

**CAN THE INTRODUCTION OF ADMINISTRATIVE  
RECONSIDERATION COMMITTEES HELP REFORM  
CHINA’S SYSTEM OF ADMINISTRATIVE  
RECONSIDERATION?**

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**I. OVERVIEW OF ADMINISTRATIVE RECONSIDERATION IN  
CHINA**

In modern society, providing sufficient remedies to people adversely affected by administrative decisions is fundamental to the rule of law and social justice.<sup>1</sup>It is generally accepted that there

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<sup>1</sup> See H.W.R. WADE, TOWARD ADMINISTRATIVE JUSTICE 3 (1963) (explaining social justice and the importance of the law and consequences).

should be a chain of remedies to settle disputes between citizens and their government.<sup>2</sup> In China, as elsewhere, there are a range of informal (non-adjudicative) remedies and formal legal remedies. Informal remedies mainly comprise (1) recourse to People's Congress deputies at all levels, (2) petitioning to "letters and visits" (*xinfang*) offices, and (3) direct appeal to agency decision-makers. Chinese citizens have two formal ways to challenge agency decisions: administrative litigation and administrative reconsideration.

Administrative litigation, providing judicial review of agency action, was formally introduced in China by the passage of the Administrative Litigation Law ("ALL") in 1989, which was revised in November 2014 and July 2017.<sup>3</sup> Of course, this channel plays an important role in the resolution of disputes between Chinese citizens and their government (hereinafter "administrative disputes"), and in providing remedies to aggrieved citizens. But, taking into account the considerable costs, time and effort involved, administrative litigation may normally be considered a last resort. Therefore, administrative reconsideration has been made available as an alternative, less costly, and less time-intensive method of formal dispute resolution.

In administrative reconsideration, the adjudicator is an administrative agency, not an external court. However, to hold to the basic tenet of justice and fairness that "no one should be a judge

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<sup>2</sup> See PETER LEYLAND & GORDON ANTHONY, TEXTBOOK ON ADMINISTRATIVE LAW 15 (5th ed. 2005) (stating that the government needs to be able to be held accountable by the people as well as people being held accountable to the government).

<sup>3</sup> Zhonghua Remin Gongheguo Xingzheng Susong Fa (中华人民共和国行政诉讼法) [Administrative Litigation Law] (promulgated by the President of the People's Republic of China, Apr. 4, 1989, effective Oct. 1, 1990, amended Nov. 1, 2014 and Jul. 1, 2017) 1989 STANDING COMM. NAT'L PEOPLE'S CONG. GAZ. 2 (China) [hereinafter ALL]; see also He Haibo, *How Much Progress Can a Legislation Bring?: The 2014 Amendment of the Administrative Litigation Law of PRC*, 13 U. PA. ASIAN L. REV. (forthcoming 2018) (explaining Administrative Litigation Law and how it is drafted); Wang Jing, *Revision of China's Administrative Litigation Law and Prospects for Expanding Judicial Review to Normative Documents*, U. PA. ASIAN L. REV. (forthcoming 2018) (explaining prospects for expanding judicial review to normative documents).

in his own case,” the adjudicator should not be the original agency decision-maker. Hence, under the Administrative Reconsideration Law (“ARL”),<sup>4</sup> passed by the Standing Committee of the National People’s Congress in 1999, a citizen who considers his or her rights impinged upon by an administrative decision may generally seek reconsideration from the relevant administrative agency at the next higherlevel (a “reviewing agency”).<sup>5</sup>

It should be emphasized that, under Chinese law, administrative reconsideration is not usually a compulsory preceding step to initiating administrative litigation. There is no

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<sup>4</sup> Zhonghua Remin Gongheguo Xingzheng Fuyi Fa (中华人民共和国行政复议法) [Administrative Reconsideration Law] (promulgated by the Standing Comm. Nat’l People’s Cong., Apr. 29, 1999, effective Oct. 1, 1999) 1999STANDING COMM. NAT’L PEOPLE’S CONG. GAZ. 3 (China) [hereinafter ARL]. Before passage of the ARL, administrative reconsideration had been governed by the Regulation on Administrative Regulation. Xingzheng Fuyi Tiaoli (行政复议条例) [Regulation on Administrative Reconsideration] (promulgated by the St. Council, Dec. 24, 1990, effective Jan. 1, 1991, amended Oct. 9, 1994) 1994 STANDING COMM. NAT’L PEOPLE’S CONG. GAZ. 24 (China).

<sup>5</sup> It can be very complicated to determine the reviewing agency in China because of the complexity of administrative organization. The following considerations may assist in identifying the three main types of reviewing agency: 1) If the original agency decision-maker is a government below the provincial government, the reviewing agency should be the government at next higher level. Specifically speaking, the decision made by the township-level government, reviewing agency should be the county-level government; decision by county-level government, reviewing agency municipal government; decision by municipal government, reviewing agency provincial government. 2) If the original agency decision-maker is a department of the government, the determination of reviewing agency should be based on the nature of the department. In many circumstances, there are two reviewing agencies: the government at the same level and the competent department at next higher level. The citizen can make a choice from two. For example, the decision made by the public security bureau of the county government, the reviewing agency can be the county government or the public security bureau of the municipal government. However, for the department that exercises vertical leadership over the customs, banking, national tax and foreign exchange administration or by a state security organ, the reviewing agency should only be competent department at next higher level. For example, the decision made by a national taxation bureau located in the county, the reviewing agency should be the national taxation bureau located in the municipality, not the county government. 3) In some circumstances, the original decision-maker is still the reviewing agency. If the decision made by a department under the State Council or by the provincial government, the citizen should apply to the decision-maker. For example, a citizen who is unsatisfied with the decision taken by the Ministry of Education, he or she should still apply to the Ministry of Education (not the State Council) for administrative reconsideration. See ARL, *supra* note 4, art. 12–14 (stating that the needs of the people that are taken into consideration in Administrative Reconsideration Law).

doctrine of exhaustion of remedies in China: an aggrieved party is not required to exhaust administrative reconsideration before seeking judicial review.<sup>6</sup> The ALL adopts the principle of individual freedom of choice in delineating the relationship between administrative reconsideration and administrative litigation. Based on Article 44 of the ALL and other relevant statutes, there are only some circumstances where a person—be it a legal person or an organization—who is unsatisfied with an administrative decision must apply for administrative reconsideration first, before continuing to challenge the relevant administrative decision through administrative litigation.<sup>7</sup> It is only in even more limited circumstances—as provided for by specific laws of the National People’s Congress or its Standing Committee—that reconsideration decisions are deemed to be final.<sup>8</sup>

Compared with administrative litigation, administrative reconsideration has some structural advantages for resolving disputes. First, administrative reconsideration permits review of a broader range of administrative decisions. Not all administrative

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<sup>6</sup> In recent years, however, some scholars have advocated carrying out “compulsory reconsideration first” in order to make administrative reconsideration become the main forum for resolution of administrative disputes. See, e.g., Zhou Lanling (周兰领), *Xingzheng Fuyi Qiangzhi Qianzhi Moshi de Chongjian* (行政复议强制前置模式的重建) [Reconstruction of Model of Compulsory Choice of Administrative Reconsideration], 4 CHANG’AN DAXUE XUEBAO (SHEHUI KEXUE BAN) 63 (2008) (China) (hypothesizing using compulsory reconsideration to facilitate the efficiency of determining the outcome of administrative disputes and proposing it as an improved model). Other scholars object to this idea. See, e.g., Yang Weidong (杨伟东), *Fuyi Qianzhi Yihuo Ziyou Xuanze—Woguo Xingzheng Fuyiyu Xingzheng Susong de Guanxi Chuli* (复议前置抑或自由选择—我国行政复议与行政诉讼关系的处理) [Reconsideration First or Free Choice—Treatment of the Relationship between Administrative Reconsideration and Administrative Litigation in China], 2 XINGZHENG FAXUE YANJIU 71 (2012) (advocating against using compulsory reconsideration).

<sup>7</sup> Per relevant provisions of laws or regulations. Such laws and regulations cover administrative decisions relating to taxation, collection of customs duties, payment of social insurance premiums, trademark registration, examination of patent, etc. It is hard to summarize the underlying standards that apply here, requiring administrative reconsideration to be sought first.

<sup>8</sup> See, e.g., ARL, *supra* note 4, art. 30 (detailing the specifics of the law).

disputes are justiciable under the Administrative Litigation Law.<sup>9</sup> Thus, reviewability of administrative decisions has been a very important (and hotly discussed) academic and practical issue in China. But it is generally accepted that the scope of review in administrative reconsideration is wider than in administrative litigation.

Second, administrative reconsideration permits deeper *intensity* of review of administrative decisions. In administrative litigation, courts can only review the “legality” of administrative decisions, generally speaking;<sup>10</sup> in administrative reconsideration, the reviewing agency has the power to review both the legality and the reasonableness of the administrative decision.<sup>11</sup> In other words, the authority of reviewing agencies extends to “merit review.” Furthermore, reviewing agencies can substitute their own decision for the decision made by the original agency decision-maker; formal remand is unnecessary.<sup>12</sup>

Third, administrative reconsideration features relatively lower costs and quicker results. Unlike courts in administrative litigation, the reviewing agency cannot charge fees from applicants for administrative reconsideration.<sup>13</sup> Although professional representation is not required either in administrative litigation or administrative reconsideration, it is more feasible for aggrieved

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<sup>9</sup> Currently, some administrative decisions are precluded from administrative litigation, such as state acts in areas like national defense and foreign affairs, and personnel decision involving civil servants. ALL, *supra* note 3, art. 13.

<sup>10</sup> See ALL, *supra* note 3, art. 6, 70, 77 (examples of references to the legality of administrative decisions).

<sup>11</sup> See ARL, *supra* note 4, art. 1, 28 (examples where both legality and reasonableness are taken into consideration).

<sup>12</sup> According to article 28 of the ARL, the reviewing agency has power to nullify, change or deem illegal a specific administrative act if it is taken in one of the following circumstances: 1) the main facts are not clear, and essential evidence is inadequate; 2) the basis is used incorrectly; 3) statutory procedures are violated; 4) authority is exceeded or power is abused; or 5) the act is obviously inappropriate. ARL, *supra* note 4, art. 28.

<sup>13</sup> See ARL, *supra* note 4, art. 39 (stating that when accepting an application for administrative reconsideration, the administrative reviewing agencies may not charge the applicant any fee).

citizens to represent themselves in the administrative reconsideration process. Administrative reconsideration procedures are relatively simple and streamlined. The basic idea behind these arrangements is to encourage citizens to make use of administrative reconsideration.<sup>14</sup>

Despite these advantages, administrative reconsideration has not met expectations in terms of public trust and support. Indeed, its poor performance is often cited in critical analysis of the many complaints and disputes in China in recent years.<sup>15</sup> As an alternative and less onerous dispute resolution procedure, administrative reconsideration should handle many more administrative disputes than are processed through litigation. However, that has not proven the case, as the following table indicates:

*Table I: Administrative Reconsideration & Administrative Litigation Cases, 2000–2007*<sup>16</sup>

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<sup>14</sup>See Ying Songnian (应松年), *Ba Xingzheng Fuyi Zhidu Jianshe Chengwei Woguo Jiejue Xingzheng Zhengyi de Zhuqudao*(把行政复议制度建设成为我国解决行政争议的主渠道) [*Build Administrative Reconsideration into the Main Channel to Settle Administrative Disputes*], 5 FAXUE LUNTAN1, 8 (2011) (stating that administrative disputes should consider administrative reconsideration as a natural part of the process to resolution).

<sup>15</sup> See Hu Kui & Jiang Shu, *Xinfang Hongfeng*(信访洪峰)[*The Flood of Xinfang*], 4 LIAOWANG DONGFANG ZHOUKAN 1, 32–35 (2003) (describing the grim situation regarding a large number of disputes and *xinfang* cases China was faced with in 2003). The number of administrative reconsideration cases is much less than the number of *xinfang* cases. See Ying Songnian (应松年), *Xingzheng Fuyi Yingdang Chengwei Jiejue Xingzheng Zhengyi de Zhuqudao*(行政复议应当成为解决行政争议的主渠道) [*Administrative Reconsideration Should Become the Main Forum of Resolution of the Administrative Disputes*], 12 XINGZHENG GUANLI GAIGE 1, 49 (2010) (arguing that administrative reconsideration should have a much more important role in settling administrative disputes).

<sup>16</sup> ZHONGGUO FALÜ NIANJIAN(中国法律年鉴) [LAW YEARBOOK OF CHINA] 1256 (2001)[hereinafter LAW Y.B. CHINA]; LAW Y.B. CHINA 1238 (2002); LAW Y.B. CHINA 1319 (2003); LAW Y.B. CHINA 1054, 1071 (2004); LAW Y.B. CHINA 1064, 1079 (2005); LAW Y.B. CHINA 988, 1007–08 (2006); LAW Y.B. CHINA 1065, 1085 (2007); LAW Y.B. CHINA 1016, 1134–35 (2008); Liu Xin (刘莘), *Xingzheng Fuyi de Dingwei Zhizheng*(行政

Year	2000	2001	2002	2003	2004	2005	2006	2007
<b>Administrative Reconsideration Cases</b>	74,448	80,857	74,168	75,918	81,833	90,624	91,667	85,587
<b>Administrative Litigation Cases<sup>17</sup></b>	85,760	100,921	80,728	87,919	92,613	96,178	95,617	101,510

The table shows the caseload for administrative reconsideration generally has been less than that for administrative litigation,<sup>18</sup> and certainly much lower than might be expected. These numbers illustrate that administrative reconsideration has not served as the primary means for resolving administrative disputes and redressing citizen grievances in China. Again, Chinese law generally does not require exhaustion of remedies before citizens may file for administrative litigation. But citizens who *do* file for administrative reconsideration first—whether at their own discretion or following certain statutory requirements—almost always retain the right to appeal the result of the reconsideration proceeding through administrative litigation.<sup>19</sup> Even so, this benefit has not proven sufficient to incentivize administrative reconsideration as a preferred way to challenge administrative decisions. Indeed, in 2006 it was reported that as many as 70% of administrative

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复议的定位之争) [*The Discussion of the Position of Administrative Reconsideration*], 5 FAXUE LUNTAN 1, 11–15 (2011).

<sup>17</sup> These figures for administrative litigation only include first-instance cases, and not second-instance cases.

<sup>18</sup> From 2008 to 2012, and particularly during 2010–2012, the number of administrative reconsideration cases tended to increase (to more than 100,000 cases per year), but still remained less than the number of administrative litigation cases (which rose to more than 120,000 cases per year). For more details, please *see infra* Part III Table 2 (explaining the numbers with more specificity).

<sup>19</sup> *See ALL, supra* note 3, art. 44 (stating that filing for administrative reconsideration does not bar the ability to appeal the result through administrative litigation).

litigation cases involved no prior claim for administrative reconsideration.<sup>20</sup>

In considering that statistic, it should be noted that, from 2003 to 2006, China experienced a flood of disputes and grievances, including complaints against administrative agencies.<sup>21</sup> It is unfortunate that administrative reconsideration did not play a more active role in the resolution of such complaints. Apparently, most claimants preferred to use informal, non-law based remedial channels, especially “letters and visits” (*xinfang*).<sup>22</sup>

What all this clearly shows is that the above-mentioned advantages of administrative reconsideration were mostly illusory for most citizens. They did not believe that administrative reconsideration could bring them justice. Hence, the mechanism of administrative reconsideration was in a state of crisis, marked by public distrust.

## II. A NEW EXPERIMENT: ADMINISTRATIVE RECONSIDERATION COMMITTEES

Confronted with this situation, some agencies tried to make changes to improve the fairness of administrative reconsideration and win the public’s trust. For example, some local governments held public hearings in administrative reconsideration cases.<sup>23</sup>

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<sup>20</sup> Li Li (李立), *Qi Cheng Xingzheng Susong Anjian Suqian Wei Jingguo Xingzheng Fuyi* (七成行政诉讼案诉前未经行政复议) [*Seventy Percent of Administrative Litigation Cases are without Administrative Reconsideration*], FAZHI RIBAO [LEGAL DAILY], Dec. 4, 2006, [http://www.legaldaily.com.cn/bm/content/2006-12/04/content\\_475926.htm](http://www.legaldaily.com.cn/bm/content/2006-12/04/content_475926.htm) [perma.cc/JM9P-FZGW].

<sup>21</sup> See, e.g., Lianjiang Li et al., *Petitioning Beijing: The High Tide of 2003–2006*, 210 CHINA Q. 313, 313–14 (2012) (describing a “high tide” of petitioning the government from 2003 to 2006).

<sup>22</sup> *Id.*

<sup>23</sup> See, e.g., Li Li, *Yinling Shehui Tongxiang Gongping Zhengyi Hexie: Xingzheng Fuyi Gongzuo Zuotanhui Fayan Zongshu* (引领社会通向公平正义和谐: 行政复议工作座谈会发言综述) [*Leading Society Toward Fairness, Justice and Harmony—Summary of Speeches at the Administrative Reconsideration Forum*], FAZHI RIBAO [LEGAL DAILY], Dec. 5, 2006, [http://www.china.com.cn/policy/zhuanti/hxsh/txt/2006-12/05/content\\_7459010.htm](http://www.china.com.cn/policy/zhuanti/hxsh/txt/2006-12/05/content_7459010.htm) [perma.cc/AG94-R2W8] (describing an Administrative



These efforts pushed forward the development of administrative reconsideration, but they were sporadic, and did not remove the key factors limiting the fairness of the procedure or otherwise provoke any basic changes.

Some essential criteria for successful complaint systems include independence, accessibility, clarity of jurisdiction, fairness, and effectiveness. Although different theorists may prioritize these criteria differently, independence is always high on the list.<sup>24</sup> The greatest defect of the present administrative reconsideration system in China is precisely that—lack of independence.<sup>25</sup> Superficially, the reviewing agency, as a higher-level agency, is independent of the original agency decision-maker, but of course the two levels work closely with one another, fueling the popular perception that “officials shield one another.” More problematic is the lack of clear separation between the adjudicative and administrative functions within the reviewing agency. As a consequence, reviewing agencies

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Reconsideration Forum and providing summaries of speeches exhibited there); Li Li, *Jiangsu Quannmian Tuixing Xingzheng Fuyi Zhizheng Tingzheng Zhidu* (江苏全面推行行政复议质证听证制度) [*Jiangsu Fully Carried Out the Cross-examination and Hearing in the Administrative Reconsideration Cases*], FAZHI RIBAO [LEGAL DAILY], Jan. 8, 2007, [http://www.legaldaily.com.cn/misc/2007-01/08/content\\_509148.htm](http://www.legaldaily.com.cn/misc/2007-01/08/content_509148.htm) [perma.cc/N9CG-KXC9] (providing examples of hearings in Administrative Reconsideration cases).

<sup>24</sup> See CAROL HARLOW & RICHARD RAWLINGS, LAW AND ADMINISTRATION 422 (1997) (stating different criteria, with independence as a major factor).

<sup>25</sup> See, e.g., Zhou Hanhua (周汉华), *Xingzheng Fuyi Zhidu Sifahua Gaige Jiqi Zuoyong* (行政复议制度司法化改革及其作用) [Judicial Oriented Reform of Administrative Reconsideration and its Implications], 2 GUOJIAXINGZHENGXUEYUANXUEBAO1, 33–34 (2005) (pointing out that the present administrative reconsideration system is designed as an administrative supervision system and is therefore not separated from ordinary administrative activities); Wang Wanhua (王万华), *Xingzheng Fuyi Fa Xiugai de Jige Zhongda Wenti* (行政复议法修改的几个重大问题) [*Several Major Issues in Amendment to Administrative Reconsideration Law*], 4 XINGZHENG FAXUE YANJIU 80, 82 (2011) (arguing that the organization handling administrative reconsideration cases is the ordinary administrative organization, which is still subject to the administrative agency in many aspects, such as outlay, appointment of staff, and assessment of work); Fang Jun (方军), *Woguo Xingzheng Fuyi Zuzhi Gaige Chuyi* (我国行政复议组织改革刍议) [*On the Reformation of Administrative Reconsideration Organization in China*], 5 FAXUE LUNTAN 16, 17 (2011) (arguing that the organization handling the administrative reconsideration cases used ordinary administrative procedure to solve disputes).

tend to employ “administrative” ways of thinking about and handling administrative disputes.

In September 2008, following the strong recommendation of Chinese administrative law scholars, and in light of the experience and practices of other countries,<sup>26</sup> the Legislative Affairs Office of the State Council (“State Council LAO”) promulgated the “Notice on Trial Experimentation of Administrative Reconsideration Committees in Some Provinces and Municipalities Directly Under the Central Government” (“Notice”),<sup>27</sup> introducing an experimental reform designed to improve the independence of administrative reconsideration. So-called “experimental reform” is a common way to carry out trial reform in China, and is frequently used in the social policy area. Under this approach, some representative cities or areas are selected to test out the contemplated reform. After a period of time, the outcome of the trial reform is evaluated, a process that determines whether it will be adopted nationwide. This approach to reform can help policy-makers avoid the potential instability that might be caused by an immature plan of reform, and

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<sup>26</sup> In recent years, Chinese administrative law scholars have introduced and analyzed foreign systems of administrative review, such as the U.S. administrative law judicial system, U.K. administrative tribunals, South Korean administrative reconsideration, and even the administrative appeal system of Taiwan. See, e.g., LÜ Yanbin (吕艳滨), *Riben he Hanguo de Xingzheng Fuyi Zhidu — Xingzheng Fuyi Sifahua Ruogan Shili* (日本、韩国的行政复议制度—行政复议司法化的若干实例) [*Administrative Reconsideration System in Japan and South Korea—Some Examples of Judicializing Administrative Reconsideration*], 1 HUANQIU FALÜ PINGLUN 7, 7–16 (2004) (analyzing the Japanese and South Korean administrative reconsideration systems); Zheng Lei (郑磊) & Shen Kaiju (沈开举), *Yingguo Xingzheng Caipansuo de Zuixin Gaige Jiqi Qishi* (英国行政裁判所的最新改革及其启示) [*The Latest Reform and Enlightenment of British Administrative Tribunals*], 3 XINGZHENG FAXUE YANJIU 127, 127–31 (2009) (presenting introductory background and key points of British government reforms to the UK administrative tribunal system in 2007).

<sup>27</sup> Guowuyuan Fazhi Bangongshi (国务院法制办公室), Guanyu Zai Bufen Sheng Zhixiashi Kaizhan Xingzheng Fuyi Weiyuanhui Shidian Gongzuo de Tongzhi (关于在部分省、直辖市开展行政复议委员会试点工作的通知) [Notice on Trial Experimentation of Administrative Reconsideration Committees in Some Provinces and Municipalities directly under the Central Government] (Sept. 16, 2008), [http://fgs.ndrc.gov.cn/xzfy/200904/t20090417\\_273029.html](http://fgs.ndrc.gov.cn/xzfy/200904/t20090417_273029.html) [perma.cc/2AWV-DSPT][hereinafter Notice].

also to uncover relevant problems and accumulate experience more generally. Thus, in issuing the Notice, the State Council LAO hoped to bring about a moderate and gradual reform.

The Notice's main innovation is to establish administrative reconsideration committees ("ARCs"), organs composed of two kinds of members: full-time members drawn from the government bureaucracy, and part-time members who are legal and other experts drawn from institutions outside the administration. ARCs are chaired, in principle, by the leading official (or their deputy) of the same level of government; the vice-chair is the head of the same-level legislative affairs office (*fazhiban*). These committees are granted the power to discuss and decide administrative reconsideration cases. At the same time, the Notice diminishes the number of alternate reconsideration organs in the pilot areas within particular government departments.<sup>28</sup> This effort to establish a relatively unified model of administrative reconsideration may be contrasted with the approach of the ARL, under which *any* administrative agency except those at the lowest level may serve as a reviewing agency.<sup>29</sup> Indeed, according to a recent NPC investigation, there exist a total of 30,450 reviewing agencies at local levels alone.<sup>30</sup>

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<sup>28</sup> The Notice states: "[o]n the basis of administrative reconsideration decisions made lawfully in the name of administrative reconsideration agencies, resources concerning administrative reconsideration should be reasonably integrated, and methods of accepting and dealing with cases by pooling reconsideration resources should be actively investigated." *Id.* at art. 1(3).

<sup>29</sup> As mentioned earlier, the reviewing agency, in principle, should be the administrative agency at the next higher level; the original agency serving as the reviewing agency is limited to high-level agencies, such as ministries of the State Council, and provincial-level governments.

<sup>30</sup> See Quanguo Renmin Daibiao Dahui Changwu Weiyuanhui Zhifa Jianchazu Guanyu Jiancha Zhonghua Renmin Gongheguo Xingzheng Fuyi Fa ShishiQingkuang de Baogao (全国人民代表大会常务委员会执法检查组关于检查《中华人民共和国行政复议法》实施情况的报告) [Report on the Enforcement of Administrative Reconsideration Law of the People's Republic of China by the Law Enforcement Inspection Group of the Standing Committee of the National People's Congress], Zhongguo Renda Wang (Dec. 24, 2013), [http://www.npc.gov.cn/npc/xinwen/2013-12/24/content\\_1819964.htm](http://www.npc.gov.cn/npc/xinwen/2013-12/24/content_1819964.htm) [perma.cc/P758-DCMY] [hereinafter Enforcement of Administrative Reconsideration Law]

On its own terms, what is most distinctive about the ARC model is that it invites scholars and experts from outside the administration, as part-time members of the committee, to take part in the discussion and even the resolution of administrative reconsideration cases. Thus, it brings an outside element and power into the adjudicative process, using this externality both to improve the quality and demonstrate the independence of administrative reconsideration. Of course, this independence is not complete—ARCs are still established within the relevant government authority, and make a decision that ultimately has to be issued under the name of that authority. Therefore, the independence of ARCs is moderate, rooted in separating the adjudicative function from the administrative function *within* the government.

The Notice identified eight provinces and municipalities that would carry out this experimental reform of administrative reconsideration.<sup>31</sup> In turn, these provinces and municipalities selected a total of thirty-five pilot areas to undertake the task. Over time, these numbers gradually increased so that by the end of 2011 there were a total of 108 pilot areas, distributed over 19 provinces and municipalities, implementing the Notice's provisions.<sup>32</sup> These provinces and municipalities were authorized by the Notice to draw up their own specific plans for ARCs based on local needs and circumstances. In practice thus far, two versions of ARCs appear to

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(detailing the NPC investigation and stating the expansiveness of number of reviewing agencies).

<sup>31</sup> These provinces and municipalities are Beijing, Heilongjiang, Jiangsu, Shandong, Henan, Guangdong, Hainan, and Guizhou. The Notice also suggests that other regions may also conduct trial experimentation along these lines. See Notice, *supra* note 27, art. 2 (stating the possibility of conducting the trial experimentation).

<sup>32</sup> See Zhang Yang & Cai Changchun, *Shijiu ge Shengfen Yilingba ge Danwei You le Xingzheng Fuyi Weiyuanhui* (19 个省份 108 个单位有了行政复议委员会) [108 Pilot Areas in 19 Provinces and Municipalities Established Administrative Reconsideration Committees], RENMIN RIBAO (Mar. 28, 2012), <http://www.law-lib.com/fzdt/newshtml/fzjd/20120328163942.htm> [perma.cc/UDX8-XMZH] (explaining the number and distribution of the pilot areas).

have been implemented: (1) the “unified” (*jizhong*) ARC model, and (2) the “panel discussion” (*heyi*) ARC model.

Under the “unified” ARC model, all or most administrative reconsideration cases at a particular level of government are accepted, heard, and even finally decided by the ARC established at that level.<sup>33</sup>In other words, different government departments (or branches) lose their separate authority to handle administrative reconsideration cases. In some of the pilot areas where this model has been implemented, the ARCs enjoy “final say” in their cases. For example, in Harbin, the capital city of Heilongjiang Province, if the head of the municipal government refuses to endorse the ARC’s decision, the ARC can in effect overrule that refusal by re-affirming its decision with a two-thirds majority. After re-affirming the decision, the head of the municipal government can block the ARC’s decision only by convening an executive committee meeting (but this procedure has never been activated to date).<sup>34</sup>

Compared with the “unified” ARC model, under the “panel discussion” ARC model, even more emphasis is placed on the inclusion of outside legal experts (from universities, research institutes, law firms, etc.) in the deliberations of the ARC, as part-time members. For example, the ARC of the Beijing municipal government significantly involves its outside legal experts in

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<sup>33</sup> Local governments that follow this model include those of Harbin, Jinan, Jining and Linyi. See Gao Fengtao, *Chuangxin Xingzheng Fuyi Tizhi Jizhi Tuidong Xingzheng Fuyi Weiyuanhui Shidian Gongzuo Shenru Kaizhan —Zai Xingzheng Fuyi Weiyuanhui Shidian Gongzuo Xianchanghui Shang de Jianghua*, (创新行政复议体制机制推动行政复议委员会试点工作深入开展—在行政复议委员会试点工作现场会上的讲话) [Official Speech on Administrative Reconsideration at On-site Meeting Concerning the Pilot Work of the Administrative Reconsideration Committee in Harbin, Heilongjiang Province] (Aug. 5, 2010), <http://www.chinalaw.gov.cn/article/xzfy/wjjjh/ldjh/201008/20100800260075.shtml> [perma.cc/5XAE-T4CF] (providing an example of an administrative reconsideration case that has been accepted, heard, and decided by the ARC at the same level).

<sup>34</sup> See Legislative Affairs Office of Harbin, *The Achievements of the Work of the Administrative Reconsideration Committee in Harbin are Obvious*, <http://www.hrblaw.gov.cn/fb/5/101/2010/04/i13045.shtml> (stating that the executive committee meeting has not been convened to block ARC’s decision in the past, and signifying this as a success).

hearing administrative reconsideration cases. In ARC meetings, these outside legal experts can not only give suggestions, *but even cast votes on the cases*. In some circumstances, they can also preside in public hearings of the ARC. However, in this model, the ARC serves mainly as a consultative body that provides suggestions to the reviewing agency, which retains final decision-making authority.

### III. PRELIMINARY ASSESSMENT OF THE ARC MODEL

Even as implementation of the ARC model expands and further develops with the general support of Chinese administrative law scholars and the media, until now there has not been an overall and systematic evaluation—official or unofficial—of this new approach to administrative reconsideration in China. In offering a preliminary assessment here, I argue that there are many potential benefits to the ARC model.

First, the ARC model can resist a certain degree of administrative pressure. Part-time committee members, in particular, will be more immune to administrative factors and influences, and can render a relatively independent judgment. Full-time committee members, then, can protect themselves behind the part-time members when reconsideration decisions go against agency decision-makers.

Second, the ARC model can improve the quality of reconsideration decisions. Part-time committee members usually are law professors, trial lawyers, or experts in other fields, who can offer suggestions or opinions that are different from the views of full-time committee members. This open and wide-ranging discussion lends itself to greater rationality in the decision-making process in reconsideration cases.

Third, the ARC model may change public perceptions of administrative reconsideration in China by opening up the decision-making process and bringing in fresh air and new energy. This may

give the general public reason to believe that administrative reconsideration will no longer be completely controlled by the administration itself.

As the originator of this reform, the State Council LAO has tried to keep track of its progress, and has noted some achievements.<sup>35</sup>In recent years, some related changes have been apparent, and it can be said that both the quantity of administrative reconsideration cases and the quality of the administrative reconsideration decision-making process have increased. For example, in 2011, there was a marked increase in the number of administrative reconsideration cases handled by provincial-level governments.<sup>36</sup>In twelve provinces, there was an increase of more than 10%; in another four provinces, the increase was by more than 40%.<sup>37</sup> In some pilot areas, the number of administrative reconsideration cases has come to exceed the number of administrative litigation cases. For example, in Weifang City, Shandong Province, the ratio of administrative reconsideration cases

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<sup>35</sup> See, e.g., Gan Zangchun, Deputy Dir., State Council LAO, (以党的十八大精神为指导努力推动行政复议工作创新发展——在 2012 年全国行政复议年度工作会议上的讲话) [Official Speech on Administrative Reconsideration at the Annual National Work Conference on Administrative Reconsideration] (Dec. 24, 2012), <http://www.chinalaw.gov.cn/article/xzfy/wjjjh/djyh/201303/20130300384783.shtml> [perma.cc/P7DK-YA93] (updating on the progress of Administrative Reconsideration); Gao Fengtao, Deputy Director, State Council LAO, (认真贯彻胡锦涛总书记重要讲话精神把行政复议打造成为化解行政争议的主渠道——在 2011 年行政复议年度工作会议上的讲话) [Official Speech on Administrative Reconsideration at the Annual National Work Conference on Administrative Reconsideration] (Dec. 15, 2011), <http://www.chinalaw.gov.cn/article/xzfy/wjjjh/djyh/201201/20120100359445.shtml> [perma.cc/7UC6-RZB6] (summarizing the progress of Administrative Reconsideration and proposing further reforms); Gao Fengtao, Deputy Director, (围绕主题主线扎实推进行政复议工作创新发展——在 2010 年度行政复议工作会议上的讲话) [Official Speech on Administrative Reconsideration at the Annual National Work Conference on Administrative Reconsideration] (Dec. 16, 2010), <http://www.chinalaw.gov.cn/article/xzfy/wjjjh/djyh/201101/20110100331743.shtml> [perma.cc/75TA-7ZRK] (proposing reforms with Administrative Reconsideration).

<sup>36</sup> Li Li, *Duodi Xingzheng Fuxi An Dafu Pansheng, Xinfang Liang Xiajiang* (多地行政复议案大幅攀升信访量下降) [*Administrative Reconsideration Cases Increased Dramatically and the Number of Xinfang Dropped in Many Places*], FAZHI RIBAO (Nov. 25, 2011), [http://news.ifeng.com/mainland/detail\\_2011\\_11/25/10895295\\_0.shtml](http://news.ifeng.com/mainland/detail_2011_11/25/10895295_0.shtml) [perma.cc/CY L3-P8QA].

<sup>37</sup> *Id.*

to administrative litigation cases had been 1:2 before the State Council LAO's introduction of the ARC model, but as of 2011, the ratio was 1.12:1.<sup>38</sup>

On September 2, 2013, the NPC Standing Committee launched an inspection, under the direction of Standing Committee Chairman Zhang Dejiang, on the implementation of the Administrative Reconsideration Law.<sup>39</sup> Six sub-groups were dispatched across China to conduct the investigation, and eight provincial-level standing committees were delegated to perform the same task within their own jurisdictions.<sup>40</sup> The report by the inspection group, issued on December 23, 2013, noted the recent increase in the number of administrative reconsideration cases, and its greater correlation to the number of administrative litigation cases. Indeed, in some provinces and with respect to some departments, the number of administrative reconsideration cases has even come to exceed that of first instance administrative litigation. For example, the number of administrative reconsideration cases is close to or even more than two times the number of first instance administrative litigation cases in Heilongjiang Province, Shanghai Municipality, and elsewhere.<sup>41</sup>

The following table shows the numbers of administrative reconsideration cases and first instance administrative litigation cases, respectively, from 2008 to 2012, in the aftermath of the State Council LAO's September 2008 Notice.

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<sup>38</sup> *Id.*

<sup>39</sup> For a discussion of "law enforcement inspection", see generally Yan Lin, *The NPC Standing Committee's Law Enforcement Inspection Power: Brief History, Process, and Main Functions*, 11 U. PA. ASIA L. REV. (forthcoming 2018) (explaining what a law enforcement inspection entails, and providing examples).

<sup>40</sup> Na Yang, *Quanguo Renda Changweihui jiang Kaizhan Xingzheng Fuyi Fa Zhifa Jiancha* (全国人大常委会将开展行政复议法执法检查)[*The Standing Committee of National People's Congress will Conduct the Investigative Research of the Enforcement of Administrative Reconsideration Law*], FAZHI RIBAO (Sept. 3, 2013), [http://www.npc.gov.cn/npc/xinwen/sywx/2013-09/03/content\\_1805301.htm](http://www.npc.gov.cn/npc/xinwen/sywx/2013-09/03/content_1805301.htm) [perma.cc/FP5X-KTD8].

<sup>41</sup> Enforcement of Administrative Reconsideration Law, *supra* note 30.



*Table II: Administrative Reconsideration & Administrative Litigation Cases, 2008–2014<sup>42</sup>*

	2008	2009	2010	2011	2012	2013	2014
<b>Administrative Reconsideration</b>	78,002	77,877	93,055	102,815	109,553	128,428	149,222
<b>Administrative Litigation</b>	108,398	120,312	129,133	136,353	129,583	123,194	141,880

Meanwhile, there is evidence that reviewing agencies have been more active in correcting the illegalities and irrationalities of administrative decisions. For example, from January to October 2011, the government of Shanghai Municipality struck down the challenged administrative decision in 32 reconsideration cases, accounting for 14% of the 230 cases that were handled.<sup>43</sup> Also in 2011, the government of Quzhou City, Zhejiang Province, struck down the challenged administrative decision in 31 reconsideration cases, accounting for 64% of the cases handled.<sup>44</sup> In 2012, after an agency wrongfully refused to release certain government information to an individual, that person applied to the government of Beijing Municipality to review the non-disclosure. The ARC of Beijing Municipality arranged for two part-time members to preside over the formal reconsideration hearing. After the hearing, these two part-time members patiently explained the meaning of the relevant articles of the Regulations on Open Government Information to the

<sup>42</sup> LAW Y.B. CHINA 1000, 1026–27 (2009); LAW Y.B. CHINA 919, 945 (2010); LAW Y.B. CHINA 1052, 1078–79 (2011); LAW Y.B. CHINA 1066, 1090–93 (2012); LAW Y.B. CHINA 1210, 1236 (2013) ; LAW Y.B. CHINA 143, 1153 (2014); LAW Y.B. CHINA 1014, 1037 (2015).

<sup>43</sup> Gao, *supra* note 33.

<sup>44</sup> Gao, *supra* note 33.

agency decision-makers, eventually persuading them to correct the illegality.<sup>45</sup>

#### IV. PROBLEMS IN IMPLEMENTING THE ARC MODEL

Although the introduction of the ARC model generally has been well-received, as implementation has gone forward, some problems have come to light. For example, there is significant variation between the different provinces and municipalities selected to carry out this experimental reform. In some areas—Beijing Municipality and Heilongjiang Province—the ARC model has been put into effect in nearly all local governments.<sup>46</sup> But in many of the selected provinces and localities, the ARC model has only been implemented in a few pilot areas. Meanwhile, there is additional variation in the status and role of ARCs in different pilot areas. In some areas, ARCs are accorded a very high status, and charged with resolving almost all administrative reconsideration cases. Elsewhere, ARCs are permitted to handle only a limited subset of such cases.

In part, the caution reflected above is due to ongoing concerns about the sustainability of the ARC model, and its ability to effectively resolve administrative disputes. If the concerns cannot be addressed or the ARC model is thought to be the good solution, the legislature will definitely not take the ARC model as breakthrough point of revising the ARL and the fundamental system of the ARL. So the concerns will affect and decide whether

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<sup>45</sup> See Office of ARC of the People's Government of Beijing Municipality, Di ErJie Beijing shi Renmin Zhengfu Xingzheng Fuyi Weiyuanhui Gongzuo Baogao (第二届北京市人民政府行政复议委员会工作报告) [*The Work Report of the Second ARC of the People's Government of Beijing Municipality*] (May 10, 2013) (unpublished manuscript) (on file with author) (detailing the report that was persuasive in correcting the illegality).

<sup>46</sup> In Beijing, ARCs have been established in the governments of all of the sixteen districts and counties, together with the government of Beijing Municipality. *Id.* In Heilongjiang, ARCs have existed in all twelve municipal governments, as well as the Government of Heilongjiang Province. Gao, *supra* note 33.

ARC model can be adopted by new ARL, they are described in the sections that follow.

*A. What Should Be the Status of ARCs?*

As previously mentioned, under State Council LAO's reform, two versions of ARCs have been formed in the pilot areas, which can be characterized in terms of a "unified" (*jizhong*) ARC model and a "panel discussion" (*heyi*) ARC model. Even under the general, overall ARC model, there are important differences between these two "sub-models" in terms of status and function. Under the unified model, ARCs may serve as the true adjudicators of administrative disputes and can be vested with final decision-making authority. On the other hand, ARCs set up according to the panel discussion model serve mainly to offer suggestions to the reviewing agency, which may well attach significant weight to those suggestions, but still retain final decision-making authority.

The prevailing scholarly view is that the "unified" ARC model is more ideal. After all, the process of administrative reconsideration can truly be independent only when the reconsideration committee is the actual decision-maker. The State Council LAO appears to hold the same view, and to encourage local governments to establish ARCs in this manner. Even then, however, there remains a dilemma as to how precisely to structure the relationship between the ARC (of a given province, municipality or locality) and the chief executive of that level of government. According to the State Council LAO's September 2008 Notice, ARCs are to be established under each level of government, and their decisions can become effective only upon the endorsement of the chief executive of that level of government (*e.g.*, the provincial governor).<sup>47</sup> In theory, this arrangement could lead to difficulties, if

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<sup>47</sup> Notice, *supra* note 27.

there is any difference of opinion in a particular case between an ARC and the head of the same-level government.

Of all the pilot areas selected to implement the ARC model, only the Harbin municipal government has developed a mechanism to address this sort of conflict, specifically one that limits the power of the government head to block the reconsideration committee's decision.<sup>48</sup> Wide adoption of this "Harbin approach" may be unlikely, however, given resistance from local governments to the diminution of their control over administrative disputes. And there remains the broader resistance from local government *departments* to the "unified" ARC model for the same reason.

### *B. Where Should ARCs Be Located?*

A further related point that needs to be discussed is where ARCs should be located within the government. To address this question, it is useful first to analyze the nature of administrative reconsideration as a process of review of government action.

In China, administrative reconsideration traditionally has been considered to be a form of administrative supervision: just another way for superior administrative agencies to monitor inferior administrative agencies, with no real distinction or separation from regular modes of administration. Simply put, administrative reconsideration was thought to be "part of the machinery of administration."<sup>49</sup> The ARL largely reflects this

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<sup>48</sup> *See supra* Part II (describing the pilot areas and the current mode of solving these conflicts).

<sup>49</sup> FRANKS COMMITTEE ON ADMINISTRATIVE TRIBUNALS AND ENQUIRIES, REPORT OF THE COMMITTEE ON ADMINISTRATIVE TRIBUNALS AND ENQUIRIES, 1957, Cmnd. 218, at 40–41 (U.K.), *reprinted in* 1 DOCUMENTS ON CONTEMPORARY BRITISH GOVERNMENT: I. BRITISH GOVERNMENT AND CONSTITUTIONAL CHANGE 282 (Martin Minogue ed., 1977). The report concluded that the tribunal should be an adjudicative body, rather than administrative one, and should be fair, open and impartial. The report pointed out that "[t]ribunals are not ordinary courts, but neither are they appendages of Government Departments . . . We consider that tribunals should properly be regarded as machinery provided by Parliament for adjudication rather than as part of the machinery of administration." *Id.*

conceptualization.<sup>50</sup> However, this notion has been criticized by Chinese legal scholars, who argue that administrative reconsideration should be seen as “machinery for adjudication,” or at least a mixture of both supervision *and* remedy.<sup>51</sup> With increased recognition of the poor performance of administrative reconsideration as a mechanism for resolving administrative disputes, this academic view has grown in popularity, and provides the theoretical underpinning for the State Council LAO’s experimental reform.<sup>52</sup>

For many scholars, in order to draw out the nature of administrative reconsideration as “machinery for adjudication,” it would be advisable for reconsideration to be conducted by neutral, court-like institutions external to the administration. But State Council LAO’s Notice did not follow this approach. Rather, the Notice requires that ARCs be established under administrative authority—not unlike the model of administrative law judges in the United States.<sup>53</sup>

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<sup>50</sup> During the drafting process for the ARL, the former director of the State Council LAO, Yang Jingyu, commented that administrative reconsideration was basically considered to be an “oversight system within the administration, whose purpose is to self-rectify errors[;]” hence it did not require any special and independent institution, and especially should not follow judicial procedures. Jingyu Yang (杨景宇), *Guanyu Zhonghua Renmin Gongheguo Xingzheng Fuyi Fa (Cao’an) de Shuoming* (关于中华人民共和国行政复议法(草案)的说明) [*Explanation on Draft Administrative Reconsideration Law of People’s Republic of China*], NAT’L PEOPLE’S CONGRESS (Oct. 27, 1998), [http://www.npc.gov.cn/wxzl/gongbao/2000-12/06/content\\_5007101.htm](http://www.npc.gov.cn/wxzl/gongbao/2000-12/06/content_5007101.htm) [perma.cc/VN2U-EGF8].

<sup>51</sup> See, e.g., Jun Fang (方军), *Lun Zhongguo Xingzheng Fuyi de Guannian Gengxin he Zhidu Chonggou* (论中国行政复议的观念更新和制度重构) [*On the Change of Ideas and Reconstruction of the System Concerning Administrative Reconsideration in China*], 2004 HUANQIU FALU PINGLUN 39, 39–46 (2004) (arguing that administrative reconsideration should be an important administrative remedy system with a dual nature: administrative and judicial).

<sup>52</sup> The Notice clearly states that “administrative reconsideration is an important statutory channel of resolving administrative disputes, protecting lawful rights and interests of citizens, pushing administrative agencies observing law, and doing the social justice.” Notice, *supra* note 27 (author translation).

<sup>53</sup> By contrast, Australia forbids the creation of multi-functional agencies that perform both judicial and non-judicial functions. Likewise, in the UK, adjudicatory functions are performed either by courts or free-standing tribunals. See Peter Cane, *Understanding*

The problem, then, is how to separate the adjudicative functions of ARCs from regular authority and processes *within* the administration. There are two main possibilities. First, ARCs could be established under the direct leadership of the chief executive of that level of government, and otherwise made completely independent of other government departments. In this scenario, ARCs would enjoy their own working offices, separate from other government departments. Alternatively, ARCs could be established under the chief executive's direct leadership, but would have their working offices situated within that level of government's legislative affairs office (*fazhiban*). This second approach is the prevailing practice in the pilot areas, and, from the perspective of country-wide *fazhiban*, the more realistic one. However, in my own view, given that *fazhiban* mostly serves to draft rules and review the rulemaking of other government departments, the first approach is superior.

*C. Who Should Be the Full-time and Part-time Members of ARCs?*

Needless to say, the identity and qualifications of both full-time and part-time members of ARCs is an important issue that will greatly influence both the status of ARCs and the quality of the reconsideration that they offer. According to the State Council LAO's Notice, scholars and other experts from outside the administration should be invited to become part-time members of ARCs, working alongside the full-time members.<sup>54</sup> However, the Notice does not clarify what proportion of committee members should be "part-time." Also, the Notice does not address the qualifications of full-time members.

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*Administrative Adjudication*, in ADMINISTRATION LAW IN A CHANGING STATE: ESSAYS IN HONOUR OF MARK ARONSON 273, 282 (Linda Pearson et al. eds., 2008) (juxtaposing the differences in several countries' separation of judicial and non-judicial functions).

<sup>54</sup> The Notice encourages the pilot places to "make full use of the role played by the scholars, experts and other social resources." See Notice, *supra* note 27 (author translation) (encouraging collaboration and all who can help to work together).

On the first issue, some scholars argue that part-time members should account for well over half of all committee members, because this would help to mitigate interference from the administration and better safeguard the independence of the reconsideration process.<sup>55</sup> This is a compelling argument. However, it may be difficult for county-level governments,<sup>56</sup> particularly in rural areas, to make such provisions. If this rule were to be adopted, it would be important to permit some exceptions, at least for a given period.

According to preliminary statistics compiled by the State Council LAO, there were a total of only 1,532 full-time ARC members throughout the country by the end of 2011.<sup>57</sup> This suggests that, to a large extent, civil servants must be handling administrative reconsideration cases alongside other duties. As to the qualifications of the full-time committee members, the Regulation on Implementation of the Administrative Reconsideration Law, issued by the State Council in 2007, provides that “specialized personnel for administrative reconsideration should possess the qualities, expertise and capabilities that are appropriate for performing their responsibilities for administrative reconsideration, and shall have obtained relevant qualifications.”<sup>58</sup> The regulation further stipulates that more “specific rules shall be

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<sup>55</sup> See, e.g., Xin Liu (刘莘), *Xingzheng Fuyi de Dingwei Zhizheng* (行政复议的定位之争) [On the Discussion of Position of Administrative Reconsideration], 26 FAXUE LUNTAN 10, 11–5 (2011) (discussing the independence of the reconsideration process as an outstanding issue).

<sup>56</sup> In China, there are four main levels of sub-national government: provincial, municipal, county, and township. According to the ARL, township-level governments may not serve as reviewing agencies for the purposes of administrative reconsideration. See ARL, *supra* note 4, art. 12-15 (prescribing the determination of reviewing agencies for administrative reconsideration).

<sup>57</sup> See Yang & Cai, *supra* note 32 (detailing the total full-time ARC members and putting that number in perspective as being extremely low).

<sup>58</sup> See *Xingzheng Fuyi Fa Shishi Tiaoli* (行政复议法实施条例) [Regulation on Implementation of the Administrative Reconsideration Law] (promulgated by the State Council, May 23, 2007, effective Aug. 1, 2007) 2007 STANDING COMM. NAT'L PEOPLE'S CONG. GAZ. 20, art. 4 (promoting scholarship and the gaining of other necessary skills to benefit the administrative reconsideration process).

made by the legislative affairs department of the State Council in conjunction with other relevant authorities of the State Council.”<sup>59</sup> To date, no such rules have been issued. Consequently, ordinary civil servants without legal qualifications can become full-time members of reconsideration committees—which would seem to undercut the main purpose of the ARC model, to improve the quality of reconsideration decisions.

*D. How Does the New Arrangement that Reviewing Agency Should Basically Serve as the Defendant in Administrative Litigation Influence ARCs?*

In Chinese administrative law, administrative litigation is the formal remedy of last resort, by which I mean that citizens who are dissatisfied with administrative reconsideration decisions usually retain the right to pursue administrative litigation next. In those circumstances, there would be two administrative agencies involved in the case: both the original agency decision-maker and the reviewing agency. Determining which agency should then serve as the defendant in the administrative lawsuit is an important and difficult issue.

The original ALL took a complex position, where determination of the defendant depended on the nature of the reviewing agency’s decision. There are three potential types of decision by the reviewing agency in a reconsideration case: confirmation, modification (including reversal and alteration), and omission (*i.e.*, refusal to accept the case, or no decision). In the first circumstance, where the reviewing agency has re-affirmed the challenged agency decision, the original ALL stipulated that the defendant and the primary target of judicial review should be the original agency decision-maker.<sup>60</sup> In the second circumstance,

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<sup>59</sup> *Id.*

<sup>60</sup> *See* ALL, *supra* note 3, art. 25 (“Regarding a reconsidered case, if the reconsideration organization upholds the original specific administrative act, the



where the challenged agency decision has been modified in the administrative reconsideration process, the original ALL stipulated that the defendant in subsequent litigation should be the reviewing agency, its reconsideration decision becoming the focus of judicial review.<sup>61</sup> In the third circumstance, where the reviewing agency has either refused to accept the case or made no reconsideration decision, determination of the defendant was left to the plaintiff's discretion, and the suit could be filed against the original agency decision-maker *or* against the reviewing agency for its failure to act.<sup>62</sup>

The key purpose underlying this complicated arrangement was to maintain a balanced administrative law caseload among the different levels of the Chinese judicial system. However, this arrangement caused an unexpected and troubling result: reviewing agencies tended just to confirm the original agency's decision in order to avoid becoming the target of an administrative lawsuit.<sup>63</sup> In China, there are many factors that make agencies want to avoid becoming a defendant in a lawsuit. Among these are entrenched cultural norms, and the continuing aversion of Chinese people to litigation.<sup>64</sup> Although this sentiment is growing weaker over time, it

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administrative organ that initially took the act shall be the defendant; if the reconsideration organization has changed the original specific administrative act, the reconsideration organization shall be the defendant.”).

<sup>61</sup> *Id.*

<sup>62</sup> See Zuigao Renmin Fayuan Guanyu Zhixing Zhonghua Renmin Gongheguo Xingzheng Susong Fa Ruogan Wenti de Jieshi (最高人民法院关于执行中华人民共和国行政诉讼法若干问题的解释) [The Interpretation of the Supreme People's Court of Several Issues Concerning the Implementation of the Administrative Litigation Law of the People's Republic of China] (promulgated by Judicial Comm. of the Supreme People's Court, Nov. 24, 1999, effective Mar. 10, 2000) 2000STANDING COMM. NAT'L PEOPLE'S CONG. GAZ. 3, art. 22 (describing the third circumstance).

<sup>63</sup> See *Fuyi Jiguan Gaibugai Zuoshang Beigaoxi* (复议机关该不该坐上被告席) [Should the Reviewing Agency Be the Defendant?], LEGAL DAILY, (July 4, 2010), <http://www.chinalaw.gov.cn/article/xzfy/llyj/201007/20100700257526.shtml> [perma.cc/XJB3-TSQE] (reporting reviewing agencies' choices to avoid becoming the defendant in administrative litigation by confirming the original decision, and stating that 330 cases of 360 administrative reconsideration cases supported the original decisions).

<sup>64</sup> See He Qinhua (何勤华), *Fansong yu Yansong de Lishi Kaocha—Guanyu Zhongxifang Falü Chuantong de Yidian Sikao* (泛讼与厌讼的历史考察——关于中西方

is still prevalent. Of course, the unwillingness of reviewing agencies to risk becoming a defendant themselves may have been based on many practical considerations as well. For example, preparing to defend against a lawsuit consumes an agency's time and energy, and if the agency were to lose the case, it would bear heavy costs.

Under the new ARC model, these problems were further exacerbated. For example, in the circumstance where an ARC is the actual adjudicator, but the decision is still credited to a reviewing agency, the reviewing agency would be even more reluctant to play the role of defendant in an administrative lawsuit. Many scholars came to argue that the original agency decision-maker should continue to be the defendant in administrative litigation subsequent to administrative reconsideration, no matter what decision was made by the reviewing agency in the interim.<sup>65</sup> But other scholars objected to this argument, and recommended maintaining the status quo,<sup>66</sup> or even making the reviewing agency *always* serve as the

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法律传统的一点思考)[*Historical Study on Pro-litigation and Anti-litigation—Thoughts on Legal Tradition between China and the Western Countries*], 3 FALÜKEXUE1, 15 (1993) (arguing that because of various factors, anti-litigation has prevailed in China since ancient times).

<sup>65</sup> For many scholars, under the new system of administrative reconsideration committee, the ARC is a neutral adjudicator, not simply the administrative decision-maker. Therefore, the decision made by the ARC is not an administrative act, but a quasi-judicial decision. The original agency decision-maker should be the defendant. See Qing Feng & Zhang Shuihai, *Xingzheng Fuyi Jiguan Zai Xingzheng Susong Zhong Zuo Beigao Wenti de Fansi*(行政复议机关在行政诉讼中作被告问题的反思)[*Reflection on the Administrative Reconsideration Agency Being a Defendant in the Administrative Litigation*], 1 XINGZHENG FAXUE YANGJIU1, 11–14 (2013) (stating that, with the reform of administrative reconsideration system and judicialization of administrative reconsideration, reviewing agencies should not continue to be defendants).

<sup>66</sup> See Zhao Yuan, *Jianxi Xingzheng Fuyi Jiguan de Beigao Diwei Wenti*(简析行政复议机关的被告地位问题)[*On the Administrative Reconsideration Agency as Defendant*], 4 HEBEI FAXUE155, 156 (2009) (arguing that no matter what the consequence of reconsideration is, an arrangement in which the original agency or reviewing agency is a defendant has many drawbacks and it is better to maintain the present arrangement with some adjustments).

defendant in administrative litigation (no matter what decision was reached in administrative reconsideration).<sup>67</sup>

After hot debates, the amended ALL ultimately seems to support the latter. The amended ALL dramatically changes the rule of determination of the defendant subsequent to administrative reconsideration.<sup>68</sup> As to three types of administrative reconsideration decision mentioned above (confirmation, modification and omission), the amended ALL maintains the old arrangement of the determination of defendant for modification and omission decisions, but completely changes the determination of defendant for confirmation decisions; in this circumstance, according to the amended ALL, the reviewing agency and the original agency decision-maker should be the co-defendants in administrative litigation subsequent to administrative reconsideration.<sup>69</sup> This means that the reviewing agency will basically be the defendant in most subsequent administrative litigation. Until this arrangement, reviewing agencies are experiencing the pressure of huge number of administrative litigation cases. In 2015, Courts at all levels heard 241,000

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<sup>67</sup> Supporters of this view believe that this arrangement will strengthen the responsibility for the reviewing agency. *Should the Reviewing Agency Be the Defendant?*, *supra* note 63.

<sup>68</sup> ALL, *supra* note 3, art. 26. As for these changes and the relevant comments, see Liang Fengyun (梁凤云), Xingzheng Fuyi Jiguan Zuowei Gongtong Beigao Wenti Yanju: Jiyu Lifa he Shifa de Kaoliang (行政复议机关作共同被告问题研究——基于立法和司法的考量) [Research on Issues about Administrative Reconsideration Agency as Co-defendants: Based on both Legislative and Judicial Reconsiderations], 6 ZHENGFA LUNTAN (政法论坛) [JOURNAL OF POLITICAL SCIENCE AND LAW], 122-135, (2016) (analyzing the reasons of the change and supporting the change.) Shen Fujun (沈福俊), Fuyi Jiguan Gongtong Beigao Zhidu zhi Jianshi (复议机关共同被告制度之检视) [Analysis on System of Reconsideration Agency as Co-defendants] 6 FAXUE (法学) [LAW SCIENCE], 108-118, (2016) (analyzing the practical influences of the change and criticizing the change.)

<sup>69</sup> Article 26 of the amended ALL provides “Regarding a reconsidered case, if the reconsideration organization upholds the original administrative act, the administrative organ that initially took the act and the reconsideration organization shall be the co-defendants; if the reconsideration organization has changed the original administrative act, the reconsideration organization shall be the defendant.” Amended ALL, *supra* note 3, art. 26..

administrative litigation cases of first instance and concluded 199,000 cases, up by 59.2% and 51.8% respectively over 2014<sup>70</sup>. The cases of reviewing agencies as the defendants account for a large proportion. So, the reviewing agencies have to spend more time in dealing with the administrative litigation. The following sentence gives the vivid description of workload: “The reviewing agency is either in the courtroom for answering the administrative litigation case or on the way to the court in order to prepare for answering the administrative litigation case ”<sup>71</sup>. As a result, reviewing agencies have not enough time and energy to hear the administrative reconsideration cases. Ever if they hear, they may tend to diminish the role of ARCs in order to strengthen the control the administrative reconsideration or to save the time.

## V. THE FUTURE OF ADMINISTRATIVE RECONSIDERATION IN CHINA

In early 2010, the State Council decided to list revision of the Administrative Reconsideration Law on its legislative agenda, and instructed its Legislative Affairs Office to prepare draft amendments.<sup>72</sup> Subsequently, the State Council LAO

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<sup>70</sup> See Zhou Qiang(周强), President of the Supreme People's Court (最高人民法院院长), Report on the Work of the Supreme People's Court, delivered at the Fourth Session of the Twelfth National People's Congress (最高人民法院工作报告——2016年3月13日在第十二届全国人民代表大会第四次会议上) (March 13, 2016), [http://www.chinahumanrights.org/html/2016/MAGAZINES\\_0919/5652.html](http://www.chinahumanrights.org/html/2016/MAGAZINES_0919/5652.html).

<sup>71</sup> See Shen Fujun(沈福俊), Fuyi Jiguan Gongtong Beigao Zhidu zhi Jianshi(复议机关共同被告制度之检视)[Analysis on System of Reconsideration Agency as Co-defendants] 6 FAXUE (法学) [LAW SCIENCE], 108-118, (2016)

<sup>72</sup>The Standing Committee of the National People's Congress, the State Council, the Central Military Commission, the Supreme People's Court, the Supreme People's Procuratorate, and the special committees of the National People's Congress may submit to the National People's Congress legislative bills, which shall be put on the agenda of a session by decision of the Presidium. Lifa Fa (立法法) [Law on Legislation] (promulgated by the Nat'l People's Cong., Mar. 15, 2000, effective Jul. 1, 2000), 2000 STANDING COMM. NAT'L PEOPLE'S CONG. GAZ. 2, art. 12. The State Council, the Central Military Commission, the Supreme People's Court, the Supreme People's Procuratorate or a special committee of

commissioned a group of administrative law scholars to provide “experts’ draft amendments” within one year. The ARC model served as the basis for the proposed draft amendments that eventually came out of that expert group’s deliberative process.<sup>73</sup>

After several years of waiting, the Report on the Work of the Standing Committee of the National People’s Congress (“NPC”), delivered by Chairman Zhang Dejiang of the NPC Standing Committee on March 9, 2014 for review at the Second Session of the 12th NPC and adopted on March 13, 2014, clearly said that revision of the Administrative Reconsideration Law will be the 2014 agenda of the NPC Standing Committee.<sup>74</sup> Thereafter, the revision of the Administrative Reconsideration Law was listed in the legislative plan of 2014 of the NPC Standing Committee. According to the plan, the NPC Standing Committee will finish the first reading the draft amendment of the Administrative Reconsideration Law.<sup>75</sup> This indicates that the NPC Standing

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the National People’s Congress may submit a legislative bill to the Standing Committee of the National People’s Congress. *Id.* at art. 24. Consequently, the State Council has the power to put forward the legislative bill about amendments to the ARL to the National People’s Congress and its Standing Committee. *Id.*

<sup>73</sup>The author, as a member of this expert group, participated in the group’s deliberations and drafting process. The draft that was submitted to the LAO at the end of 2011 aims to make administrative reconsideration the primary forum for resolving administrative disputes in China by improving its independence, openness and fairness. Besides supporting further development of the ARC system, other key elements of the experts’ proposed amendments include: (1) enlarging the scope of administrative reconsideration cases to include all administrative decisions except those excluded by express statutory provisions; (2) establishing a “public function test” to include decisions made by non-governmental bodies exercising public functions; and (3) generally judicializing administrative reconsideration procedures.

<sup>74</sup> *Quanguo Renmin Daibiao Dahui Changwu Weiyuanhui Gongzuo Baogao* (全国人民代表大会常务委员会工作报告)[*The Report on the Work of the Standing Committee of the National People’s Congress*] (Mar. 9, 2014), [http://www.npc.gov.cn/npc/dbdhhy/12\\_2/2014-03/17/content\\_1856100\\_4.htm](http://www.npc.gov.cn/npc/dbdhhy/12_2/2014-03/17/content_1856100_4.htm).

<sup>75</sup> See Xuewen Zhang, *Wei Quanmian Shenhua Gaige Tigong Qiangyouli de Fazhi Baozhang: Quanguo Renda Changweihui Chutai 2014 Nian Lifa Gongzuo Jihua* (为全面深化改革提供强有力的法制保障: 全国人大常委会出台 2014 年立法工作计划) [Providing Powerful Legal Guarantees for Comprehensively Deepening Reform: Legislative Plan of 2014 of the NPC Standing Committee], 8 *ZHONGGUO RENDA* [NAT’L PEOPLE’S CONGRESS] (2014), [http://www.npc.gov.cn/npc/zgrdzz/2014-05/14/content\\_1862889.htm](http://www.npc.gov.cn/npc/zgrdzz/2014-05/14/content_1862889.htm).

Committee has begun the revision of the ARL. However, the progress was not smooth. The NPC Standing Committee didn't begin the first reading because it didn't receive the Administrative Reconsideration Law bill. In 2015 and 2016, the thing remained so. As of this writing, it is difficult to predict when the revision of Administrative Reconsideration Law will be the real agenda of the NPC Standing Committee and to predict the outcome of ACRs.

The reason behind it is that it is hard to reach a consensus about how to revise the administrative reconsideration system. Because the administrative reconsideration committee system may diminish administrative power in some circumstances and has some above-mentioned concerns, it may not be the best choice. But it seems to have not formed the best alternative until now. Any legislative process requires complex bargaining between parties representing different interests, and revision of the Administrative Reconsideration Law will be no exception. The crucial step of revision of the Administrative Reconsideration Law is to find an equilibrium point between the different interests.

Undoubtedly, the ARC model still is an important choice. We should give an overall assessment of trial experimentation with ARCs and fully analyze the advantages and disadvantages of this new model, and then decide the fate of ARCs and development direction of the administrative reconsideration system.