulate the situation. It is clear that the State tends to divert many of the major and complex cases towards administrative reconsideration. First, the courts are reluctant to take on such cases.[35] An annual report from the court openly stated:

> [We] have successfully handled cases of administrative disputes involving collective actions. Cases concerning major policy amendments and cases that are difficult to resolve purely

[35] The courts of Guangxi Zhuang Autonomous Region explicitly refused to take thirteen categories of disputes in 2004. These categories included capital-raising disputes, illegal 'sale-network' disputes, real estate disputes as a result of governmental management, disputes of workers laid off due to company restructuring, disputes on compensation for rural land requisition and resettlement of farmers, disputes of local governments terminating agricultural contracts on a large scale, disputes on disbursement of collectively owned assets, disputes relating to 'two-committees–one-department' as debtors, bankruptcy application without clear employee settlement arrangements, disputes of manipulated securities trading causing infringement, disputes of *fengshui*, burials, and graveyards, and so on. Of course, this phenomenon is by no means limited to Guangxi province. See China Youth Daily, 'Guangxi Courts Refuse to Take Thirteen Categories of Cases' (2004) <http://www.china.com.cn/chinese/difang/643257.htm> accessed 6 July 2014.

> by administrative litigation *shall be referred to the party committee and government for coordination.*[36]

As a result of the pressures and difficulties faced by the courts, they are not equipped with the resources to resolve problems, often resulting in wasted efforts. For example, the most commonplace administrative disputes in our research findings are those concerning *waijianv*—that is, issues relating to whether village women marrying away from local villages are entitled to economic benefits distributed within their original villages. The courts often forward these types of disputes to the administrative agencies, and they would eventually come to a mutual understanding that results in a 'three-step method': 'Decision by the township government, followed by administrative reconsideration and then administrative litigation'.[37] There is no actual legal basis for the second step (administrative reconsideration), but all government agencies would nonetheless give this standard response upon enquiry. The intention of such institutional arrangements is obvious. Before establishing the 'three-step method' in *waijianv* cases, the court received 213 petitions for administrative litigation within three months. However, after the method was set up, the court received a total of only 88 petitions in the entire year of 2005.[38] Further, the court had demonstrated self-restraint by forwarding the cases to the administrative authorities.[39] They also had constrained access to justice by setting up more stringent requirements for commencing legal proceedings as well as by refusing to take on cases filed as civil litigation. As such, these cases were prevented from reaching the court directly, and they were directed through administrative reconsideration first.[40] Our research is not suggesting that the court has completely refused to take on such cases or that it is completely bowing to the government. However, it is clear from the handling of these cases that the court is not not helping private parties to achieve favourable results and, thus, is not encouraging the affected private citizens to litigate directly.

Local governments, which are equally reluctant to take on troublesome or trivial cases, have had no choice but to accept this task. Once the government has accepted these cases, intervention by the court will only disrupt the operation of the administration. The result is that the private parties are often led into administrative reconsideration, and the cases are reviewed, coordinated, and decided by the heads of the administration. Indeed, the State Council has

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[36] *Law Yearbook of China 2007* (n 34) 161 [emphasis added].

[37] Haijian Liu, 'The Guangdong High Court: New Avenues for Protecting "Married-away Women" Rights' (广东高院：外嫁女维权新路) *Guangzhou Daily* (5 April 2004) 1 (economic section).

[38] Yongbo Zhang and others, 'Judicial Research on Rural "Married-away Women"' (农村外嫁女问题的司法研究) (2006) 1 Yushan L Forum 2.

[39] See also Moustafa and Ginsburg (n 8) 1, 14–17.

[40] See Xin He, 'Why Did They not Take the Disputes? Law, Power, Politics in the Decision-Making of Chinese Courts' (2007) 3 Intl J L in Context 203. See also Moustafa and Ginsburg (n 8) 1, 18–20.

provided clear and specific direction regarding the administrative reconsideration system:

> [From now on, we shall] reinforce our scrutiny and education of the statewide operation of administrative reconsideration, expand our policy research on the complex and major subjects such as land appropriation, demolition and removal, enterprise restructuring, and labor and social welfare. [We shall] fully realize the important functions of administrative reconsideration to resolve administrative disputes, settle internal conflicts of citizens, and maintain social stability. This means that administrative reconsideration will focus on addressing the most *complex, acute, and conspicuous* issues and will serve on the frontline in resolving administrative disputes.[41]

Conclusions

With limited data from different sources, the findings may be inconsistent and even contradictory. However, overall they are more complementary than conflicting. One theme that emerges from the analysis is that the types and nature of disputes are vastly different between administrative reconsideration and administrative litigation. Administrative reconsideration deals with cases of administrative disputes that are of great importance, highly complex, and extremely influential, in which the courts are unable or unwilling to become involved. Administrative litigation deals mostly with disputes that involve relatively weak administrative authorities.[42] In contrast, the majority of the private parties that have opted for administrative reconsideration would be disinclined to proceed with the theoretically viable process of administrative litigation. In this sense, the relationship between administrative reconsideration and administrative litigation is not so much a system of filtration as it is a system of diversion. This trend favouring private parties has appeared in recent statistics on administrative litigation, and it does not represent a great leap forward in China's road to judicialization but, rather, is a result of the institutional constraint on the development of administrative litigation by administrative authorities. It explains why, although judicialization has occurred in many transitional countries, China's progress in administrative litigation is, at best, incremental.[43] The erosion of administrative litigation by administrative

[41] Jun Fang, 'An Analysis on Administrative Reconsideration and Administrative Responses to Litigation in 2006' (2006 全国复议和应诉情况的分析) (2007) <http://www.china.com.cn/law/zhuanti/fzbg/2007-11/14/content_9225780.htm> accessed 6 July 2014 [emphasis added].

[42] See Thomas E Kellogg, 'Courageous Explorers? Education Litigation and Judicial Innovation in China' (2007) 20 Harvard Human Rights J 141.

[43] For analysis on the dynamic of administrative litigation in China, see Xin He, 'Administrative Law as a Political Control Mechanism in Contemporary China' in Michael Dowdle and Stephanie Balme (eds), *Building Constitutionalism in China* (Palgrave Macmillian 2009) 143. For an analysis on China's dejudicialization, see Peerenboom (n 2). See also Benjamin Liebman, 'China's Courts: Restricted Reform' (2007) 191 China Q 620; Thomas E Kellogg,

reconsideration has resulted in an intriguing effect. The reconsideration system has succeeded in preventing many disputes from reaching the court and has in part fulfilled the expectation of the legislators.

However, this achievement does not mean that the administrative reconsideration system has provided an effective recourse for remedies. Rather, it is simply the combined result of the inducement by administrative authorities and the reluctance of the courts to take on relevant cases, leaving the private parties with only a 'Hobson's choice'. The 'success' of the reconsideration system is in reality a reflection on its failure, evidenced by the numerous petitions and collective actions that are beyond the institutionalized channels. Needless to say, this situation will pose an obstacle in the construction of administration by law and adversely affect social stability. The institutional dispute resolution mechanism has failed to achieve its intended purposes, while mechanisms that are beyond the institution cannot really resolve the problems.[44]

China is neither the first nor the only country to restrict the development of judicial power by engineering a paralleling institution. In Franco's Spain, beneath the apparent independence of the common court was the State's firm control over the special court.[45] With the politically sensitive cases under the jurisdiction of the special court, the State could tolerate naturally the relative independence of the common court in handling other cases. In comparison, the corrosion of administrative litigation by the reconsideration system in China presents a more subtle and complicated scenario. Franco's Spain openly established the special court to channel cases in accordance with their nature and sensitiveness. China's administrative reconsideration system accomplishes the same function, but the scheme is much more delicate and, in a way, more deceptive. As opposed to a directly established special court, the reconsideration system never competes head on with administrative litigation for jurisdiction, nor has it stripped the latter of its finality. It claims that reconsideration only serves to filter administrative disputes. In this way, the simultaneous existence of administrative reconsideration and administrative litigation completely allows China to fulfil its commitment to subject administrative acts to judicial review. By so doing, it declares that it has governed the country in accordance with the law, so as to boost its legitimacy and achieve the instrumental goals brought by laws and courts.

In a way, channelling different types of administrative disputes to different institutions is less a result of institutional design than of interaction between the administrative agencies and judiciary. This outcome derives from the

'Constitutionalism with Chinese Characteristics? Constitutional Development and Civil Litigation in China' (2009) 7 Intl J Const L 215.

[44] Due to the high cost in discerning the validity of information in the petition process, it is almost impossible for the national or provincial governments to systemically solve the problems.

[45] Jose J Toharia, 'Judicial Independence in an Authoritarian Regime: The Case of Contemporary Spain' (1975) 9 L & Soc Rev 475.

staggering power of the government agencies and the incapability of the judiciary to handle disputes of far-reaching influence. Therefore, this discussion of the Chinese legal system would enrich the literature on judicial politics in transitional countries. We shall not limit our focus on the regular and auxiliary or exceptional courts, or on the 'fragmented versus unified judicial system,' as aptly put by Tamir Moustafa and Tom Ginsburg.[46] There is a need to explore the operation of other systems related to the judiciary as well as the dynamics between them.

[46] Moustafa and Ginsburg (n 8) 1, 17.