

# China's Administrative Reconsideration and Administrative Litigation Cohesion Mechanism

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**ABSTRACT.** *In the long-term development process of administrative reconsideration and administrative litigation, many countries have become effective legal systems to protect national rights and properly handle administrative disputes. With the gradual deepening of practice, the current administrative reconsideration and administrative litigation connection model gradually revealed many problems and deficiencies, which urgently need to be resolved and improved. Administrative reconsideration and administrative litigation, as the two most important methods of dispute resolution in the field of administrative law in China, have many similarities, but there are also big differences. They both take effective protection of civil rights as their ultimate goal. The two relief systems have their own advantages. They can achieve effective convergence through mutual cooperation, so as to efficiently handle administrative disputes and better protect citizens' legitimate rights. Through an in-depth analysis of the problems existing in the connection between administrative reconsideration and administrative litigation in China, we have drawn a summary of legal considerations on perfecting the connection between the two procedures, and finally realized a good connection between administrative reconsideration and administrative litigation to help it better protect the administration. The legitimate rights of the opposite person.*

**KEYWORDS:** *administrative reconsideration, administrative litigation, cohesion*

## 1. Introduction

The establishment of administrative reconsideration and administrative litigation is to achieve the relief and protection of the legal rights and interests of the administrative counterpart, so that the rights of the administrative counterpart will be protected by law when the rights of the administrative counterpart are violated. From the perspective of procedural initiation, administrative reconsideration and administrative litigation have a natural ex post nature. [1] The specific procedures of

administrative reconsideration and administrative litigation can be initiated only when the interests of the administrative counterpart are damaged, and both of them are applicable. Principle. In China, the two are divided and adjusted by the "Administrative Reconsideration Law" and the "Administrative Procedure Law" respectively. [2] Due to the difference of the handling agencies, their natures are different. Subject to the different division of labor between the administrative agency and the judicial agency, the review agency and the agency under review are the subject of the same system in administrative reconsideration, while the two in administrative litigation are The subject of the system is not the same, so in the applicable law and basis? The scope of administrative reconsideration is also broader than administrative litigation. [3] This article will, on the basis of grasping the similarities and differences between administrative reconsideration and administrative litigation, start with the current dilemma of the connection model of administrative reconsideration and administrative litigation in China, conduct comparative law research, and at the same time deeply explore its practice path, in order to achieve the second Provide ideas for the good connection of the participants.

## **2. The connection model and predicament of China's administrative reconsideration and administrative litigation**

### ***2.1 The convergence model of administrative reconsideration and administrative litigation in China***

#### (1) Free choice

Free choice, that is, the administrative counterpart can freely choose a relief path in administrative reconsideration and administrative litigation. It contains two situations: one is the situation where a lawsuit can be brought directly without reconsideration; the other is a situation where the lawsuit can only be filed through administrative reconsideration first and the reconsideration decision cannot be accepted. In this regard, Article 44 of China's Administrative Procedure Law clearly stipulates: "For administrative cases that fall within the scope of the people's courts, citizens, legal persons, or other organizations may first apply to the administrative agency for reconsideration. If they disagree with the reconsideration decision, they shall apply for reconsideration. The people's court initiates a lawsuit; it can also directly file a lawsuit in the people's court. Laws and regulations stipulate that you should first apply for reconsideration to the administrative agency. If you refuse to accept the reconsideration decision and then file a lawsuit in the people's court, the provisions of laws and regulations shall be followed." [4]

#### (2) Pre-reconsideration

The pre-administrative reconsideration type means that when the administrative counterpart does not agree with a specific administrative act, the administrative counterpart should conduct a reconsideration first when seeking legal relief. If the reconsideration decision is still dissatisfied, or the reconsideration agency does not make a handling decision, the administrative counterparty People can carry out

administrative litigation. Common types of important cases in the pre-reconsideration include: cases concerning taxation disputes, cases concerning natural resource rights that have been obtained, cases concerning restrictions or prohibitions on the concentration of business operators, etc.

(3) Final type of administrative reconsideration

The final type of administrative reconsideration means that after an administrative case has undergone administrative reconsideration, the parties can no longer use administrative litigation to obtain relief. There are two main situations for the final reconsideration: one is the selective reconsideration finality, where the parties can freely choose either reconsideration or litigation to resolve administrative disputes. However, after the reconsideration is selected, no further litigation can be filed if the reconsideration decision is not accepted. The second is that the unity of reconsideration is final. Only administrative reconsideration can be used to protect the legitimate rights and interests of the administrative counterpart, and no prosecution is allowed if the reconsideration decision is not accepted.

(4) Prosecution type

There is no specific regulation on the reconsideration procedure for the prosecution type, only the procedure for administrative litigation. When an administrative act made by an administrative entity is dissatisfied by the counterparty, it can directly file a lawsuit in the court. In China, there are several types of cases that can be applied to prosecution: penalties for maritime traffic safety, penalties for copyright infringement, penalties for false registered trademarks, and penalties for land management.

## ***2.2 Difficulties in the connection between administrative reconsideration and administrative litigation in China***

(1) Disconnection of administrative review scope

Article 6 of China's "Administrative Procedure Law" mentions that when administrative cases are tried, the people's courts need to examine and verify the legality of specific administrative actions, and the appropriateness of the administrative actions shall be tried by the administrative review agency. Article 3 of China's "Administrative Reconsideration Law" mentions that when reviewing specific administrative actions, their legality and appropriateness must be reviewed. However, there is no clear provision in the Administrative Litigation Law as to whether or not a lawsuit against a counterparty questioning the appropriateness of administrative actions must be accepted. In practice, as long as the behavior is subject to administrative reconsideration, whether it is due to legality or appropriateness, it seems likely to enter the proceedings. Because administrative litigation cannot solve the problem of the rationality of administrative actions, such a system design will inevitably cause a waste of resources. Due to the appropriateness of the original administrative act, the administrative reconsideration agency will be subject to judicial review if it makes a change decision. Under such

circumstances, if the court approves and maintains the change decision, it will only add the respondent Cost, making administrative reconsideration review of the rationality of administrative actions will eventually become a mere formality.

(2) Disconnection in applicable law

In terms of the application of law, both administrative reconsideration and administrative litigation explore the basis of whether the specific administrative actions of the administrative organs are legitimate or not. The "Administrative Reconsideration Law" does not clearly stipulate this content. For example, Article 28, paragraph 3, item 1 of China's "Administrative Reconsideration Law" mentions that if the specific administrative action is due to a problem with the applicable basis, then confirm and change or to revoke this behavior is illegal. Administrative litigation is based on laws and regulations and reference rules, which are detailed in Article 52 and 53 of China's Administrative Procedure Law. For example, in Article 70, Item 2 of China's "Administrative Litigation Law," it is mentioned that if the laws and regulations applicable to specific administrative actions made by administrative agencies are wrong, the wrong decision can be made in whole or in part. At the same time, it can also be sentenced to re-implement the administrative subject of the act. Emphasize the fallacy of specific administrative actions in the application of laws and regulations, which is very different from administrative reconsideration. Administrative reconsideration does not specifically restrict the application of normative documents, while administrative litigation has strict restrictions on the application of normative documents. This shows that the divergence of legal provisions has led to the inconsistency in the application of the two laws, and then the phenomenon of disconnection has emerged.

(3) Identify the disjointed qualifications of the parties

The determination of the qualifications of the parties will have an impact on the protection of the infringed interests, and is an important prerequisite for administrative reconsideration or administrative litigation. Article 2 of China's "Administrative Reconsideration Law" mentions that citizens, legal persons, or other organizations have the right to conduct administrative reconsideration if they believe that specific administrative actions have harmed their legitimate rights and interests. However, at this time, citizens, legal persons, or other organizations and administrative litigation differ in the definition of the qualifications of the parties, and they are only limited to the counterparts of specific administrative actions. However, in the administrative litigation, the qualifications of the parties mentioned are all citizens, legal persons or other organizations that have a legal interest in the specific administrative act being sued. The Supreme People's Court of China also mentioned that the subject that can initiate an administrative litigation is the Citizens, legal persons, or other organizations that have a legal interest in specific administrative actions have expanded the scope of realizing the rights of the parties concerned, which is also more helpful to resolve disputes as soon as possible. The distinction between the two parties in determining the qualifications of the parties is likely to result in that the counterparty may not have the right to initiate reconsideration for the same specific administrative act according to the

"Administrative Reconsideration Law", but will have the right to sue according to the judicial interpretation of the Supreme People's Court. This will not only lead to situations where administrative reconsideration cannot be accepted but administrative litigation can be accepted, but also conflicts with some accepted administrative reconsideration cases.

(4) The scope of administrative reconsideration is out of touch with the scope of administrative litigation

In terms of the scope of the case, the "Administrative Reconsideration Law" refers to specific administrative actions concerning property rights, personal rights, education, labor and other rights made by administrative agencies. If the administrative counterpart is not satisfied, he can apply for reconsideration. In the case of administrative actions, incidental reviews can be filed together. [5] However, the "Administrative Litigation Law" stipulates that if the administrative counterpart disagrees with the specific administrative actions related to property rights and personal rights made by administrative agencies, they can file an administrative lawsuit; if they disagree with specific administrative actions other than the relevant property rights and personal rights, they must Only those stipulated in laws and regulations can be prosecuted, and abstract administrative acts cannot be prosecuted. Therefore, the scope of the two cases is out of touch.

### **3. Enlightenment from typical models of administrative reconsideration and administrative litigation in other countries**

#### ***3.1 Comparative law research on the connection model of administrative reconsideration and administrative litigation in other countries***

(1) U.S. administrative reconsideration and administrative litigation convergence model

The United States has adopted the principle of exhaustive administrative relief in the connection of the two procedures. In principle, all administrative cases in the United States shall apply this principle. This principle not only requires the parties to seek administrative relief, but also refers to the entire administrative relief. The procedure is over; judicial remedies cannot be obtained for the infringements suffered, unless it is impossible to obtain remedies through any administrative procedures. In order to better deal with the jurisdiction of the administrative reconsideration agency and the court, the principle of first instance requires that in cases where the administrative agency enjoys the right of first instance, the parties can only seek administrative relief first, rather than directly bring the case to court. This is very similar to the pre-reconsideration, but it also requires exhaustion of all possible relief methods, otherwise it cannot directly seek judicial relief from the court, so its system setting is more thorough.

(2) German administrative reconsideration and administrative litigation convergence model

Germany determines its different trial rules according to different types of litigation in the law. Among them, confirmation suits, general benefit suits, and continuing confirmation suits can be directly filed without administrative reconsideration. For other types of litigation, the pre-reconsideration shall be adopted as the criterion, and the direct litigation shall be the exception. Germany's cohesive model provides the greatest degree of convenience for administrative counterparts. When any type of administrative agency violates civil rights, the administrative counterpart can choose a corresponding type of litigation, so it can better deal with the administrative counterpart. Protect the legitimate rights and interests of

(3) French administrative reconsideration and administrative litigation convergence model

France has changed from the principle of pre-administrative reconsideration to exception. Now it adopts a cohesive mode of free choice by the parties. That is to say, the parties can choose to directly file a lawsuit without reconsideration, or they can choose administrative reconsideration first, and then they can sue after dissatisfied with the results. . France has overturned the pre-administrative review system, but there are exceptions in certain special circumstances. It mainly includes two aspects: on the one hand, the parties must first request compensation for the infringement suffered by the administrative subject, except for public works compensation suits, when the parties are dissatisfied with the decision made by the administrative agency or the administrative agency does not act. Only then can a lawsuit be brought to the court. On the other hand, there are exceptions provided by law. The precondition for administrative litigation must be administrative reconsideration. [6]

(4) Japanese administrative reconsideration and administrative litigation convergence model

The convergence model adopted by Japan is the free choice of the parties. At the same time, the "Administrative Case Procedure Law" Article 8 paragraph 1 has specific and detailed provisions on exceptions. For the cancellation of a specific administrative act in an administrative litigation, an administrative litigation cannot be initiated directly. An administrative review must be carried out first, and an administrative ruling must be made before an administrative litigation can be initiated. The difference from the French model is that many laws in Japan provide for some exceptions before reconsideration, such as tax administrative litigation cases. Because such cases are characterized by heavy workload, high technical requirements, and strong professionalism, administrative reconsideration first and then administrative litigation can not only handle a large number of administrative disputes through administrative channels, but also reduce the burden on judicial organs.

### ***3.2 The enlightenment of the connection model of administrative reconsideration and administrative litigation in other countries***

#### **(1) Set clear standards and have proper goals**

Through the above comparison, we can clearly see that the outstanding feature of the convergence model of administrative reconsideration and administrative litigation in various countries is that they have very clear standards for the convergence of the two, whether it is pre-reconsideration, free choice or other types. Types reflect very clear setting standards. In other words, which remedies are applicable under what circumstances are very clear and will not be difficult for administrative counterparts to understand. For example, the convergence model established in Germany is based on the type of litigation to determine the convergence procedure, while France and Japan adopt a liberal choice of parties. They all set out the principles and exceptions in a very clear and orderly manner, making the entire convergence standard also very clear. Although the United States, which implements the principle of exhaustive administrative relief, does not explicitly mention the special circumstances of the principle in the statutory law, the courts with the right to decide whether to use the principle have great discretion and will ultimately determine it in the form of precedent. Exceptional circumstances, which also makes the standard of convergence relatively certain.

#### **(2) Implement the principle of final judicial decision**

The principle of final judicial ruling is a very important principle of contemporary administrative rule of law. It requires that in the event of administrative disputes, no matter what remedy path is adopted by the administrative agency, the application of the judicial path cannot be excluded, that is, the opposite party can finally adopt the judicial path To resolve administrative disputes. The important role of the final judicial ruling principle in supervising the administrative agency to exercise its powers reasonably and appropriately and safeguarding the legitimate rights and interests of the counterparty cannot be denied. At the same time, there is no administrative reconsideration of the administrative agency in the final judicial decision principle, which eliminates the possibility of the administrative agency "being its own judge", making fairness and justice be realized. Although various countries have adopted different models for the connection of administrative reconsideration and administrative litigation, they all follow the principle of final judicial ruling. In a sense, the principle of final judicial ruling is actually for each country's administrative reconsideration and administrative litigation. The establishment of the connection relationship provides a solid institutional guarantee.

#### **(3) Effective relief for civil rights**

Looking at the connection models of administrative reconsideration and administrative litigation in various countries in the world, it is not difficult to find that although the models are different, they are all for the effective relief of the legitimate rights and interests of citizens, but the expression methods are slightly different. For a specific administrative dispute, determine whether it is directly used for administrative internal remedy or through administrative external remedy (ie,

judicial relief). The criterion for determining is which method is more useful to protect the legitimate rights of the parties and can be more timely and effective To resolve administrative disputes. It can be seen from this that when each country resolves the issue of procedural connection between administrative reconsideration and administrative litigation, it is the same principle for the legal rights of parties to obtain relief. In addition, any convergence model between administrative reconsideration and administrative litigation cannot be far away.

(4) The administration and the judiciary cooperate with each other to protect the rights and interests of citizens, and to supervise the administration of administrative agencies according to law

The procedure for determining the type of litigation in Germany fully reflects the mutual cooperation between the administration and the judiciary, and the complementary connection between the administration and the judiciary is determined in the legislative process. The principle of exhaustive administrative relief adopted by the United States to give administrative agencies the opportunity to correct themselves has avoided the adverse effects of judicial intervention on the resolution of administrative disputes, and has given full play to the strengths of administrative agencies. [7] Although various countries have different system designs for the connection between the two procedures, each has its own characteristics, but they all combine the administrative and judicial procedures, and give full play to their respective strengths and cooperation. Organs shall conduct administrative supervision according to law and protect the legitimate rights and interests of the parties.

#### **4. Analysis and discussion on the connection between administrative reconsideration and administrative litigation in China**

##### ***4.1 An analysis of the connection between administrative reconsideration and administrative litigation in China***

(1) There are many ways to connect, so that professionals can understand

In China, as there are many separate administrative laws and regulations, there is no consistent standard for the connection between administrative reconsideration and administrative litigation. China's administrative laws and regulations are very rich in content. The separate laws and regulations have inconsistent provisions on the connection of reconsideration and litigation procedures, which are often not understood by the relatives. In the course of practice, when administrative agencies make specific administrative actions to confirm the ownership or use rights of one party, situations will often occur that damage the legally obtained natural resource ownership or use rights of the neighboring counterparty. In this case, according to Article 6 of China's "Administrative Reconsideration Law," one party can apply for reconsideration or directly file a lawsuit. According to the content of Article 30, when a party is not satisfied with a specific administrative act, it can only apply for administrative reconsideration first. Therefore, after a dispute occurs, the



administrative counterpart can only rely on the provisions of separate laws and regulations. There is no law that can be followed in rights relief, and it is difficult for the parties to accurately understand and correctly choose the method of safeguarding their rights.

(2) Different scope of trial

In terms of the scope of trial, the legality and appropriateness of specific administrative actions are reviewed by administrative reconsideration, while administrative litigation only reviews their legality. In terms of specific administrative actions, administrative reconsideration is more extensive than administrative litigation in terms of the scope of cases to be tried. In addition to the enumerated provisions, the Administrative Reconsideration Law also has the following provisions: "Those who believe that other specific administrative actions of administrative agencies infringe their legal rights", while in the "Administrative Litigation Law" it is limited to "the administrative agencies infringe other personal rights, "Property rights", this shows that administrative litigation only adds important and specific administrative actions to the scope of cases to be tried, which makes the two in the scope of cases to be tried out of line, which in turn causes the court to accept the Administrative Procedure Law Difficulties in administrative reconsideration cases not mentioned in. As far as abstract administrative actions are concerned, Article 7 of China's "Administrative Reconsideration Law" refers to the supervision of abstract administrative actions as a legal system, which is a major breakthrough in legislation. However, the "Administrative Litigation Law" does not include abstract administrative acts outside the scope of administrative litigation cases. If it is an abstract administrative act in a normative document below the rules, the court can request the court for additional review. The "Administrative Reconsideration Law" includes abstract administrative actions in the scope of administrative reconsideration cases, and it is not complete to just allow them to seek administrative relief. Because administrative reconsideration is still "the judge of one's own case" under certain circumstances, its fairness should be tested by justice in the end.

(3) Problems with applicable laws and regulations

Administrative reconsideration and administrative litigation have the same legal basis. In China, laws formulated by the National People's Congress and its Standing Committee, administrative regulations formulated by the State Council, local regulations formulated by local people's congresses, and autonomous regulations and separate regulations of ethnic autonomous areas . [8] Regarding the issue of whether the rules and the generally binding decisions and orders announced by the higher administrative organs can be used as the legal basis for the two, they have different positions. In administrative reconsideration, the above-mentioned basis and the decision or order of the higher-level administrative agency, like laws and regulations, can be the legal basis for the reconsideration agency to review the reconsideration case. In administrative litigation, the court can only refer to the regulations of various ministries and commissions and provincial and municipal

regulations when trying administrative cases. Therefore, the legal basis of administrative litigation is much smaller than administrative reconsideration.

#### ***4.2 Discussion on the connection between administrative reconsideration and administrative litigation in China***

##### (1) Clearly list the pre-reconsideration type

For proper consideration, certain highly professional administrative actions can only be handled by administrative reconsideration agencies with professional knowledge. Therefore, pre-reconsideration will exist for a long time in some fields. But it must be controlled within the scope of strong professionalism, and it must be clearly and specifically stipulated. First, limit the pre-reconsideration categories to certain highly technical and professional cases, so that the administrative agencies' professional and technical advantages, such as trademarks, patents, and taxation, can be better utilized; The scope of the reconsideration is determined by the law itself, which will help the counterparty to obtain effective protection.

##### (2) Expand the scope of administrative litigation

The scope of China's administrative reconsideration is wider than that of administrative litigation, which makes the connection between the two out of touch, and then emerges the situation of final reconsideration. [9] With the rapid development of the market economy in China, the people continue to attach importance to the protection of rights, and the state has the mission to provide more favorable judicial relief to them. Therefore, in terms of the scope of cases, the administrative counterparty's right to prosecute should be maximized. , To ensure the highest level of citizens' litigation rights, where there is right, there is relief. Therefore, expanding the scope of administrative litigation is not only a requirement of the administrative rule of law, but also makes the connection between the two more harmonious.

The scope of case acceptance is the basis for specific administrative actions. The scope of case acceptance mentioned in China's Administrative Procedure Law refers to the specific administrative actions of administrative agencies and their staff. Citizens, legal persons or other organizations believe that they have the right to damage their legitimate rights. Proceed to the court in accordance with this law. Article 12 of China's "Administrative Litigation Law" specifies the categories of specific administrative actions in administrative litigation; Article 13 lists the categories of non-actionable administrative actions. Therefore, it can be seen that the scope of case acceptance is limited in China's administrative litigation, which limits the right of citizens to pursue judicial protection, and affects the level of protection of citizens' personal rights, property rights and other rights. Therefore, the scope of administrative litigation should be expanded to ensure citizens' litigation rights, so that citizens' rights are better protected.

(3) Cancel the final mode of administrative reconsideration and implement the principle of final judicial decision

One of the primary signs of contemporary democratic countries under the rule of law is the effective limitation and supervision of administrative power through judicial power. This is well reflected in the principle of final judicial ruling. The principle of final judicial ruling makes judicial power an effective way to supervise administrative power. Means to avoid abuse of administrative power in the process of resolving specific administrative disputes. The abolition of the final administrative reconsideration model is to realize the restriction of judicial power on administrative power, not to allow judicial power to replace administrative power.

Selective reconsideration finality and unitary reconsideration finality are two modes existing in Chinese legislation. In essence, these two models restrict the administrative counterpart's right to use administrative relief, which is contrary to the principle of final judicial decision. The final reconsideration model certainly considers the efficiency of administrative remedies, but this is only an internal dispute resolution mechanism for administrative agencies, and it cannot achieve judicial supervision of administrative power, and it is not conducive to effective relief of the rights of administrative counterparts. It is unfair. It will still happen. In accordance with the requirements of the final judicial decision principle, the right of the administrative agency to make a final decision must be gradually cancelled, so that it can be more helpful for the judicial power to restrict the administrative power and protect the right of the administrative counterpart to file a lawsuit. Therefore, the final mode of administrative reconsideration should be abolished and the principle of final judicial decision should be implemented.

(4) Promote a free choice model to fully protect the legitimate rights and interests of citizens

In essence, the establishment of remedies is mainly for personal gain, so the parties should be trusted to make rational choices for their own rights. Because the purpose of setting up administrative reconsideration and administrative litigation is to protect the private interests of administrative counterparts, it is necessary to implement an unrestricted free choice model and give the administrative counterparts the right to choose relief procedures to exercise themselves. From the evolution of the connection between administrative reconsideration and administrative litigation procedures in France, Japan and other countries, we have found that when the administrative subject harms the legitimate rights and interests of the administrative counterpart, it has become a common trend for all countries to choose the legal remedy procedure independently.

In the current process of the construction of the administrative rule of law in China, as the function of the administrative reconsideration mechanism is slowly declining, it is not possible to compulsorily stipulate the pre-model of administrative reconsideration in law. Only when the administrative counterpart is free to choose, the two can obtain a reasonable room for survival and development in cooperation and competition. Therefore, it is necessary to respect and protect the autonomous choice of administrative counterparts, and implement a free choice model to protect their legitimate rights and interests.

#### 4. Conclusion

With the continuous development of democracy and the rule of law in China, the convergence model of administrative reconsideration and administrative litigation has gradually become perfect. The construction of the rule of law is not an overnight project. Improving the convergence model of administrative reconsideration and administrative litigation is also completed step by step. This requires improving the legal environment, establishing citizens' concept of the rule of law, improving the level of the courts to hear cases, and enhancing the overall quality of judges. In such a legal environment, develop and improve a rich, diverse and effective administrative relief system, so that various relief systems can play their respective roles in a coordinated and interconnected relationship, so as to achieve the goal of resolving disputes and protecting the legitimate rights of all parties. Ultimately achieve social harmony and stability.

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