

## HOW MUCH PROGRESS CAN LEGISLATION BRING? THE 2014 AMENDMENT OF THE ADMINISTRATIVE LITIGATION LAW OF PRC

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### ABSTRACT

The Administrative Litigation Law of the People's Republic of China underwent significant amendments in 2014, the background, process, main contents, and preliminary effects of which will be examined in this paper.

Generally speaking, the amendments have made a powerful response to issues besetting the judicial review of agency action in China, especially the “difficulties in getting an administrative lawsuit registered, adjudicating administrative cases, and executing court decisions.” After the amended Administrative Litigation Law came into effect, the acceptance of first instance administrative lawsuits increased sharply, the plaintiff's winning rate rose slightly, and the reform of the administrative reconsideration and petition mechanisms were further advanced. In my opinion, the amendments have achieved the legislators' desired results, and the administrative litigation in China is embracing the best ever period in its history.

However, the deep-seated problems that have troubled administrative litigation for years still exist. Courts' review of normative documents, the collateral review of local regulations, and the acceptance of public interest litigation have all been evaded.

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Furthermore, full independence and authority of administrative trials still requires an overall judicial and political reform. Consequently, administrative adjudication still faces a difficult path.

The amendments of the Administrative Litigation Law not only reflect the efforts to promote the rule of law in this era, but also illustrate the limitations of the process under the rule of law in China at this stage.

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The Administrative Litigation Law of the People's Republic of China (hereinafter referred to as the "Law") underwent significant amendments for the past twenty-five years since its promulgation in 2014. It was hoped that the amendments would solve difficulties in settling administrative disputes and help establish the rule of law in China. This paper will examine the background, courses, main contents and the preliminary effects of the amendments. The author is mainly concerned with the following issue: the leading party proclaims that this era seeks to "promote the rule of law in an all-round manner," but how much progress may the amendments bring to China's legal system construction?

## **I. THE BACKGROUND OF THE ADMINISTRATIVE LITIGATION LAW AMENDMENTS**

### **A. The Symbol of Democracy and the Rule of Law**

The current administrative litigation system in China was established by the 1989 Administrative Litigation Law (the "1989 Law"). The 1989 Law was adopted by China's highest institution of state power—the National People's Congress (hereinafter referred to as the "NPC") on the eve of the "Tiananmen Incident," and was scheduled to take effect in October 1990—a year and a half later. It is not common to deliberate and adopt a law by a group of nearly 3000 deputies in China; in fact, it is rare to spend one and a half years on preparing for a legislation. This is a sign of this country's grave and arduous transition to a modern governance system.

The Law allows citizens and organizations to file a complaint against the peoples' government or its divisions regarding their action or inaction in the peoples' courts at different levels, with the latter hearing the case. It is a totally new attempt in China's traditional bureaucracy and contemporary party-state system that an independent judicial body, instead of the administrative agency's superior, examines the action of the agency concerned. Fully aware

of the impacts and difficulties in the implementation of the Law, the Legislators were cautious and granted a relatively limited power to courts in the Law. Citizens may litigate against specific administrative decisions, but may not file a lawsuit against generally applicable normative documents. Courts may only judge the legality of administrative action according to laws and regulations and may not review with principle administrative discretion, nor could courts review the constitutionality of laws and regulations.

The promulgation of the Law has been deemed from the beginning as a significant event in the construction of democracy and rule of law in China. The government and academic circles have held activities to mark the fifth, the tenth and twentieth anniversary of the Law's promulgation, and the mass media has widely publicized in celebration of the law. Courts nationwide have accepted and concluded more than 2.1 million administrative lawsuits by 2014. By a rough estimate, one-fourth of the plaintiffs had got some sort of relief through litigation. Administrative litigation has also helped increase the awareness of administration by law and promoted the perfection of the administrative law system. Without administrative litigation, many of the plaintiffs would have been still running on the road to petition, and many of the officials would not have heard of terms such as "excess of power" or "due process." "The significance of The Law can never be overstated,"<sup>1</sup> said Professor Ying Songnian (应松年), who has been involved in drafting the Law.

### **B. Predicaments of Administrative Litigation**

Nevertheless, the implementation of the Law has proved to be unusually difficult. Ordinary people described administrative

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<sup>1</sup> Ying Songnian (应松年), *Zhongguo Xingzhengfa de Chuangzhi yu Mianlin de Wenti* (中国行政法的创制与面临的问题) [*The Making and Problems of Chinese Administrative Law*], 1 Jianghai ACAD. J (2001). For more discussion, see Ying Songnian, Yu Fa Tong Xing (与法同行: 应松年口述) [WALK WITH LAW: YING SONGNIAN'S NARRATION] (China Univ. Political Sci. & Law Press 2016), at 107, 183 (discussing the Law and its repercussions).

litigation as “hurling an egg against a rock,” judges mocked themselves as “living in the crevice,” and scholars’ descriptions were filled with words such as “hardship” and “predicament.”<sup>2</sup> Prior to the amendments of the Law, the National People’s Congress Legislative Affairs Commission (hereinafter referred as the “Commission”) summarized in its survey report the predicaments of administrative litigation as a “difficulty in getting an administrative lawsuit registered, a difficulty in adjudicating administrative cases, plus a difficulty in executing court decisions.”<sup>3</sup> The “Three Difficulties” were widely accepted and set the tone for future legislation.

### 1. The Difficulty in Getting an Administrative Lawsuit Registered

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<sup>2</sup> For a comprehensive investigation of the situation, *see generally* Gong Xiangrui (龚祥瑞), *IDEAL AND REALITY OF THE RULE OF LAW: REPORT ON THE ACTUAL IMPLEMENTATION AND FUTURE DEVELOPMENT OF THE ADMINISTRATIVE LITIGATION LAW OF THE PEOPLE’S REPUBLIC OF CHINA* (法治的理想与现实) (China Univ. Political Sci. & Law Press 1993); Lin Lihong (林莉红), *IDEAL AND REALITY OF THE ADMINISTRATIVE RULE OF LAW: REPORT ON THE EMPIRICAL RESEARCH ON THE IMPLEMENTATION OF THE ADMINISTRATIVE LITIGATION LAW* (行政法治的理想与现实) (Peking Univ. Press 2014) (each describing the implementation of the Law). For discussion in English journals, *see generally* Susan Finder, *Like Throwing an Egg against a Stone: Administrative Litigation in the People’s Republic of China*, 3 *J. CHINESE L.* 1 (1989) (discussing the history of administrative litigation in China and analyzing the provisions of the Administrative Litigation Law ); Pei Minxin, *Citizens vs. Mandarins: Administrative Litigation in China*, 152 *CHINA Q.* 832 (1997) (examining the patterns of administrative litigation after the enactment of the Administrative Litigation Law and evaluating the effectiveness of the Law’s implementation); Kevin O’Brien & Li Lianjiang, *Suing the Local State: Administrative Litigation in Rural China*, 51 *CHINA J.* 75 (2004) (relating the implementation of the Law in rural China); He Haibo, *Litigations without a Ruling: The Predicaments of Administrative Law in China*, 3 *TSINGHUA CHINA L. REV.* 257 (2011) (focusing on the administrative implementations and repercussions of the Law).

<sup>3</sup> Xin Chunying (信春鹰), *Guanyu Zhonghua Renmin Gongheguo Xingzheng Susong Fa Xiuzhengan Cao’an de Shuoming* (关于中华人民共和国行政诉讼法修正案草案的说明) [Explanations on the Amendment of the Administrative Litigation Law of the PRC], the Sixth Plenary Session of the 12<sup>th</sup> Standing Committee of the NPC on Dec. 23, 2013.

The most prominent problem in implementing the Law is the difficulty in getting an administrative lawsuit registered. Lawsuits of sensitive areas relating to birth control (early stage), land expropriation and house removal, town planning and illegally-built structure demolition, and business shut-down, where there were intensive disputes and frequent mass incidents, were found especially difficult to enter litigation. Some courts simply did not accept any such cases. “The work in our division is to battle against the ordinary people with wits and courage,” said a judge of the lawsuit-registration division who does not wish to give out his name, “and to make every attempt to not register the lawsuit.” A chief judge of a High People’s Court administrative division estimated that, in his jurisdictional area, about one-third of all the lawsuits filed with the courts were accepted. Because a large number of lawsuits were rejected by the courts and could not be resolved through litigation, those people concerned had to turn to petitioning. According to Professor Yu Jianrong’s 2004 survey, 401 out of 632 farmers who went to Beijing for petitions had filed a lawsuit about their problems with the local court before they turned to petitioning; 172 lawsuits were rejected by the court, accounting for forty-three percent of the total.<sup>4</sup> The lawsuits the courts rejected were mainly government-involved disputes.

The difficulty in getting an administrative lawsuit registered was shown statistically by the small number of administrative cases. In 2014, 141,880 administrative cases of first instance were accepted by the courts nationwide, which created a historical record before the Law was amended.<sup>5</sup> But what did the number suggest? It represents a fractional ratio of one administrative case for around

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<sup>4</sup> Yu Jianrong (于建嵘), *Zhongguo Xinfang Zhidu de Kunjing he Chulu (中国信访制度的困境和出路)* [Plight of China’s Petitioning System and Way out], 1 STRATEGY & MGMT. (2009).

<sup>5</sup> The statistic here and the ones below on administrative litigation, unless otherwise stated, have been provided by the Supreme People’s Court Research Office Statistics Division. Some of them may be found in the *Law Yearbook of China* (中国法律年鉴) of respective year. Readers may also see the relative parts of He Haibo’ *Administrative Litigation Law* (Law Press China 2016).

ten thousand people, and fewer than forty administrative cases for a court on average. Many courts accepted and heard fewer than ten administrative cases throughout a year. Among the nine million various cases of first instance accepted and heard by the courts nationwide, only 1.5 percent were administrative cases. Compared with 4-6 million petitions arising from administrative disputes to the Bureau for Letters and Visits at various level per year, administrative cases were almost trivial.<sup>6</sup> Compared with other countries, there were surprisingly fewer administrative cases in China. France has only a population of sixty million, equal to that of the seventh largest province in China, but French local administrative courts heard 190 thousand cases a year, which is more than that by the total of Chinese courts.<sup>7</sup> Given the fact that in China, administrative dispute resolution is not required in principle to “exhaust administrative remedies,” and disputes handled (not solved) through administrative reconsideration are no more than the ones through administrative litigation, 140 thousand cases in a year is really a small number.

## 2. Difficulty in Adjudicating Administrative Cases

The difficulty in adjudicating administrative cases was at first manifested when only a fraction of administrative cases were closed with judgement. In previous years before the amendments, the courts only closed fewer than thirty percent of the administrative cases with judgment, which was even lower than that of civil cases. Where were the remaining cases then? The courts had actually found various reasons to dismiss the lawsuits instead of entering substantive judgment. A substantial number of cases, with fifteen percent in a year at its utmost before the law’s amendment, were simply dismissed by the court. More cases ended because the courts

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<sup>6</sup> Sun Qian (孙乾), *Min Gao Guan Xinfang Anjian Nian Chao 400 Wan Jian* (“民告官”信访案件年超400万件)[Citizen v. Official Type Petitions Over 4 Million per Year], *Beijing Times*, Nov.5, 2014, p.3.

<sup>7</sup> THE CONSEIL D'ÉTAT, <http://english.conseil-etat.fr/Judging> [https://perma.cc/9CMC-RFDQ] (last visited Dec. 18, 2016).

have tried to persuade the plaintiffs to withdraw. The withdrawal rate has never been lower than thirty percent since after the Law became effective, and the highest one reached fifty-seven percent. The low rate of judgement stemmed partly from the authority's efforts to advocate a judicial policy of coordination and reconciliation. But the main reason was that the courts did not have strong political and legal backing and they were unable to render a fair judgment according to law.<sup>8</sup>

Another manifestation of the difficulty in adjudicating administrative cases was the low rate of plaintiffs' win by court adjudication and the consequently high appeal and petition rates. Plaintiff first instance winning rate dropped all the way from twenty percent when the Law was first implemented to eight percent in years before the amendments. Almost eighty percent of the parties of all cases closed by judgement would appeal against the court judgment. Ninety percent of the appellants were plaintiffs, and agencies only accounted for five percent. The bias at the first trial can be seen at a glance. One may assume that courts of the second instance might handle the appeals more in favor of the citizens. However, only less than ten percent was favorable to the appellants and seventy percent to eighty percent was favorable to the appellees. Putting them together, only one out of ten citizens won by judgment at the first and second instances. Due to the low winning rate at the first and second instances, the rate of petition to a further higher court of administrative cases was several times higher than that of civil cases.

Evidently, the low winning rate of citizens could not be ascribed to good law enforcement by agencies. According to a judge who is unwilling to reveal his identity, administrative actions filed with the court were mostly questionable, and half of them should have been revoked (but the judge did not do so). The courts in Taizhou, Zhejiang Province, once executed cross-regional jurisdiction, namely, to transfer cases against agencies of County A

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<sup>8</sup> He Haibo, *supra* note 2.

to the court in County B for trial, and those against agencies of County B to the court in County C. The one year's result showed that the government's losing rate reached 62.5 percent.<sup>9</sup> Beginning in July 2014, all the courts in Henan Province executed cross-regional jurisdiction across the whole province and the one-year result showed that the government's losing rate reached 28.6 percent, 18 percent higher than that before the cross-regional jurisdiction was practiced.<sup>10</sup> As cross-regional jurisdiction was less subject to administrative interference, the losing rate of Taizhou and Henan seemed to be more reflective of the actual level of administrative law enforcement and the potential level that judicial review in China should have reached.

The third manifestation of the difficulty in adjudicating an administrative case was that citizens rarely won a case in the real

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<sup>9</sup> Sun Wenying (孙文鹰) & Huang Xian'an (黄献安), *Xingzheng Anjian Yidi Shenpan: "Chen Chongguan Men" Xianxing Yibu* (行政案件异地审判: "陈崇冠们" 先行一步) [Cross-Regional Trial of Administrative Cases, Chen Chongguan and His Colleagues One Step Ahead], PEOPLE'S COURT DAILY (Feb. 5, 2004), <http://www.chinacourt.org/article/detail/2004/02/id/103160.shtml> [<https://perma.cc/W2VW-2TQ3>] (summarizing cases that stimulated the Chief Justice of Zhejiang Intermediate People's Court Administrative Tribunal, Chen Chongguan, to implement the mode of remote cross-regional trials of administrative cases and providing statistics of the result). For more discussion, see Zheng Chunyan (郑春燕) & Chen Chongguan (陈崇冠), *Guanyu Xingzheng Anjian Yidi Jiaocha Shenpan Moshi de Sikao* (关于行政案件异地交叉审判模式的思考), 1 J. OF ZHEJIANG GONGSHANG, (2005) (reflecting on the mode of a remote cross-regional trial of administrative cases based on its establishment, formalization, and legal theories); ADMIN. TRIBUNAL OF SUPREME PEOPLE'S COURT, ADMINISTRATIVE REGULATION AND JUDICIAL REVIEW 105-32 (Law Press China, Ser. No. 4. 2007) (providing a report on administrative cases of cross-jurisdiction in Zhejiang Province); He Cailin (何才林), *Jiafeng Zhong de Biange* (夹缝中的变革), 10 PEKING U. L. REV. (2009) (discussing the outcomes of cross-regional jurisdiction reform in certain courts).

<sup>10</sup> Shi Yan (时岩), *Henan Min Gao Guan An Yidi Guanxia Gaige: Geduan Difang Zhengfu Guanxi Wang* (河南民告官案异地管辖改革: 割断地方政府关系网) [Reform on Cross-Regional Jurisdiction of Cases against Authorities Brought by Ordinary People: Sever Local Government's Network], PEOPLE'S DAILY ONLINE, (Aug. 11, 2015), <http://henan.people.com.cn/n/2015/0811/c356896-25927749.html> [<https://perma.cc/4TAK-6C8A>].

sense. In some cases, the court revoked the administrative action in question or ordered the agency to perform its duties. It seemed that citizens had won their cases, but the cases were actually switched back to center on administrative procedures. The litigation would probably have to go through the procedures again after the agency at issue enters a new decision. Some extreme case even went over many rounds. Some disputes involved both an administrative action and the interests of a third party. The party concerned had to proceed separately with the civil action and administrative litigation. Unfortunately, much energy was wasted on many pointless things due to the lack of coordination on the courts' side. In one extreme case, the parties got twenty-eight judgments and rulings of different courts in different procedures in ten years but were still on the way of petition.<sup>11</sup> In such circumstances, a citizen could only get an empty win at best, and the dispute had not been really settled.

### 3. Difficulty in Executing Court Decisions

The difficulty in execution was not a common problem in the past. There were not many administrative cases of compulsory execution (including cases when a citizen was the obligator). These cases dropped from the highest forty thousand pieces to fewer than ten thousand pieces in recent years, accounting for only 4.6 percent of administrative cases. There are even fewer conflicts relating to execution on record in statistics, which may suggest that litigants increasingly obey the effective court's judgments and resistance is decreasing. The other reason may be that the court had already ruled out some tough cases while they put cases on file and considered subsequent disposition while they adjudicated a case. Thus, difficulty in execution was overshadowed by the difficulties in case registration and adjudication.

Nonetheless, there were still a few difficult cases of

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<sup>11</sup> Wang Guisong (王贵松), *Xingzheng yu Minshi Zhengyi Jiaozhi de Nanti* (行政与民事争议交织的难题) [The Conundrum of Interwoven Cases of Civil Action and Administrative Litigation: Reflection from Jiaozuo Real Estate Dispute] (Law Press 2005).

execution, especially when there was strong resistance from the agency. In *FAN Zhanfei v. Department of Land and Resources of Shaanxi Province*, the plaintiff won a case concerning mining license in the High Court. The losing defendant went so far as to hold a multi-department coordination meeting to veto the effective court judgment.<sup>12</sup> In another extreme case, a court in Hunan Province ruled that a Tianjin public security sub-bureau should pay five million yuan in compensation but it was still not executed twelve years later, even though the Supreme People's Court expressed its concern and the Central Political and Legislative Affairs Committee of the Communist Party sent a letter.<sup>13</sup> Although such phenomenon is not common, it actually serves as a touchstone which reflects the incompetency of the judiciary and helplessness in the face of resistance. Such phenomenon has aggravated the public's impression that the court is useless and further dampen the parties' confidence in administrative litigation.

### C. The Law is in “Urgent Need of Amendment”

Judges have long known the problems in implementing the

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<sup>12</sup> Wang Wenzhi (王文志) & Xiao Bo (肖波), *Shan Guotuting Fou le Fayuan Panjue* (陕西国土厅否了法院判决) [*Department of Land and Resources of Shaanxi Province Vetoed the Court Judgment and Intensified the Ming Right Dispute*], THE ECON. OBSERVER (July 19, 2010), [http://jjckb.xinhuanet.com/yw/2010-07/19/content\\_238609.htm](http://jjckb.xinhuanet.com/yw/2010-07/19/content_238609.htm) [https://perma.cc/2AHW-GVL2]; Zhao Lei (赵蕾), *Shannxi Guotuting Foujue Fayuan Panjue Shiya Zuigaoyuan Yaoqiu Gaipan* (陕西国土厅否决法院判决 施压最高法院要求改判) [*Department of Land and Resources of Shaanxi Province Vetoed the Court Judgment and Pressed the Supreme People's Court to Amend the Judgment*], SOUTHERN WKLY. (Aug. 5, 2010).

<sup>13</sup> Wu Yi (吴意), Zhixing Nan, Nan Yu Shang Qingtian? (执行难, 难于上青天?) [*It is Easier to Climb to Heaven than to Execute a Judgement*]. 10 CHINESE LAWYER (2007); He Xin (贺信), *Panpei 500 Wan Gonganju 12 Nian Bu Zhixing Xingzheng Panjue Zhixing Nan Beihou de Kunjing* (判赔500万公安局12年不执行 行政判决执行难背后的困境) [*The Court Ruled that Tianjin Tanggu Public Security Sub-bureau Should Pay 5 Million Yuan Compensation But the Sub-bureau has not Executed It 12 Years Later*]. NANFANG METROPOLIS DAILY (Apr. 24, 2008), [http://www.360doc.com/content/08/0428/14/142\\_1220805.shtml](http://www.360doc.com/content/08/0428/14/142_1220805.shtml) [https://perma.cc/B4BT-2B4R].

Law. The court has made a great effort to settle the predicaments. However, judicial efforts are subject to the restrictions of the Law and, consequently, amending the Law is inevitable.

At first, judges have overcome some deficiencies of the Law's existing rules through an innovative interpretation of them. For instance, the court has attempted to break through the original restrictions on personal right and property right and incorporated the right to education and "other legitimate rights" into litigation so that the scope of administrative litigation could be expanded.<sup>14</sup> The court may on the basis of the "due process principle" revoke administrative actions so as to strengthen review of the legality of administrative actions, although legislation does not explicitly provide for administrative procedures.<sup>15</sup> If an agency does not, when it takes an administrative action, inform the interested party of the content or the relief approach and application deadline, the plaintiff shall be granted an extended time limit (beyond the statutory time limit of three months) for filing his complaint. These judicial innovations were altogether embodied in the "Ninety-eight Provisions of Judicial Interpretation" issued in 2000.<sup>16</sup> They show

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<sup>14</sup> He Haibo (何海波), *Xingzheng Susong Shouan Fanwei: Yiye Sifa Quan de Shijian Shi (1990-2000)* (行政诉讼受案范围: 一页司法权的实践史 (1990-2000)) [*Expanding the Scope of Administrative Litigation: One Page History of Judicial Practice 1990 – 2000*], 4 PEKING U. L. REV. (Ser. No. 2, 2002); Thomas Kellogg, "Courageous Explorers"?: *Education Litigation and Judicial Innovation in China*, 20 HARV. HUM. RTS. J. 141 (2007).

<sup>15</sup> He Haibo, *The Dawn of the Due Process Principle in China*, 22 COLUM. J. ASIAN L. 57–118 (2008).

<sup>16</sup> 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 Supreme People's Court Judicial Interpretation of Several Issues Relating to the Implementation of the Administrative Litigation Law of the PR] (2000), [http://www.npc.gov.cn/npc/lfzt/2014/2013-12/20/content\\_1817962.htm](http://www.npc.gov.cn/npc/lfzt/2014/2013-12/20/content_1817962.htm) [<https://perma.cc/7KVS-VAHX>]; see Jiang Bixin (江必新), *The Contribution of Judicial Interpretation to the Development of Administrative Law Theories* (司法解释对行政理论法学的发展), 4 CHINA LEGAL SCI. 36 (2001) (analyzing the effect of People's Supreme Court's explanation on several issues regarding the execution of the Administrative Procedural Law of the People's Republic of

the potentials of a dynamic judicial system even in the case of limited judicial authority. Nevertheless, judges cannot ignore the legal restrictions in their innovations and such innovations by a few bold judges cannot represent the general practice.

In addition, judges have tried other methods to flexibly handle administrative cases to ease the difficulties in getting an administrative lawsuit registered and adjudicating administrative cases. For instance, some courts experimented on a “round table trial” to avoid the rigidity of traditional court setting. Specifically, the plaintiff, the defendant and the judge are all seated at one table and talk and negotiate in a civil manner.<sup>17</sup> Some courts, considering potential dilemmas after a case is registered, conducted “pre-action mediation.” Namely, the court first mediates between the two parties before registering the lawsuit brought by the plaintiff. If both parties accept the mediation, the court will not need to put the case on file (even if the mediation fails). Coordination is the most widely used by the court to persuade plaintiffs to withdraw. Because the Law prohibits mediation, judges renamed their practice as “coordination,” which is actually disguised mediation. Coordination has long been used extensively in administrative litigation. Judges even consider it for some time as a “new mode” of administrative trial under the influence of official documents. However, such measures are simply reluctant choices of judges who cannot decide cases according to law. These measures fail to substantially benefit plaintiffs in most cases.<sup>18</sup>

What’s more, many courts actively approach local Party Committees and governments and closely follow the “central task” of the locality for the purpose of obtaining the above two’s support to administrative trials. As a proverb puts it, “help but do not cause

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<sup>17</sup> Zheng Chunsun (郑春笋), *Min Gao Guan An Yuanzhuo Shen Xieshang Duihua Hao Kuansong* (民告官案圆桌审 协商对话好宽松), LEGAL DAILY (July 24, 2008), [http://www.legaldaily.com.cn/bm/content/2008-07/24/content\\_908113.htm?node=10](http://www.legaldaily.com.cn/bm/content/2008-07/24/content_908113.htm?node=10).

<sup>18</sup> He Haibo, *supra* note 2, at 257.

troubles.” A grassroots administrative division chief judge, who has been awarded the title of Outstanding Individual of National Administrative Trial but who does not wish to disclose his name here, explained to me his trade-off theory: the court will give unconditional support to the administrative action concerning the local government’s “central task,” and for the rest of administrative cases, the local government should respect the court and be supportive. Such an approach sacrifices judicial independence, violates the principle of the rule of law, and radically undermines judicial status and authority.

Although the court has made various efforts, administrative litigation is still in straitened circumstances and is unable to get rid of the predicaments. Chief Judge Zhao Daguang (赵大光) of the Supreme People’s Court Administrative Division appealed loudly at the 2014 Annual Administrative Law Conference that the administrative litigation system had come to a “dead end” and must be amended.<sup>19</sup> The court system’s insignificant legal and political power further increased the necessity of the amendment.

## II. COURSE OF THE ADMINISTRATIVE LITIGATION LAW AMENDMENT

### A. Start-up

The legislature has noticed the demand for amending the Law in an early time. The Standing Committee of the NPC included this item in the five-year legislative schedules in 2003 as a program to “discuss, prepare a draft and arrange for deliberation at due time.” The Standing Committee included it again in the five-year legislative schedules in 2008 as “a draft bill to be submitted for deliberation within its term of office.”<sup>20</sup> But it would not be

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<sup>19</sup> August 23, 2014, Zhengzhou City, Henan Province.

<sup>20</sup> *Legislative Schedule of the Tenth National People’s Congress Standing Committee* (十届全国人大常委会立法规划), PEOPLE’S DAILY ONLINE (Dec. 18, 2003), <http://www.people.com.cn/GB/14576/14957/2252949.html> [<https://perma.cc/2W2V-FPUN>]; *Legislative Schedule of the Eleventh National*

arranged for deliberation until the next NPC Standing Committee holds its session. The Law, enacted in 1989 and remained untouched since, is almost the oldest law in contemporary China where the legal system is going through rapid development and frequent revisions. In comparison, the Civil Procedure Law and the Criminal Procedure Law have undergone respectively two major amendments since that period.

Whether it is the right time for legislation is much related to the political climate. The Law was adopted exactly along with the upsurge of political reforms in the 1980s. It is hard to imagine the enactment of the Law without that trend. Afterwards, the political reform receded to a low ebb, and it was very difficult to put major reforms on the agenda. On the technical level, the Supreme People's Court itself can perfect the Law (and it has frequently done so), but no real improvement at the system level can be made unless there is a resolution from the top political authority. None of the major issues involved in the administrative litigation system, such as incorporating normative documents into the scope of administrative litigation, raising the level of trial courts on a large scale or excluding local government's interference with court trials, will concern the adjustment between judicature and administration and the Party Committee. None of these issues will be tackled without the resolution of the top political authority.

It is not always a good time for a legal reform. There was an obvious "regression" after 2006 in the Chinese political and legal system under the control of Zhou Yongkang (周永康), who was later sentenced for corruption. Instead of underlining the court's

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*People's Congress Standing Committee (十一届全国人大常委会立法规划)*, the NAT'L PEOPLE'S CONGRESS, [http://www.npc.gov.cn/npc/xinwen/syxw/2008-10/29/content\\_1455985.htm](http://www.npc.gov.cn/npc/xinwen/syxw/2008-10/29/content_1455985.htm) [<https://perma.cc/2A3X-XJ4M>]. For more information of legislative plan, see Kan Ke (阚珂), *Look back on the NPC Standing Committee's Legislative Planning Work (回望全国人大常委会的立法规划工作)*, NAT'L PEOPLE'S CONGRESS, [http://www.npc.gov.cn/npc/xinwen/lfgz/lfdt/2013-11/07/content\\_1812837.htm](http://www.npc.gov.cn/npc/xinwen/lfgz/lfdt/2013-11/07/content_1812837.htm) [<https://perma.cc/56YT-2NM8>] (describing the NPC Standing Committee's legislative planning work).

independence in trial, officials at each level demanded an adherence to “absolute leadership of the Party;” instead of underlining trial according to law, they chased a “unity of three effects” (*i.e.*, political effect, social effect, and legal effect); instead of demanding the court to adjudicate cases decisively, they demanded the court to do “grand mediation” and “grand reception of petitions”.<sup>21</sup> It was doubtful during that time that an amendment of law would achieve the desired effect. An official of the Legislative Affairs Commission stated at a meeting in early 2009 that amendments should touch major issues and facilitate the improvement of the system. But if it was not done correctly, effectuating the amendments might lead to regression.<sup>22</sup> Some judges and scholars were also concerned about the bad timing for amending the Law, which might not result in a positive effect.

After the 18<sup>th</sup> National Congress of the Communist Party of China, the leadership redressed the deviation, and “rule of law” and “judicial reform” became hot topics again. Amending the Law was really put on the agenda this time. In November 2013, the Third Plenary Session of the 18<sup>th</sup> Central Committee of the CPC proposed to build the rule of law in China, announcing the goal to make the masses feel fair and just in every judicial case. In October 2014, the last critical moment for amending the Law, the Fourth Plenary Session of the 18<sup>th</sup> Central Committee of the CPC released a signal of “comprehensive promotion of the rule of law” and put forward a number of measures relating to the administrative litigation system. Among the highlights were “to perfect the system and mechanisms of administrative litigation, to moderately adjust the administrative lawsuit jurisdiction system, to effectively solve the prominent problems of difficulties in getting an administrative lawsuit registered, adjudicating administrative cases and executing court

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<sup>21</sup> He Haibo (何海波), *Xingzheng Fazhi, Women Haiyou Duo Yuan* (行政法治, 我们还有多远?) [Administrative Rule of Law, How Far Away are We from It?], 6 TRIB. OF POL. SCI. & L. (2013).

<sup>22</sup> NPC Legislative Affairs Comm’n, Forum on Administrative Litigation Law at Henan Hotel in Beijing (Jan.21, 2009).

decisions,” “to improve the rules on agency’s appearance in court, to support the court to accept and hear administrative cases, and to respect and execute effective court decisions.”<sup>23</sup> That, under the party-state system, can be deemed as the political determination and supreme authorization for amending the Law.

Compared to the past, the time for amending the Law could not be any better.

## **B. Participating Parties**

The amendment of the Law, as a typical process of legislation and with the NPC Standing Committee as the center, involved many parties.

### **1. Legislative Affairs Commission**

At the NPC level, the Legislative Affairs Commission is mainly responsible for the amendment of the Law. This Commission consists of nearly 200 legislative experts who are responsible for drawing up major draft bills, and since 2007 the whole process of legislative work includes the overall planning, organization, coordination, guidance and service. There are about one dozen experts in the Administrative Law Office of the Commission who are responsible for major administrative legislation. This Office has drafted basic laws, including the Administrative Penalty Law, the Administrative Licensing Law, and the Administrative Coercion Law, and has completed the amendments of a series of important laws including the Environmental Protection Law.

Compared with other state institutions (including the court), the Commission is in a more detached position and the experts have

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<sup>23</sup> Zhonggong Zhongyang Guanyu Quanmian Tuijin Yifa Zhiguo Ruogan Zhongda Wenti de Jueding (中共中央关于全面推进依法治国若干重大问题的决定) [Decision of the Central Committee of the CPC on a Number of Major Issues Concerning Comprehensively Promoting the Rule of Law], adopted at the Fourth Plenary Session of the 18<sup>th</sup> Central Committee of the CPC on Oct. 23, 2014.

a better understanding of the actual situation of the administrative litigation. But after all, this Commission does not have formal legislative power and thus cannot decide major issues. It is at best a coordinator of the opinions of all parties. The Commission needs to first act on the orders of the Central Committee of the CPC and the NPC, then coordinate the opinions of the court, the people's procuratorate, the legal affairs office and other departments, and listen to the public, the scholars and others in the society. The impacts of its efforts also depend on whether the draft bills it draws up can be adopted by a massive majority vote among the 152 NPC Standing Committee members.

## 2. Other State Organs

Courts aspire to amend the Law, pay earnest attention to amending the Law, and have the closest association with the Commission. Judges have accompanied the Commission officials in most of their surveys. The Supreme People's Court has drafted its version of amendments to the Law and submitted to the Commission, and the leading Party group of the Supreme People's Court has twice submitted opinions on specific issues to the Commission.<sup>24</sup> Compared with scholars' opinions, the opinions of

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<sup>24</sup> These opinions are not publicly disclosed. But one can learn about the Supreme People's Court's basic standpoint from the work of the Supreme People's Court judges. See generally Jiang Bixin (江必新) & Cai Xiaoxue (蔡小雪), *ZHONGGUO XINGZHENG SUSONG ZHIDU DE WANSHAN: XINGZHENG SUSONG FA XIUGAI WENTI SHIWU YANJIU* (中国行政诉讼制度的完善: 行政诉讼法修改问题实务研究) [Perfection of the Chinese Administrative Litigation System: Study on the Practice of Administrative Litigation Law Amendments] (Law Press China 2005) (analyzing the Administrative Litigation Law through 11 different questions); Jiang Bixin (江必新), *Wanshan Xingzheng Susong Zhidu de Ruogan Sikao* (完善行政诉讼制度的若干思考) [Some Thoughts on Perfecting the Administrative Litigation System], 1 *CHINA LEGAL SCI.*, 5 (2013) (discussing current practical problems with the Administrative Litigation Law, and providing suggestions to amend the Law); Li Guangyu (李广宇), Wang Zhenyu (王振宇) & Liang Fengyun (梁凤云), *Xingzheng Susong Fa Xiugai Ying Guanzhu Shi Da Wenti* (行政诉讼法修改应关注十大问题) [*Ten Major Issues in the Amendment of Administrative Litigation Law*], 3 *J. L. APPLICATION* (2013) (detailing the major problems in the amendment to the Administrative Litigation Law).

the courts receive more attention. Judges say in private to the Commission officials, “thank you for helping us solve the problems,” and the Commission officials would say, “we are a family. It’s our pleasure.” Notwithstanding the above, the Commission will not take all the demands in the list.

The function of the people’s procuratorate is not that prominent and its demands are relatively simple. It expects the Law to grant them a more powerful status, to represent the public interest, to bring administrative lawsuits alongside the courts, and to supervise, as the guardian of law, the whole process of administrative litigation.

The attitude of the government legal departments appears to be comparatively negative. Although the government makes great efforts to build “governance by law,” it is concerned that judicial intervention will disturb government agencies’ routine work and exceed administration officials’ capacity. Government law officers rarely publish articles, hold discussions, or state their stands in public. But the Commission cannot ignore their attitudes. The Commission needs to persuade the Legal Affairs Office of the State Council to accept major institutional changes or at least not to strongly oppose the changes. The provision that reconsideration organ shall be the defendant was adopted in the draft bill partly as the Legal Affairs Office of the State Council compromised. The people’s procuratorate failed to represent the public interest and to sue against the agency mainly because the objection of the Legislative Affairs Office of the State Council.

### **3. The Public, NPC Deputies and Legal Scholars**

The public is very interested in amending the Law. The NPC Standing Committee published the draft amendments twice to solicit public comments and the public showed considerable enthusiasm.<sup>25</sup> It is reported that that more than 4,000 citizens

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<sup>25</sup> The National People’s Congress of the People’s Republic of China, *Xingzheng Susong Fa Xiuzhengan (Caoan) Tiaowen* (行政诉讼法修正案草案条

nationwide responded with 7,736 pieces of comments in total.<sup>26</sup> Some NPC deputies also offered their opinions one after another. These opinions may not be very professional or operational, but they reflected the people's concerns and dissatisfactions with the Law. The public complained about the "difficulty in getting administrative lawsuits registered with the court," that they could not "see the defendant agency official in court," and that the reconsideration organ simply sustained the original action, which deeply impressed the legislature. The legislature eventually responded to the public complaints.

Social organizations in China are underdeveloped. Legal scholars largely act as the spokespersons for public interest and consultants of the legislature. Administrative law scholars have been calling for amendments of the Law for years, which was frequently reported by the media. The Chinese Administrative Law Society and other academic organizations have held a great number of discussions in the course of the amendment. Several major academic institutions have submitted their respective proposed amendments.<sup>27</sup> Generally speaking, scholars share a highly

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文) [Administrative Litigation Law Amendment Draft] (Dec. 31, 2013), [http://www.npc.gov.cn/npc/lfzt/2014/2013-12/31/content\\_1822188.htm](http://www.npc.gov.cn/npc/lfzt/2014/2013-12/31/content_1822188.htm) [<https://perma.cc/Y6KC-4KP7>]; The National People's Congress of the People's Republic of China, *Xingzheng Susong Fa Xiuzhengan (Caoan Erci Shenyi Gao) Tiaowen (行政诉讼法修正案草案二次审议稿条文)* [Administrative Litigation Law Amendment Second Draft] (Sep. 1, 2014), <http://npc.people.com.cn/n/2014/0901/c14576-25580921.html> [<https://perma.cc/2AXY-LKTG>].

<sup>26</sup> *Yijing Jieshu de Zhengqiu Yijian (已经结束的征求意见)* [Legislation Drafts that Have Closed Up Soliciting Public Comments], THE NATIONAL PEOPLE'S CONGRESS OF THE PEOPLE'S REPUBLIC OF CHINA, [http://www.npc.gov.cn/npc/flcazqyj/node\\_8195\\_2.htm](http://www.npc.gov.cn/npc/flcazqyj/node_8195_2.htm) [<https://perma.cc/83HY-EZ7B>] (last visited Nov. 19, 2016).

<sup>27</sup> Ma Huaide (马怀德), *Sifa Gaige yu Xingzheng Susong Zhidu de Wanshan (司法改革与行政诉讼制度的完善)* [Judicial Reform and Perfection of the Administrative Litigation System: Proposed Amendments to the Law and Explanations], CHINA U. POL. SCI. & L. PRESS 126 (2004); Hu Jianmiao (胡建淼), *Xingzheng Susong Fa Xiugai Yanjiu (行政诉讼法修改研究)* [Study on Revising the Administrative Litigation Law: Proposed Articles and Reasons], ZHEJIANG U.

consistent position: more judicial review and more effective dispute resolution. However, legal scholars have been more influential for technical issues than policy decisions.

As in the course of many other legislations, foreign laws were frequently taken as a reference by Legislative Affairs Commission officials and scholars.<sup>28</sup> Foreign experts from the U.S., Germany, Japan and Taiwan were invited to Beijing several times for consultation.

### C. Three Deliberations

In accordance with the Legislation Law of the PRC, a legislative bill shall in general be put to vote after three deliberations at the sessions of the Standing Committee of the NPC. If there is a consensus from various quarters, the bill shall be put to vote after two deliberations, or even after one deliberation. The Draft Amendment of the Law has undergone three deliberations, which reflects legislators' prudence. However, it took less than one year for the Draft Amendment to be adopted on November 1, 2014. For the amendment of an important law, that was faster than most scholars had expected.

After three deliberations, the Draft Amendment was changed

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PRESS 117 (2007); Yang Xiaojun (杨小君), XINGZHENG SUSONG FA WENTI YANJIU YU ZHIDU GAIGE (行政诉讼法问题研究与制度改革) [Study on Problems of the Administrative Litigation Law and Reform of the System] (Chinese People's Public Security Publishing House 2007); MO XIAOCHUAN (莫于川), JIANSHE FAZHI ZHENGFU XUYAO SIFA GENG GEILI: XINGZHENG SUSONG FA XIUGAI WENTI YANJIU JI ZHUANJIA JIANYI GAO (建设法治政府需要司法更给力: 行政诉讼法修改问题研究及专家建议稿) [More Effective Judicature Needed to Build Rule of Law: Study on the Amending the Administrative Litigation Law and Expert Proposals] (Tsinghua University Press 2014); He Haibo (何海波) et al., *Lixiang de Xingzheng Susong Fa – Zhonghua Renmin Gongheguo Xingzheng Susong Fa Xuezhе Jianyi Gao* (理想的行政诉讼法--《中华人民共和国行政诉讼法》学者建议稿) [Ideal Administrative Litigation Law: Scholars' Proposed Draft of the Administrative Litigation Law], 2 ADMIN. L. REV. (2014).

<sup>28</sup> A Chinese translation and compilation of foreign statutes with regard to judicial review is on the way of publication. A COMPILATION OF ADMINISTRATIVE LITIGATION LAW OF CHINA AND FOREIGN COUNTRIES (He Haibo ed., The Commercial Press) (forthcoming).

in many places. This paper will not relate in detail the changes made at each deliberation, but will give an overview of the content changes.<sup>29</sup> This will help the readers understand the value of repeated deliberations on a draft bill.

Generally speaking, the Legislative Affairs Commission has done considerable research before drafting the bill and knows the opinions of various quarters. Thus, the Commission was comparatively certain of the goals of the Amendment. Once the Commission completed the Draft Bill, the basic framework of the Amendment was therefore determined. Some scholars previously proposed an “overall revision” from the litigation system and mechanisms to the wording of the clauses and structure of the code. Obviously, that proposal was not accepted. The Commission’s Draft Bill is basically a “moderate revision.” Nonetheless, new suggestions were constantly accepted at the deliberations and the Draft Bill had been gradually improved.

After the first deliberation by the Standing Committee, the Second Draft had several big changes. “Obviously improper” was added to the basis of the judicial review, which gives the court a better footing in exercising its reviewing power over administrative discretion and a concrete reason to invalidate an unreasonable

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<sup>29</sup> For more relevant information, please refer to the explanations of all the previous deliberations by the NPC Standing Committee. *See generally* Li Shishi (李适时), REPORT ON THE REVISIONS OF THE AMENDMENT OF THE ADMINISTRATIVE LITIGATION LAW OF THE PRC (DRAFT) (关于中华人民共和国行政诉讼法修正案草案修改情况的汇报), at the Tenth Plenary Session of the 12<sup>th</sup> Standing Committee of the NPC on Aug. 25, 2014; Qiao Xiaoyang (乔晓阳), REPORT ON THE RESULTS OF THE DELIBERATIONS ON THE AMENDMENT OF THE ADMINISTRATIVE LITIGATION LAW OF THE PRC (DRAFT) (关于中华人民共和国行政诉讼法修正案草案审议结果的报告), at the Eleventh Plenary Session of the 12<sup>th</sup> Standing Committee of the NPC on Oct. 27, 2014; Qiao Xiaoyang (乔晓阳), REPORT ON THE OPINIONS ON DRAFT DECISION OF THE NPC STANDING COMMITTEE ON THE AMENDMENT OF THE ADMINISTRATIVE LITIGATION LAW OF THE PRC (《全国人民代表大会常务委员会关于修改〈中华人民共和国行政诉讼法〉的决定(草案)》修改意见的汇报), at the Eleventh Plenary Session of the 12<sup>th</sup> Standing Committee of the NPC on Oct. 31, 2014 (explaining several opinions on the amendments to the Law).

administrative act. The clause, “The Supreme People’s Court shall refer to the State Council for ruling when [the court] thinks the administrative rules are inconsistent,” was deleted. The reconsideration organ shall also become the defendant when it sustains the administrative action in question. The Second Draft for deliberation also made a minor adjustment to the structure—the chapter with the most content, “Trial and Judgment,” was divided into five sections, which made it seem better organized.

Some major revisions were made to the Draft Bill even at the last deliberation. Social organizations that undertake public administration and public service functions under authorization were also included as the defendant of an administrative litigation. Administrative contract was added to the scope of acceptable lawsuit. It was emphasized that the court should disclose on its own initiative legally effective judgments and rulings “for the public access.” Qiao Xiaoyang (乔晓阳), Chairman of the Law Committee of the NPC, made a special explanation on these changes just one day before the Draft Bill was put to vote.<sup>30</sup>

Some clauses in the Draft Bill have been repeatedly revised. For instance, it was provided in the First Draft, “the Higher People’s Court may determine a number of grassroots people’s courts’ cross-administrative-regional jurisdiction over first instance administrative cases.” The Supreme People’s Court and others pointed out that cross-administrative-regional jurisdiction over administrative cases should not be limited to the grassroots courts and the Draft Bill should leave some space for the jurisdiction reform. Therefore, the word “grassroots” was deleted in the Third Draft. The Supreme People’s Court then pointed out in accordance with the message of the Fourth Plenary Session of the 18<sup>th</sup> Central Committee of the CPC that cross-administrative-regional jurisdiction would not be limited to the first instance cases. Thus, the language “first instance” was deleted before the Draft Bill was put to vote.

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<sup>30</sup> Qiao Xiaoyang (乔晓阳), Oct. 31, 2014, *supra* note 30.

There are also individual clauses that remained the same, though they have undergone several proposed changes. The Law provides that the court shall revoke any administrative action that violates statutory procedures. In the First Draft of amendments, the language was revised to “violates statutory procedures and may have practical impact on the plaintiff’s right.” Some scholars commented that this revision denied the independent value of administrative procedure and turned out to be a regression of the legislation on administrative procedure. In the Second Draft, the language was revised as “violates statutory procedures and no additions and corrections can be made.” Some scholars worried that this would give too much leeway for agencies and as a result make the requirements of statutory procedures meaningless. The Third Draft accepted scholars’ opinions, removed the additional limit and restored the original expression of the Law.

#### D. **Passing**

Under the Chinese legislative system, amendment of laws may be conducted by the annual National People’s Congress which consists of nearly 3,000 deputies or by the NPC Standing Committee, which is much smaller in size and holds meetings more frequently. It may appear to be more solemn when an amendment is conducted by the NPC but the amendment will be equally powerful in its legal effect. Moreover, the NPC’s sessions are relatively shorter and address more matters. As a result, it is often difficult to put legislative matters on the agenda. In practice, the vast majority of law amendments have been conducted by the Standing Committee and only four laws were amended by the NPC itself.<sup>31</sup>

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<sup>31</sup> The Law of the People’s Republic of China on Chinese-Foreign Equity Joint Ventures (中华人民共和国中外合资经营企业法) (promulgated by Nat’l People’s Cong., July 1, 1979, effective July 8, 1979); Electoral Law of the People’s Republic of China for the National People’s Congress and Local People’s Congresses (中华人民共和国全国人民代表大会和地方各级人民代表大会选举法) (promulgated by Nat’l People’s Cong., July 1, 1979, effective Jan. 1, 1980); Criminal Procedure Law of the People’s Republic of China (中华人民

Thus, it is not strange at all that the amendment of the Administrative Litigation Law was carried out by the Standing Committee.

The Draft Bill was put to vote after three deliberations at the session of the Standing Committee of the NPC. On November 1, 2014, the Eleventh Plenary Session of the 12<sup>th</sup> Standing Committee of the NPC adopted the decision on the Amendment of the Administrative Litigation Law by 152 votes in favor, zero votes against and five votes in abstention. Although the legislature is comparatively easy to achieve consensus under the Chinese political regime, it is also common to have negative votes. The result of zero negative vote implied that the Amendment had been widely recognized by the Standing Committee members who were mostly former officials. This, for the staff of the legislature, was a huge success.

### III. MAIN CONTENTS OF ADMINISTRATIVE LITIGATION LAW AMENDMENTS

After the 2014 amendments, the articles of the Administrative Law increased from 75 to 103, out of which 45 are revised, 33 are added, 5 are deleted, and only 25 of the original provisions remained unchanged. The Amendment is a relatively big revision if one judges purely on the language. But some clauses have only incorporated the previous judicial interpretations of the Supreme People's Court, and some have been revised to make the

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共和国刑事诉讼法) (promulgated by Nat'l People's Cong., July 1, 1979, effective January 1, 1980); Legislation Law of the People's Republic of China (中华人民共和国立法法) (promulgated by Nat'l People's Cong., Mar. 15, 2015, effective July 1, 2000). But several revisions of the above laws were also conducted by the Standing Committee of the NPC. Many other major amendments of important laws, such as The Organic Law of Local People's Congresses and Local People's Governments of the PRC (中华人民共和国地方各级人民代表大会和地方各级人民政府组织法), The Criminal Law (中华人民共和国刑法), and The Civil Procedure Law (中华人民共和国民事诉讼法) were all conducted by the Standing Committee.

expression more precise or concise (*e.g.*, abandon the concept of “specific administrative action,” and use the wording “administrative action”). What marks a major amendment of a law is not how many provisions have been altered, but how much the institution has been improved. Measured by the improvement of the system, this Amendment signaled a remarkable progress, but there are still considerable limitations.

#### **A. Measures to Solve “Three Difficulties”**

As the problems have been identified as “difficulty in getting an administrative lawsuit registered, difficulty in adjudicating administrative cases, and difficulty in executing court decisions,” legislators’ attentions were drawn to these three aspects and their efforts were concentrated in solving these difficulties.

##### **1. Measures to Solve “Difficulty in Getting an Administrative Lawsuit Registered”**

The Amendment of the Law makes it a priority to solve the difficulty in getting a case registered. It first sets it as a legal principle to register a case according to law, requiring the court to protect the right of a citizen to file a complaint and emphasizing that agencies must not interfere with the court’s case acceptance. The Amendment also adds a list of the types of actionable administrative actions, declaring that several types of difficult administrative cases, like land expropriation decisions, shall fall into the scope of case acceptance of administrative litigation. Thirdly and most importantly, the pre-registration complaint examination is revised as complaint registration. When the court “is unable to determine on the spot whether a complaint meets the conditions for filing a complaint as set out by the present law, the court shall receive the complaint, issue a written certification bearing the date of receipt, and decide whether to register the complaint within seven days.”<sup>32</sup> Lastly, remedies are set out for plaintiffs when their complaints are

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<sup>32</sup> Article 51.

rejected. When the court refuses to register a complaint, the plaintiff may either appeal the rejection or file his complaint with the court at a higher level; if the court rejects the complaint materials and gives no written certification, the judge directly in charge and other persons directly responsible shall be disciplined. With regard to lawsuit registration, the Amendment sets out the guideline, the rule and the guarantee. Its tough tone and severe measures are unprecedented in Chinese law.

## **2. Measures to Solve “Difficulty in Adjudicating Administrative Cases”**

In order to solve the difficulty in adjudicating administrative cases, the Amendment has adopted a number of measures.

It has first strengthened procedural safeguards. The agency leader is required in principle to appear in court, or at least an employee should appear in court; if the leader or an employee of the agency refuses to appear in court or if an agency uses illegal means such as deceiving or coercing the plaintiff to withdraw his complaint, the agency shall be subject to appropriate punishment. In the course of a litigation, if the court deems that the execution of an administrative action will impair state and public interest or will cause irreparable damage to the parties, the court shall rule to suspend the execution of the administrative action under challenge. The time limit for trial of administrative cases has been extended to six months for first instance of trial and three months for second instance (originally, three months and two months) and summary procedures have been added so as to relieve judges' caseloads.

In the second place, the court is equipped with more powerful means of examination. If an administrative action is “obviously improper,” the court shall rule to revoke it. Previously, the court may only exercise very limited review of administrative discretion. An administrative action that just violates statutory procedure slightly and does not cause any actual impact to the plaintiff's right shall also be deemed illegal. When the court deems a normative document (a legal document that is not a piece of

formal legislation but has universal binding force), on the basis of which the administrative action under challenge is taken is illegal, the court shall not take the normative document as a legal basis for determining the legality of the administrative action in question. This point has also been clarified.

Thirdly, court decisions can be more flexible and diverse. Besides revoking illegal administrative actions, the court may also declare administrative actions illegal and order the agency to modify its action or to perform what it should do. If the revocation of an administrative action that should be revoked may cause significant detriment to state and/or public interest, the court shall refrain from revocation and instead declare the administrative action illegal and order the agency to take remedial measures. If an administrative action seriously and evidently violates the law, for instance, and the action is not taken by a competent administrative institution, the court shall declare the administrative action void. In addition to inappropriate administrative punishment, other administrative actions involving erroneous determination of the amount of money can cause the court to directly enter a judgment to modify the administrative actions. The scope of mediation by the court is largely extended: the court may conduct mediation in all cases involving administrative discretion, and conclude the cases with mediation agreements. Prior to the Amendment, judges could only persuade the plaintiff to withdraw to achieve reconciliation.

Fourthly, with regard to a case that is tossed back and forth, the Amendment makes special provisions for the purpose of closing the case and settling the dispute. When the cases involve administrative licensing, registration, expropriation, or agency's decision on civil disputes, the court shall, under the parties' application for collectively resolving relevant civil disputes, adjudicate them together. When a remanded case has been reheard by the trial court but a party appeals the decision, the court of second instance shall enter a judgment by itself and must not remand the case to the trial court for retrial a second time.

### 3. Measures to Solve “Difficulty in Executing Court Decisions”

To solving the difficulty to execute court decisions, the Amendment also makes a fierce prescription. At first, for any agency that should make the payment but does not perform it, the court shall inform the bank to transfer the money from the agency’s bank account. Before this Amendment, the Law did not mention compensation. Second, if an agency fails to perform its duties within the prescribed time limit, the agency leader shall be imposed a fine of 50-100 yuan a day. Before this Amendment, the court may only impose a fine on the agency. This revision is more accommodating in theory and will be more viable in practice. Third, if an agency refuses to perform the court’s judgment, ruling or mediation agreement, resulting in adverse impact in society, the court shall deem the agency’s executive staff and other staff directly liable; if the circumstances are serious enough to constitute a crime, the court shall transfer the case to the people’s procuratorate for prosecution. This provision conveys a very clear message: administrative officials must take the court decision seriously. When the Amendment of the Law was promulgated, a newspaper created a banner headline to discuss this provision.<sup>33</sup> Fourth, the court may make a public announcement on an agency’s refusal to enforce the court decision and put forward judicial recommendations to relevant departments. This seemingly mild approach is probably more helpful under the Chinese system in urging agencies to perform their obligations. Overall, it should be uncommon that an agency shall avowedly refuses to perform a court decision in the future.

#### B. Provisions with Chinese Characteristics

Legislators have also established, in the course of amending the Law, some rules with strong Chinese characteristics to

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<sup>33</sup> Sun Qian (孙乾), *Xingzheng Jiguan Bulxing Panjue Ke Ju Fuzeren* (行政机关拒不履行判决可拘负责人) [Responsible Official Shall be Detained if Administrative Organ Refuses to Perform Court Decision], SOHUNews (Nov. 2, 2014) [<https://perma.cc/HD96-883T>].

accommodate the current Chinese political system and social perceptions. First of all, the leader of an agency is required to appear in court. Secondly, reconsideration organ is demanded to be the defendant. These rules are controversial even in China. The practical effects of these practices remain to be seen.

### 1. The Leader of an Agency Appears in Court

Long before the Law was amended, the practice that the leader of an agency appears in court was already the norm in some areas. A State Council's document has included it as a measure to "strengthen the construction of a government ruled by law."<sup>34</sup> Those who favor this provision believe that the agency leader appearing in court will help ease the antagonism between the two parties in the litigation, settle the administrative dispute appropriately, enhance the agency leader's sense to conduct administration in accordance with law, and identify and solve the problems of administrative enforcement of law. In a certain sense, this practice also symbolizes agencies' respect for the judiciary and for the rule of law. Opponents argue that agency leader appearing in court is a mere formality, does not solve practical problems and may even cause unnecessary stress and troubles to the court.<sup>35</sup>

The Second Draft once provided that "the leader of the defendant agency should appear in court. If the leader cannot

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<sup>34</sup> Guowuyuan Guanyu Jiaqiang Fazhi Zhengfu Jianshe de Yijian (国务院关于加强法治政府建设的意见) [Opinions of the State Council on Strengthening the Construction of Government Ruled by Law] (promulgated by the St. Council, Oct. 10, 2010, effective Oct. 10, 2010).

<sup>35</sup> See Lv Shang Min (吕尚敏), *Xingzhengshouzhang Yingdang Chuting Yingsu ma? Zai Sifa de Jishu, Quanneng Yu Gongneng Zhijian* (行政首长应当出庭应诉吗? 在司法的技术、权能与功能之间), [Should the Chief Executive Appear in Court? In Between the Judicial Technology, Power and Function], 17 ADMIN. L. REV. 98 (2009) (discussing the ramification of administrative organ's chief officials appearing in court); Zhang Zhi Yuan (章志远), *Xingzheng Susong Zhong de Xingzheng Shouzhang Chuting Yingsu Zhidu Yanjiu* (行政诉讼中的行政首长出庭应诉制度研究), [Study on the Rule of Chief Executive Appearing in Court in Administrative Litigations] 34 L. SCI. MAG. 94 (2013) (discussing the rules and procedures of administrative organ's chief officials appearing in court).

appear in court, he or she may also entrust an appropriate employee to appear in court.” Some NPC deputies were not satisfied, arguing that the language of the draft providing that the leader “may also entrust” other employees to appear in court does not have binding force to the agency leader. In the last deliberation, the language “may also” was then changed to “should.” Thus, after some revision, article 3.3 reads “the leader of an agency against which the complaint is filed shall appear in court to respond to the complaint. If the leader is unable to appear in court, a relevant employee of the agency shall appear in court.”

In Chinese law, “agency leader” includes the agency head and deputy head of the agency. The provision “shall appear in court to respond to the complaint” looks more like a manifesto. This provision, in practice, needs to rely on the internal regulation and evaluation of the agency for enforcement. Whether the leader of an agency shall appear in court depends to a large extent on the work schedules and caseloads of the agency. The court may advise the leader of an agency to appear in court in particular cases, but generally speaking the court shall not force the agency leader to appear in court, demand an agency to explain why its leader is unable to appear in court, or investigate whether the reasons are tenable. In short, an agency must entrust a relevant employee, instead of merely entrusting an attorney outside the agency, to appear in court when its leader is unable to appear in court. The amended law also allows, in addition to the agency leader appearing in court, an agency to entrust one or two legal representatives to appear in court at the same time.

On April 11, 2016, almost one year after the amended Law came into effect, Chen Minming (陈鸣明), vice-governor of Guizhou Province appeared in a court session. Minming became the first high official appearing in court to defend an agency action in the Chinese history of administrative litigation. This case was widely covered by the media.<sup>36</sup>

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<sup>36</sup> Jia Shi Yu (贾世煜), *Fu Shengzhang Chuting Yingsu* “*Min Gao Guan*”

## 2. Reconsideration Organ Demanded to be the Defendant

This provision may be the most controversial provision in this Amendment. Yet it also has the most remarkable and far-reaching impact.

In addition to administrative litigation, there are various internal relief channels in the Chinese administrative system. A party may, in principle, apply to the agency of the next higher level for reconsideration if he or she disagrees with the decision made by an agency. If the decision is made by a department of a local government, the party may apply to the local government for reconsideration. The Legal Affairs Office of a reconsideration organ is the one that undertakes the duty of reconsideration, even though the decision is made in the name of the reconsideration organ. A party may, in general, file a case to the court if he or she does not accept the decision after reconsideration.

In theory, administrative reconsideration should become the main channel of solving administrative disputes due to its simple procedure and low cost. However, in reality, this channel has achieved suboptimal effect. First of all, reconsideration organs have only handled a small number of cases, the number being even smaller than that of litigation cases. Administrative reconsideration cases would be even fewer but for the provisions of some laws or regulations that there must be reconsideration before administrative litigation. Moreover, the percentage of reconsideration decisions in favor of the applicants (including revocation, modification, ordered performance or confirmed illegality of administrative action) has dropped from thirty percent, before the enforcement of the Administrative Reconsideration Law, to less than ten percent in recent years.<sup>37</sup> On the other hand, the percentage in favor of

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*Qianhou* (副省长出庭应诉“民告官”前后) [Before and After the Vice-Governor Appearing in Court] BEIJING NEWS (April 18, 2016), <http://www.bjnews.com.cn/news/2016/04/18/400436.html> [<https://perma.cc/7R2A-65BU>].

<sup>37</sup> The statistic here and the ones on administrative reconsideration below

agencies has increased to a sustained value of sixty percent. Reconsideration organs thus received the notorious nickname of “sustaining agency.” The low percentage of reconsideration decisions in favor of the applicants in turn dampened the people’s confidence in the system’s effectiveness and hindered them from seeking reconsideration.

There are many reasons for the insufficient effects of administrative reconsideration, but one provision of the Law can hardly absolve itself from the blame. According to that provision, which agency shall be the defendant when an applicant does not accept the reconsideration decision and files in the court depends on the reconsideration organ’s decision on the dispute. Should it decide to sustain the original administrative action, the reconsideration organ shall not be the defendant. On the other hand, when it decides to modify the original administrative action, it shall be the defendant.

In practice, a reconsideration organ that decides to modify the original administrative action often falls between two stools because it will not only offend its counterpart that has decided the administrative action, but also poke up the third party and act as the defendant. Being the defendant will incur a substantial cost and, in the current official evaluation system, a risk of demerits in the evaluation. Hence, reconsideration organs try to sustain administration actions to avoid troubles. The unusually high proportion of reconsideration decisions that sustain the original administrative actions can be attributed as an effect of the aforesaid provision.

There are two ways to get rid of this predicaments: one is to stipulate that no reconsideration organ shall be a defendant, and the other is to stipulate that all reconsideration organs shall be named as defendants. Those who argue for the former state that reconsideration organs are the presiding judges over the dispute, and

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have been provided by the State Council Legal Affairs Office. See <http://www.chinalaw.gov.cn/col/col28/index.html>.

it is a common practice across nations that a judge cannot be a defendant. Once they are required to be defendants, reconsideration organs will have a great burden of court appearance, and disputes will not be effectively solved in the end. Those who argue otherwise state that administrative reconsideration is an internal procedure for supervision and error correction within the administrative system, and as part of the administrative system, the reconsideration organ should assume administrative responsibilities. In the Chinese system, is making reconsideration organs defendants the only way to compel them to take on responsibilities? Scholars are divided. Government legal affairs departments unanimously oppose the idea of making reconsideration organs defendants, while the masses and NPC deputies scream for making reconsideration organs defendants, and courts also believe that making reconsideration organs defendants will help settle disputes.

The Amendment of the Law made a decision on this issue that a reconsideration organ shall be defendant regardless of whether it decides to sustain or modify the original administrative actions. The Amendment stipulates that the reconsideration organ and the agency of the original administrative action shall be co-defendants if a reconsideration organ decides to sustain the original administrative action. The design of this rule has caused many complex technical problems, including but not limited to court jurisdiction, defendant's response, and way of judgment. The effect of implementation shall be discussed afterwards.

### **C. Unachieved Proposals for Amendment**

Although the legislature has made a lot of efforts many problems remain unresolved, much to the disappointment of some judges, scholars and the public. These unfinished tasks include expanding the scope of actionable cases, establishing public interest litigation, defining review power over regulations, and adjusting the judicial system. The general goal of the legislature is to solve the most pressing problems of administrative trials instead of simply expanding the function of administrative litigation in state

governance.

### **1. Rather Limited Expansion of Actionable Cases**

The Amendment has made some efforts to expand the scope of administrative cases. Firstly, it has added several types of actionable cases to the original eight stipulations, expanding the scope to twelve stipulations. One breakthrough is to bring agency's contract action into the scope of administrative cases. Secondly, as the fallback provision of the circumstances listed above indicates, the rights to be protected have been expanded from personal right and property right to other lawful rights and interests. Thirdly, the administrative actions taken by an organization that is empowered by law, regulation or rule has also been brought, by way of describing the concept of administrative actions, into the adjustment scope of law and scope of actionable cases by the court. These stipulations have provided space for future extension of the scope of administrative litigation.

However, provisions on the scope of cases still follow the mode originally listed and the clause concerning the cases that the court shall not accept remains untouched. Firstly, the agency's normative documents remain outside the scope of actionable cases. Courts can only indirectly review related normative documents, while reviewing the legality of specific administrative actions. Courts may rule in a particular case that the related normative document does not apply but may not declare it unlawful and void. Secondly, the justiciability of management actions such as recruitment, dismissal, and discharge of civil servants are not affirmed. Thus, civil servant management cases are still exempt from lawsuits. Thirdly, the justiciability of some new types of rights such as the right to work, the right to education and the right to a healthy environment remains to be interpreted. Compared with the original judicial interpretations of the Supreme People's Court, the scope of actionable cases of administrative litigation is not substantially expanded in the aspect of legal norms.

All the above shows that the principle of rule of law that "all

legal disputes may be settled at court” has not been recognized. In reality, the statement on administrative litigation in the decision of the Fourth Plenary Session of the 18<sup>th</sup> CPC Central Committee also places more emphasis on the solution of “difficulties in getting an administrative lawsuit registered, adjudicating administrative cases, and executing court decisions,” instead of fully acknowledging the importance of administrative litigation in a government ruled by law. The public still cannot expect much from the administrative litigation function.

## **2. Public Interest Administrative Litigation Still Missing**

Public interest administrative litigation should have been an extension of the functions to facilitate administrative litigation, helping to supervise agencies, maintain the public law and order, and transform administrative litigation into a public forum for promoting institutional changes. The academics have vigorously called for public interest efforts in administrative litigation. Some scholars have suggested, albeit in vain, that social organizations be the ones to initiate public interest administrative litigations. On the one hand, social organizations in China are still underdeveloped. On the other hand, the authorities have reservations about many social organizations and thus are doubtful about social organizations’ involvement in public interest litigation.

The Eighteenth CPC Central Committee mentioned in its decision adopted at the Fourth Plenary Session, “exploring the establishment of a public interest litigation system where the people’s procuratorate initiates the legal proceedings.”<sup>38</sup> Although the procuratorate have great enthusiasm for this, the Government Legal Affairs Department expressly opposes the suggestion that the procuratorate acts as the plaintiff of administrative cases. The Legal Affairs Office of the State Council points out that an agency itself is the representative of public interest. Thus, it does not conform to the traditional system where the procuratorate initiates legal

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<sup>38</sup> *Supra* note 23.

proceedings against an agency in the court.<sup>39</sup> Some scholars are also concerned about the actual effect of the procuratorate's initiation of public interest litigations. The current procuratorates of China, like the court, do not enjoy a guaranteed independence to exercise their power. Even if the law empowers them to initiate public interest litigations, the procuratorates may not be able to initiate more than a few in years. They will not be able to help much to establish a system as such. Because there were too many differences on this issue, the Amendment did not endorse this suggestion and the problem is left for "further exploration" in practice.<sup>40</sup>

### 3. The Power of Regulation Review Remains to be Defined

The legal system of China is highly complicated, which frustrates even domestic legal scholars and attorneys, not to mention foreign observers. In simple terms, the National People's Congress and its Standing Committee may enact laws, the State Council may enact administrative regulations, local People's Congress and its Standing Committee of relatively higher status may enact local regulations, and State Council departments and local governments of relatively higher status may enact administrative rules. Among these forms, the force of laws is higher than that of administrative and local regulations, and the force of administrative and local regulations is, roughly speaking, higher than that of rules. It is completely out of the question in China for courts to review the constitutionality of laws, while it has been legally affirmed that courts have the power to review collaterally the legality of rules and determine their application. At present, a difficult problem is the

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<sup>39</sup> Qiao Xiaoyang (乔晓阳), Oct. 31, 2014, *supra* note 30.

<sup>40</sup> On May 1, 2015, after the Administrative Litigation Law Amendment was promulgated, the Standing Committee of the NPC authorized the Supreme People's Procuratorate to conduct a two-year Public Interest Litigation Pilot Program in the fields of ecological environment, resources preservation, state-owned assets protection, assignment of the right to the use of state-owned land and food and drug safety. Up to September 2016, the pilot Procuratorates filed 28 litigations of such sort in total.

inconsistency between regulations (especially local regulations) and laws. The law has not explicitly provided whether a court may exclude directly the application of inconsistent local regulations. A judge once declared in the court decision that a provision of a local regulation was inconsistent with the law and should not apply, but that caused herself a lot of trouble.<sup>41</sup> Along with the continuous delegation of legislative power, 282 cities nationwide with subordinate districts will be delegated the power to enact local regulations,<sup>42</sup> which makes it more urgent for the judicial body to review local regulations.

However, there are different opinions on this issue. The majority of scholars propose that the courts should have the power to independently decide on the application of a local regulation in adjudicating individual cases. The opposite opinion is that under the Chinese system of the People's Congress courts are accountable to the People's Congress at the same level, by which judges are appointed and to which the court presidents shall report. Therefore, courts cannot exclude on their own the application of a local regulation. If in adjudication courts have any doubt about the legality of a local regulation, they may suspend the adjudication and refer it to a competent organ for judgment according to relevant provisions. The Amendment evaded this controversy and inherited the original stipulation, that is, courts must "base" their judgment on the law, administrative regulation and local regulation.

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<sup>41</sup> Wang Hong (王宏), *Fayuan Qike Feiyi Renda Fagui* (法院岂可非议人大法规: 甘肃高院撤销酒泉中院一起错误判决) [How Could a Court Reproach the Regulation Enacted by the People's Congress: Gansu Provincial Higher People's Court Reversed the Wrong Decision by Jiuquan People's Court], BEIJING YOUTH DAILY, Oct. 27, 2000; Tian Yi (田毅) & Wang Ying (王颖), *Yige Faguan De Mingyun Yu Fatiao Dichu Zhi Bian* (一个法官的命运与“法条抵触之辩” [A Judge's Fate and “Debate on the Conflict of Legal Provisions”], 21<sup>st</sup> CENTURY ECON. REP., (Nov.17, 2003).

<sup>42</sup> Chen Liping (陈丽平), *Difang Lifa Quan Kuozhi 282 Ge Shequ De Shi* (地方立法权扩至282个设区的市)[282 Cities that are Divided into Districts to be Delegated Law-making Power], FAZHI RIBAO [Legal Daily], (Aug.26, 2014), [http://www.legaldaily.com.cn/zt/content/2014-08/26/content\\_5733453.htm?node=71314](http://www.legaldaily.com.cn/zt/content/2014-08/26/content_5733453.htm?node=71314) [https://perma.cc/Y6HJ-WXAU].

Controversies over this issue may still occur in the future.

#### 4. Partial Adjustment to Administrative Adjudication System

Compared to the above improvement on administrative adjudication mechanisms, the reform on administrative adjudication system is probably of more decisive significance. Administrative adjudication system decides what kind of judiciary shall adjudicate administrative cases. Many people deemed it a top priority when amending the Law. If the provision on this issue is not properly amended and judges do not have independence and authority, the Amendment of the Law will achieve a fraction of its intended effects, and some clauses will become mere decorations.

In the course of amending the Law, there have been various proposals, including one of establishing within the current court system administrative courts to specifically adjudicate administrative cases.<sup>43</sup> The legislation finally retained the current system that there is an administrative division in people's courts at all four levels but made a lot of minor adjustments. The final revision combined various proposals. The first is hierarchical jurisdiction. This proposal says that any complaint brought against a county government shall be referred to the intermediate people's

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<sup>43</sup> See generally Jiang Bixin (江必新), *Zhongguo Xingzheng Shenpan Tizhi Gaige Yanjiu - Jianlun Woguo Xingzheng Fayuan Tixi Goujian De Jichu Yiju Ji Gouxiang* (中国行政审判体制改革研究——兼论我国行政法院体系构建的基础、依据及构想)[*Research on China's Administrative Adjudication System Reform — Currently on Foundation, Basis and Conception of China's Administrative Court System Construction*], 4 XINGZHENG FAXUE YANJIU [Administrative Law Review] 3 (2013) (explaining the proposed changes to the court systems); Ma Huaide (马怀德), *Xingzheng Shenpan Tizhi Gaige De Mubiao: Sheli Xingzheng Fayuan* (行政审判体制改革的目标: 设立行政法院) [*The Aim of Administrative Adjudication System Reform Is to Establish Administrative Court*], 7 FALV SHIYONG [Journal of Law Application] 8 (2013) (describing the projected benefits to the amendments to the court system through administrative changes); He Haibo (何海波), *Xingzheng Shenpan Tizhi Gaige Chuyi* (行政审判体制改革刍议) [*On Reform of Administrative Adjudication System*], 1 ZHONGGUO FALV PINGLUN [China Law Review] 63 (2014) (detailing the reforms of the administrative adjudication system, and the impacts of these decisions).

court. A superior court may also hear a case under the lower court's jurisdiction, but the superior court is forbidden to send a case in its jurisdiction to a lower court. Then, a lower court may refer a case under its jurisdiction to a superior court for designating another court to hear the case. This leaves open the possibility of cross-regional jurisdiction. Finally, the higher people's court under the approval of the Supreme People's Court may determine a number of courts to exercise cross-regional administrative jurisdiction over administrative cases. This provides a basis for centralized jurisdiction and also leaves open the possibility of establishing special administrative courts.

The above provisions reflect the spirit of the Fourth Plenary Session of the 18<sup>th</sup> CPC Central Committee of moderate adjustment of the administrative lawsuit jurisdiction system. It helps enhance the anti-interference capacity of administrative adjudication. However, because legislators have not made decisions on the judicial system, there is still much uncertainties left in terms of specific plan and many issues remain to be further explored in practice. The overall advancement of judicial reform measures such as centralized management of the personnel, finance and materials of courts below the provincial level will also influence the trend of the reform of administrative adjudication system.

#### **IV. PRELIMINARY EFFECT OF THE AMENDMENT**

It has been more than two years since the amended Administrative Litigation Law came into effect in May 2015. Now, we can make a preliminary evaluation on the effect of the Amendment.

There are different perspectives on the effects of the amended Administrative Litigation Law. From the perspective of institutional improvement, I would like to list three indicators: (1) whether the amended law can effectively solve the difficulty in getting an administrative lawsuit registered and make administrative cases increase by a large margin, (2) whether it can effectively solve

the difficulty in winning an administrative case and make the plaintiff's winning rate rise significantly, and (3) whether it can improve the relevant mechanism of administrative dispute resolution and make administrative reconsideration cases increase and petition cases decrease.<sup>44</sup>

Statistics by the Supreme People's Court, the Legal Affairs Office of the State Council and the State Bureau for Letters and Visits on the situation of administrative litigation, administrative reconsideration and petitions nationwide in 2015 and 2016 provide an answer to the above questions. It should be noted that the new Administrative Litigation Law has not been in effect long enough to fully reveal the effect of the new Law. Nevertheless, the statistics can give us an idea of the effect.

#### **A. Administrative Cases Increased by a Large Margin, and “Difficulty in Getting an Administrative Lawsuit Registered” Greatly Alleviated**

There were 220,398 pieces of first instance administrative cases in 2015, an increase of fifty-five percent compared to 2014 and the number leveled off at 225,485 in 2016. This is the biggest increase following the overall implementation of the Administrative Litigation Law in early 1990s. Because the scope of actionable cases has not been largely extended in this Amendment, which had limited influence on the increase of cases accepted, the increase in the number has obviously resulted from the implementation of the registration system. According to report, in the month the registration system was first implemented, first instance administrative cases that were accepted nationwide attained a growth of 221 percent compared with the same period of the previous year, and 90 percent complaints were registered on the

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<sup>44</sup> He Haibo (何海波), *Xingzheng Susong Fa Xiugai Zhihou De Xuannian* (《行政诉讼法》修改之后的悬念) [*Suspense after the Administrative Litigation Law Amendment*], 12 CHINA REFORM, (2014).

spot.<sup>45</sup> Although court's refusal to register a case or issue a ruling is still heard occasionally, the difficulty in getting an administrative case registered has been greatly alleviated. In the meantime, the case number of second instance continuously increased to more than ten thousand in 2016, an all time high in its history.

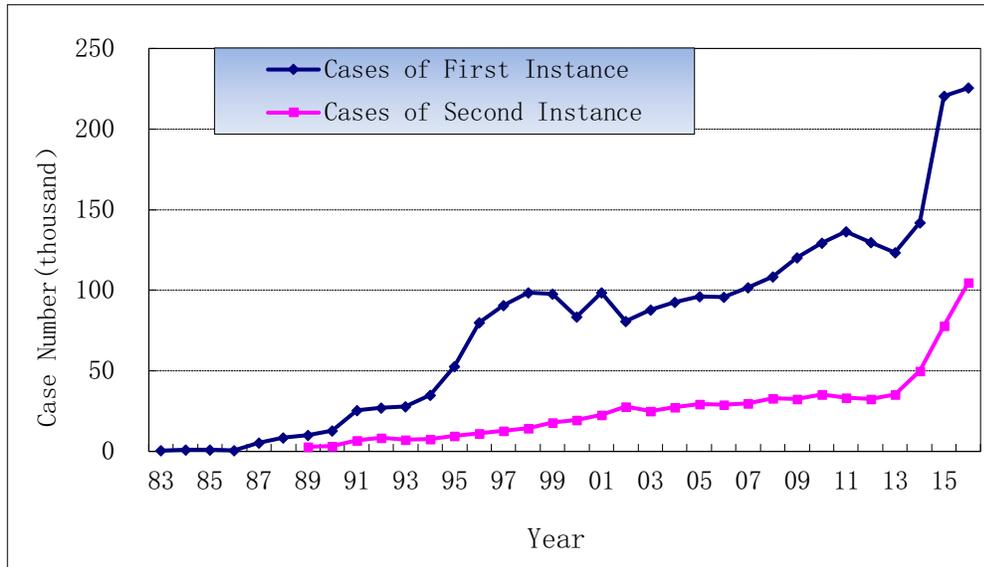
The surge of administrative cases in quantity will provide new opportunities for lawyers. Trial lawyers of administrative litigation (including government lawyers) are at the threshold of a new period in development. However, it has brought tremendous pressure to courts' adjudication and administrative response in the short term. From January to September 2016, the Supreme People's Court received more than 2,000 new administrative cases, which is unprecedented.<sup>46</sup> The cases suing the State Administration of Taxation and the Housing and Construction Department exceeded 500 respectively. The legislative affairs officers of the departments of the State Council are busying flying around the county to respond to lawsuits. Because it is difficult to immediately recruit in-staff personnel, the judges and government legal staff in position suddenly faced a greatly increased burden.

Figure 1: Number of Administrative Cases Accepted and Heard over the Years

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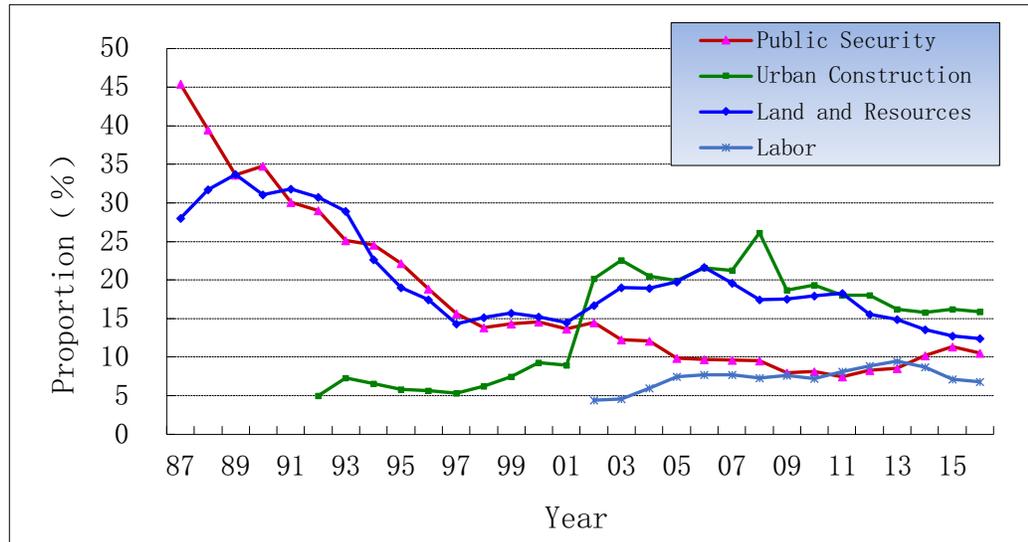
<sup>45</sup> Luo Shuzhen (罗书臻), *Zuigao Renmin Fayuan Tongbao Shishi Li' an Dengji Zhi Gaige Shouyue: Qingkuang Li' an Shu Chao Baiwan, Dangchang Li' an Lv Da 9 Cheng* (最高人民法院通报实施立案登记制改革首月情况: 立案数超百万, 当场立案率达9成) [The Supreme People's Court Announced the First-month Implementation of the Amended Case Registration System: Number of Cases Registered Reached over a Million and 90% Registered on the Spot], RENMIN FAYUANBAO [People's Court Daily] (Jun. 10, 2015), [http://rmfwb.chinacourt.org/paper/html/2015-06/10/content\\_98797.htm?div=-1](http://rmfwb.chinacourt.org/paper/html/2015-06/10/content_98797.htm?div=-1) [<https://perma.cc/V38W-LPBH>].

<sup>46</sup> Zhang Wei (张维), *Zuigao Fa Shouli Hang Su An Jinnian Jiang Chao Sanqian Jian* (最高法受理行诉案今年将超三千件) [The Supreme People's Court Will Accept and Hear More Than 3000 Pieces of Administrative Cases This Year], FAZHI RIBAO [Legal Daily] (Oct. 17, 2016), <http://epaper.legaldaily.com.cn/fzrb/content/20161017/Article06002GN.htm> [<https://perma.cc/WDS8-QDNJ>].



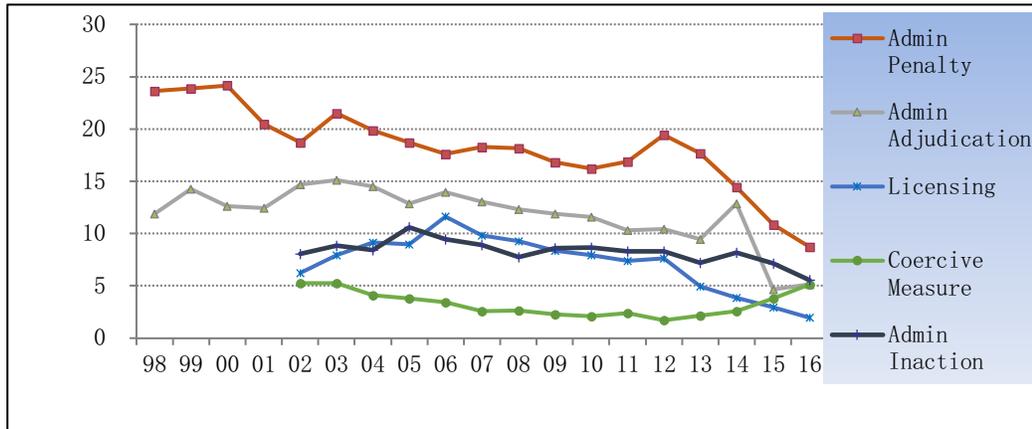
It is not clear how many disputes and what disputes should have been settled in courts but failed to enter court proceedings. It is not entirely clear at present what administrative management areas the newly accepted cases mainly concern and what the administrative actions in questions are. These issues require specific research. The statistics over the years show that public security cases once occupied the first place but declined later to the third place. Cases involving urban construction and natural resources have been the two most prevalent types of lawsuits for ten years consecutively, accounting for around 30 percent of the total number (see Fig. 2). House demolition and land expropriation have become social disputes of great contention. The courts are actively engaged in settling the hot disputes.

Figure 2: Proportion of Administrative Lawsuits in Several Major Areas of Administrative Management



Among the types of administrative actions, administrative penalty is still the first category, but the proportion of cases involving administrative penalty has been declining continuously in recent years and dropped to below nine percent in 2016. It is worth noting that several types of traditional administrative actions (including administrative penalty, administrative licensing, administrative adjudication, administrative coercive measures, administrative inaction, administrative compensation) altogether account for less than thirty percent (*see* Figure 3). It is worth studying what the “other” cases refer to.

Figure 3: Proportion of Administrative Lawsuits Involving Several Major Types of Administrative Actions



The Case Registration System has brought some new problems while solving the difficulty in getting an administrative lawsuit registered. A small number of citizens filed a large number of complaints, which included many trivial, repetitive, and practically meaningless ones. For instance, a party filed, in order to get more compensation for house demolition, hundreds of complaints on government information disclosure to force the government to participate in negotiation. We cannot identify the proportion of litigation abuse from the statistics, but many courts are deeply bothered by it. These lawsuits have taken up too much of the judicial resources while unable to solve practical problems. Courts have begun to limit such lawsuits, and their initiative has been recognized by the Supreme People's Court.<sup>47</sup>

<sup>47</sup> Nantong Gangzha Fayuan Guizhi Lanyong Suquan An Yishen Caiding Shu (南通港闸法院规制滥用诉权案一审裁定书) [First Written Verdict on Regulation of Abusing Litigation Right by Gangzha Dist. People's Ct., Nantong City, Jiangsu Province] (Mar. 11, 2015), 2015 Gang Xing Chu Zi Di 21 Hao (港行初字第21号); Wang Xiaoyan (王小燕), *Nantong Gangzha Fayuan Shuaixian Guizhi Zhengfu Xinxi Gongkai Lansu Xingwei* (南通港闸法院率先规制政府信息公开滥诉行为) [Gangzha People's Court of Nantong City Takes the Lead in Regulating Abuse Action on Government Information Disclosure], Jiangsu Province High People's Court, [http://www.jsfy.gov.cn/art/2015/02/27/23\\_88908.html](http://www.jsfy.gov.cn/art/2015/02/27/23_88908.html); Lu Hongxia *Su Nantong Shi Fazhan He Gaige Weiyuanhui Zhengfu Xinxi Gongkai Dafu An* (陆红霞诉南通市发展和改革委员会政府信息公开答复案) [Lu Hongxia v. Nantong Development and Reform Commission, Response to Governmental Information Disclosure Case], SUP. PEOPLE'S CT. GAZ., Issue. 11, 2015.

**B. Plaintiff Winning Rate Rose Slightly, but “Difficulty in Adjudicating Administrative Cases” Still to Be Improved**

The implementation of Case Registration System has brought the difficult task of solving administrative disputes into the courtroom. How the court will deal with the incoming disputes is the biggest suspense. In the past, courts usually persuaded plaintiffs to withdraw or flatly rejected complaints due to the excessive caseloads. Meanwhile, plaintiff’s winning rates sometimes declined rather than rose. In this regard, courts have done well in the past year.

Plaintiffs’ withdrawal rate has dropped sharply. Plaintiff withdrawals used to be the most common way to close cases, exceeding even court judgments. Plaintiffs’ withdrawal rate experienced two radical changes in the past thirty years, and the highest was respectively fifty-seven percent in 1997, and fifty percent in 2012; accordingly, cases that were closed in ways other than court judgments reached more than seventy percent at one time. The high withdrawal rate reflects courts’ difficulty in adjudicating administrative cases. Along with the adjustment of judicial policy, plaintiffs’ withdrawal rate kept declining in the last three years, and even reached twenty percent in 2016, the lowest since the implementation of the 1989 Administrative Litigation Law (*see* Figure 4). Moreover, the rate of plaintiffs’ withdrawal after the defendant agency modified the administrative action in question, which may be regarded as if the plaintiff actually won the case, has also risen somewhat (*see* Figure 5).

Figure 4 Proportion of Non-decision including Plaintiff Withdrawal, Dismissal and Transferal

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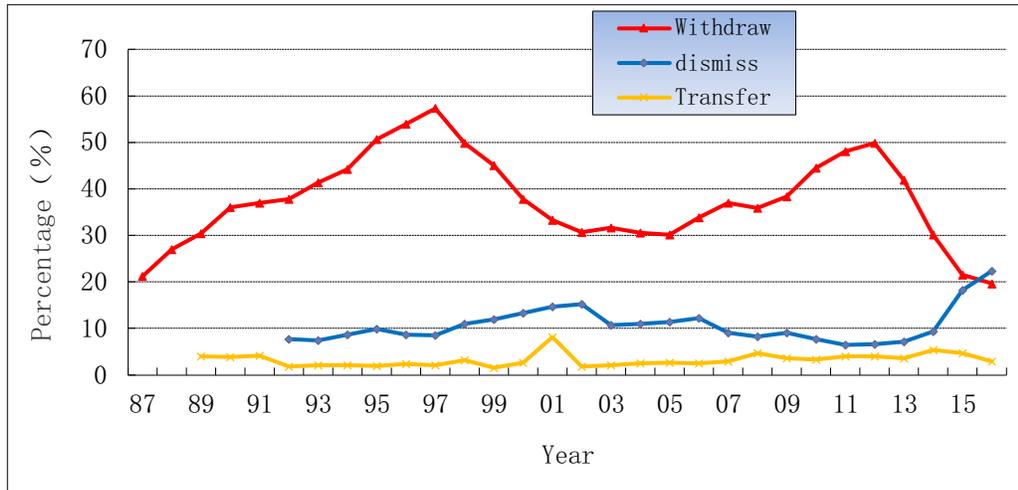
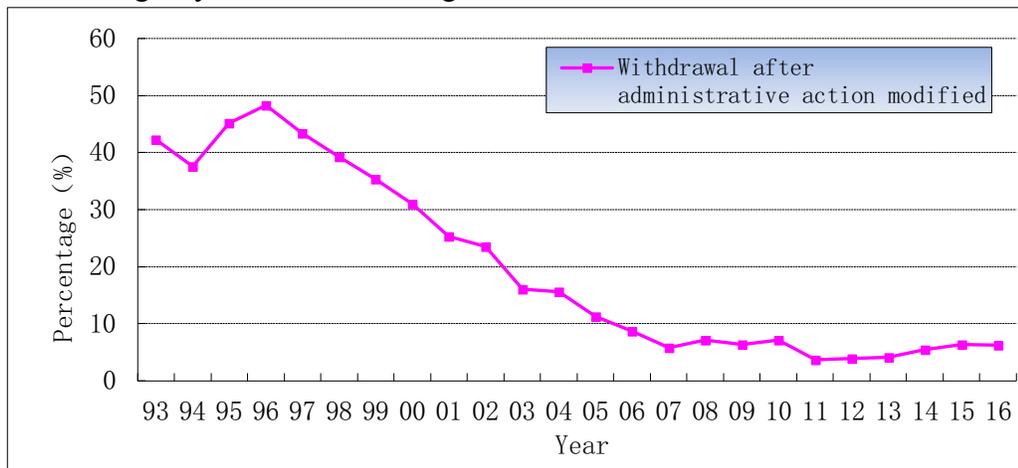


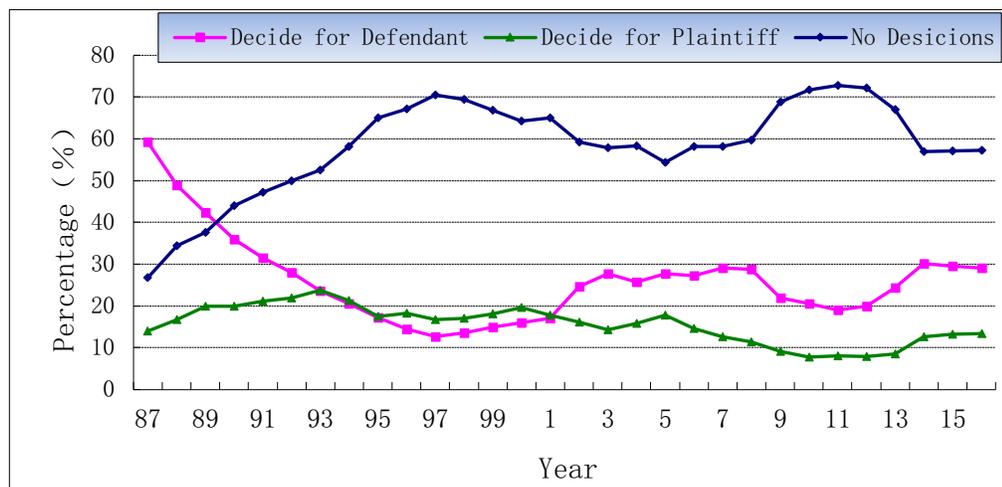
Figure 5: Proportion of Plaintiff Withdrawal after the Defendant Agency Modifies the Alleged Administrative Action



Next, the rate that the court finds in favor of the plaintiff has risen slightly. In the present actual context of Chinese administrative law enforcement and judicial review, the plaintiff winning rate is a valid index of fair trial according to law by the court. The rate that the court finds in favor of the plaintiff has once reached twenty-four percent in history, but it declined afterwards. The judicial system implemented “grand mediation” a few years ago, and the plaintiff winning rate once dropped to less than eight

percent. It has risen slightly in the recent two years, and reached 13.4 percent in 2016 (*see* Figure 6). This indicates that the amended Administrative Litigation Law has played a positive role in protecting citizens' rights. We are not sure, however, how many plaintiffs out of plaintiff's winning cases have received substantive relief, and whether those disputes have been solved meaningfully. Even on the surface of the cases, there is still room for the plaintiff winning rate to rise further in the future, referring to the aforementioned experience of Zhejiang Taizhou and Henan Province.

Figure 6: Proportion of First Instance Case Decisions in Favor of Plaintiff and Defendant



In addition, the proportion of court decisions to dismiss the lawsuit without a ruling on substantial issue has increased significantly, accounting for twenty-two percent of all cases closed in 2016 (*see* Figure 4). It is not surprising that the proportion of courts' rulings to dismiss the lawsuit after registration increased, taking into account that the court has lowered the threshold for accepting a case after the implementation of the Case Registration System and many cases that did not meet the conditions for lawsuit filing have been accepted. Compared to the proportion of courts'

decisions to reject the complaint, the proportion of court rulings to dismiss the lawsuit is still higher. Courts only ruled to reject 10,343 complaints in 2016, which was equal to one-fifth of the cases dismissed after acceptance. It is necessary for the court to improve case registration in the future and rule to reject complaints at the very beginning that obviously do not meet the conditions for acceptance, including complaints that clearly indicate litigation abuse. Rejection at the very beginning is more cost-efficient than dismissal afterwards. The public needs to accept the fact that the Case Registration System does not need to accept all complaints.

**C. Administrative Reconsideration Achieves Better Effect but the “Main Chanel” Role has not been Brought into Full Play**

Administrative dispute settlement is a big category and dispute settlement mechanisms—administrative litigation, administrative reconsideration and petition—should be reasonably allocated. Administrative reconsideration should, for reasons of simplicity, speed, and cost, accept and solve in theory the majority of administrative disputes and become the main channel of administrative dispute settlement. For the reason of its strictness and authority in fact-finding, law application, and implementation procedure, administrative litigation should become the last relief. Petition, an informal and complementary channel of dispute settlement, should be limited to a small number of administrative disputes. An ideal ratio of administrative reconsideration to administrative litigation to petition should be, roughly speaking, 100:10:1; but it has been quite the opposite in reality.

The poor effect of administrative reconsideration mainly attributes to its system, but as aforementioned, the following provision of the Law was also problematic: if the reconsideration organ decides to sustain the original administrative action, the party concerned may only sue the original agency that has taken the administrative action in question. If the reconsideration organ decides to modify the original administrative action, the reconsideration organ shall be the defendant. Then, the amended

Administrative Litigation Law will provide whether the reconsideration organ should decide to sustain or modify the original administrative action, in which the reconsideration organ would be the defendant. There has been much controversy over the above provision in the academic circle.

The statistics of the year 2015 and 2016 show positive responses to the above provision by the reconsideration organ. At first, the long-term increase of reconsideration decision to sustain the original administrative action, including dismissal of application for administrative reconsideration, stopped and visibly declined for the first time. In addition, the number of reconsideration decisions in favor of applicants stopped declining over the years, attained 16.8 percent in 2016, which was the highest in a decade, doubling that of the year prior to the amendment (*see* Figure 7). In the meantime, administrative reconsideration cases continued to grow, reaching close to 164,000 pieces in 2016 (*see* Figure 8). The provision that the reconsideration organ shall be the defendant has promoted the conscientious fulfillment of its reconsideration duties and the duties to protect of citizens' rights. It may also induce future reform of the administrative reconsideration system and amendment of the Administrative Reconsideration Law. It will take some time to see what the effects will be.

Figure 7: Closure of Administrative Reconsideration Cases  
Nationwide Over the Years

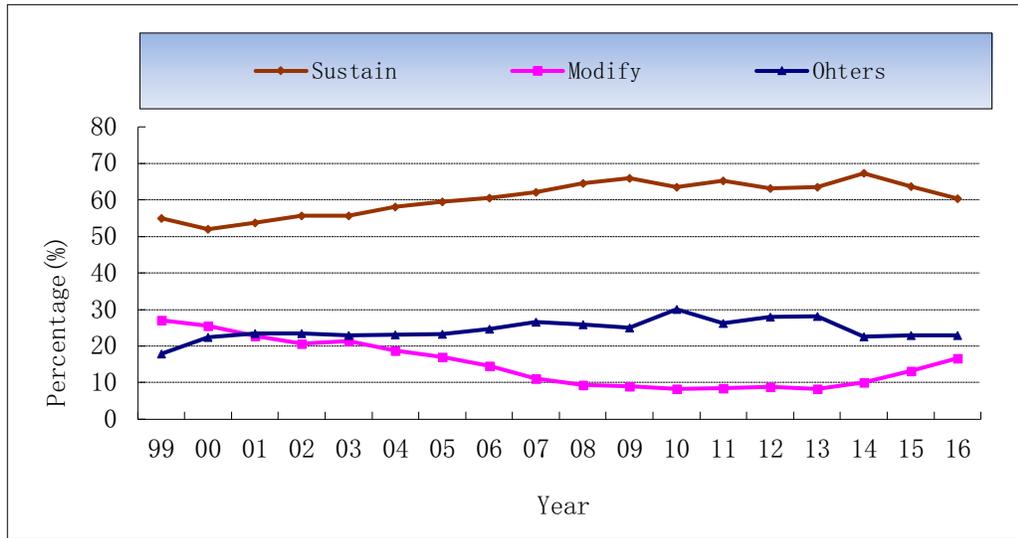
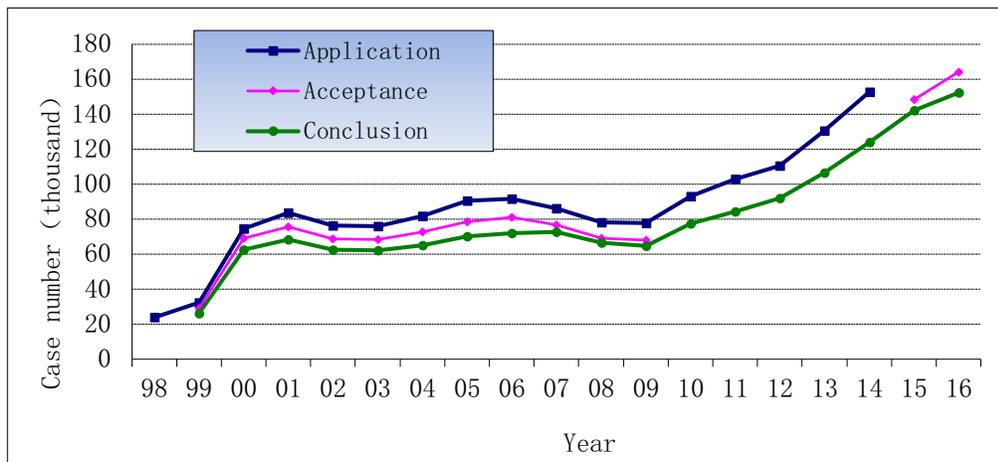


Figure 8: Number of Administrative Reconsideration Cases Nationwide Over the Years



While administrative litigation and administrative reconsideration increased, the number of petitions declined. Statistics from the State Bureau for Letters and Visits show that petitions nationwide declined by 7.4 percent in 2015, petitions in the city of Beijing declined by 6.5 percent, and the number of collective

petitions also declined.<sup>48</sup> In 2016, petitions nationwide declined again, slightly but steadily.<sup>49</sup> We cannot simply attribute the decline of petitions to the improvement of administrative litigation and administrative reconsideration systems. However, considering that the vast majority of petitioned matters relate to agencies, the unimpeded channels mentioned above have indeed played a role in the decrease in petitions.

## V. CONCLUSION

The 2014 Amendment of the Administrative Litigation Law has made a powerful response to the difficulties in getting an administrative lawsuit registered, adjudicating administrative cases and executing court decisions. After the amended Administrative Litigation Law came into effect, the acceptance of first instance administrative lawsuits increased sharply, and the plaintiffs' winning rate also rose in the same time. The function of administrative litigation has been improved in settling disputes, which has promoted the reform of the administrative reconsideration and petition mechanisms. In general, the Amendment of the Administrative Litigation Law has achieved the results of that legislators desired and administrative litigation in China is embracing the best ever period in its history.

The initial target of this Amendment is very humble. The Amendment has aimed to solve the "three difficulties," and thus it has not prioritized expanding the functions of administrative

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<sup>48</sup> Bai Yang (白阳), *Guojia Xinfang Ju: 2015 Nian Quanguo Xinfang Zengliang Cunliang Shixian "Shuang Xiajiang"* (国家信访局: 2015年全国信访增量存量实现“双下降”) [State Bureau for Letters and Visits: Increment and Stock of Petitions Nationwide in 2015 Both Declined], XINHUA WANG, (Jan. 24, 2016), [http://news.xinhuanet.com/legal/2016-01/24/c\\_1117876355.htm](http://news.xinhuanet.com/legal/2016-01/24/c_1117876355.htm) [https://perma.cc/SAR7-LM2D].

<sup>49</sup> Lu Junyu (卢俊宇), *Qunian Quanguo Xinfang Zongliang Tongbi Xiajiang 1.2% (去年全国信访总量同比下降1.2%)* [Petitions Nationwide Declined by 1.2% Compared with the Year Before], XINHUA NET, [http://news.xinhuanet.com/legal/2017-01/16/c\\_129448119.htm](http://news.xinhuanet.com/legal/2017-01/16/c_129448119.htm) [https://perma.cc/M6TB-EBFR].

litigation. Court reviews of normative documents, collateral reviews of local regulations, and acceptance of public interest litigation were not implemented. The biggest problem that has restricted administrative litigation, namely a full guarantee of the independence and authority of administrative trial, has not been solved by the Amendment. Solving this problem will require an overall advancement of judicial and political reform. The deep-seated problems that have troubled administrative litigation for years still exist. Administrative trial still faces a difficult future.

Compared to administrative law enforcement and judicial practices, legislation is the key factor and major symbol of legal development. The Amendment of the Administrative Litigation Law reflects the efforts to promote the rule of law in this era, as well as the limitations to the process of law at this stage. If there is a gap between the law and our expectations, it is because there is a gap between the times we are in and the future we look forward to. We appeal and criticize because we cherish such an ideal.