

LITIGATIONS WITHOUT A RULING:

THE PREDICAMENT OF ADMINISTRATIVE LAW IN CHINA

HE Haibo

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*HE Haibo**

Abstract

The Administrative Litigation Law of China 1989 paints a rosy picture in which the individual and the government face each other in court, both submitting to the judgment of the law. However, in reality, many administrative cases do not conclude with judicial rulings but largely with withdrawals by plaintiffs (varying between 30-57%). In recent years, coordination and settlement in administrative litigations are even advocated in the official directives.

This paper employs national statistical data, articles and reports written by judges to demonstrate that in most situations, withdrawals in administrative cases have not only denied individual plaintiffs the opportunity to protect their legal rights through litigation, but also rendered illusory any potential contribution that litigations might have towards the rule of law. The large number of withdrawals indicates the degree of difficulty that the institution of administrative litigation faces. Efforts made by the Supreme People's Court to enhance the number of administrative cases or reduce the rate of withdrawal have failed to reverse the general pattern. The preference for coordination and settlement that courts at all levels have expressed in administrative litigation may be partly motivated by the prevailing judicial philosophy, but it is believed to be primarily a collective compromise that courts have made in face of challenging conditions.

The paper indicates that the institution of administrative litigation, embedded in the contemporary political and social structure of China, cannot be a means for achieving constitutional governance in China, and its impact on social change is severely limited. To eliminate the obstacles to administrative litigation, the immediate priority should be the promotion of judicial independence and authority. In the long term, the reform depends on the growth of civil society and the perfection of democratic politics.

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An earlier version of this paper has been published in 中外法学 [PEKING U.L.J.], No. 2, 2001. The author has updated the data and developed his opinions in this paper, with the main addition being Section IV: The "Coordination Turn" of Administrative Litigation.

Fan Kai, J.D. student at Harvard Law School, meticulously translated the paper from Chinese to English. Sally Lam, editor of this journal, did hundreds of amendments to this paper which made it more readable. But the author himself will be solely responsible for all mistakes that may occur in the paper.

I. INTRODUCTION

The *Administrative Litigation Law* of 1989 embodies the rule of law ideals to an exceptionally large extent, and its enactment attracted substantial attention and expectation.¹ At the early stage of implementation of this legislation, Professor Gong Xiangrui and his fellows conducted systematic field research and underscored a number of problems in its implementation.² American scholars such as Kevin O'Brien researched into administrative litigation in China's rural areas and also painted a bleak picture for us.³ These studies, mainly based on various interviews and surveys, depict a strong impression on the audience, but they are apparently unable to supply empirical evidence on the national scale. Professor Pei Minxin may be one of the few scholars who have made an in-depth analysis based on the national data.⁴ However, his research, covering only the years of 1986-96, did not correlate the main indicators (case number and their dispositions) with the policy factors behind them and failed to provide a dynamic picture of administrative litigation in China over the past decades.

Among other data, the high rate of withdrawal cases and its high volatility remained a "puzzle" for many. The Chinese legal circle for a long time has had different attitudes towards withdrawal in administrative litigation. In recent years, coordination and settlement in administrative litigations are even advocated in the official directives. Will withdrawal, or "coordination and settlement" as so-called, be a way to go out of the predicament in judicial review, or is it merely a result of such predicament.

This paper seeks to first review the withdrawal, a particular institution in administrative litigation, as the vantage point, then to demonstrate and analyze the difficulties that the institution of administrative litigation faces with national statistical data (1987-

¹ See Chen Duanhong (陈端洪), *Confrontation: the Route to Constitutionalism in China from the Perspective of Administrative Litigation* (对峙: 从行政诉讼看我国的宪政出路), 4 ZHONGWAI FAXUE (中外法学) [PEKING UNIV. L.J.] (1995) ("[A]dministrative litigation established the confrontational mode in Chinese politics for the first time, signifying the beginning of democratic constitutionalism.").

² FAZHI DE LIXIANG YU XIANSHI: ZHONGHUA REMIN GONGHEGUO XINGZHENG SUSONG FA SHISHI XIANZHUANG YU FAZHAN FANGXIANG DIAOCHA YANJIU BAOGAO (法治的理想与现实: 中华人民共和国行政诉讼法实施现状与发展方向调查研究报告) [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] (Gong Xiangrui et al. eds., 1993).

³ See Susan Finder, *Like Throwing an Egg against a Stone: Administrative Litigation in the People's Republic of China*, 3 CHINESE LAW L. 1 (1989); Kevin O'Brien & Li Lianjiang, 'Suing the Local State: Administrative Litigation in Rural China', 51 CHINA J. 76, 75 (2004).

⁴ Pei Minxin, *Citizens vs. Mandarins: Administrative Litigation in China*, 152 CHINA Q. 832 (1997).

2010), articles and reports written by judges and interviews, and ultimately to reveal the current state of administrative law in China. My conclusion corroborates the prevailing scholarly opinions on the practice of administrative litigation and emphasizes that the lack of judicial independence is the main cause of the difficulties in administrative litigation.

II. THE GAP BETWEEN INSTITUTION AND REALITY

A. *The Well-Intentioned Statutory Rules*

According to the *Administrative Litigation Law* (hereafter “the Law”) of China, mediation is unsuitable for administrative cases, but plaintiffs may opt for withdrawals. Nonetheless, plaintiffs’ applications for withdrawal must be reviewed and approved by the court. Article 51 of the *Law* states that “before the people’s court makes a ruling or determination in an administrative case, the plaintiff may apply for a withdrawal, or when the defendant changes its concrete administrative act the plaintiff may consent to and apply for a withdrawal; whether to approve such an application or not shall be subject to the discretion of the people’s court.” In either of the above scenarios, “if the people’s court determines that a withdrawal should be disallowed, and if the plaintiff refuses to appear in court,” the court may rule *in abstentia*.⁵

Both the *Administrative Litigation Law* and the relevant judicial interpretations emphasize the requirement that all withdrawals must be approved by courts. Although it was not until the publication of *the Rules on Several Issues in Withdrawals of Administrative Litigation* by the Supreme People’s Court that conditions for withdrawals by plaintiffs were explicitly laid out,⁶ it is many

⁵ See Zuigao Renmin Fayuan Guanyu Guanche Zhixing Zhonghua Renmin Gongheguo Xingzheng Susongfa Ruogan Wenti de Yijian (最高人民法院关于贯彻执行中华人民共和国行政诉讼法若干问题的意见)(试行) [Opinions of the Supreme People’s Court in Regard to Certain Issues in the Implementation of Administrative Litigation Law] (promulgated by Adjudication Comm. Sup. People’s Ct., Jun. 11, 1991, effective Jul. 11, 1991) (Chinalawinfo).

This provision has been incorporated in Zuigao Renmin Fayuan Guanyu Zhixing Zhonghua Renmin Gongheguo Xingzheng Susongfa 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) [Interpretations of the Supreme People’s Court in Regard to Certain Issues in the Implementation of Administrative Litigation Law] (effective March 10, 2000) art. 49.

⁶ See Zui Gao Renmin Fayuan Guanyu Xingzheng Susong Chesu Ruogan Wenti de Guiding (最高人民法院关于行政诉讼撤诉若干问题的规定) [Rules of the Supreme People’s Court in Regard to Certain Issues in Withdrawals in Administrative Litigation] (promulgated by Adjudication Comm. Sup. People’s Ct., Jan. 14, 2008, effective Feb. 1, 2000) art. 2 (Chinalawinfo) (“When the defendant changes the concrete administrative act that is being challenged, and the plaintiff applies for a withdrawal, the people’s court should approve the application, when the following conditions are satisfied, 1) the application for withdrawal is an expression of the applicant’s true will; 2) the defendant changes the concrete administrative act that is being challenged, and it does not violate any prohibitive

scholars and judges' conviction that a court may approve an application for withdrawal only if certain conditions are met. In general, the court exercises not only procedural review of a plaintiff's application for withdrawal, but also substantive review, including whether the plaintiff's application is made voluntarily, and whether the challenged administrative act or the changed administrative act is legal.⁷ Therefore, in administrative litigation, the court is not an umpire that is completely neutral and passive; on the contrary it bears the duty to correct illegal acts and to preserve the order of administrative law.

Although the majority of scholars point out that the review of and the restrictions on withdrawal serve the twin purposes of safeguarding citizen's rights against the harm of illegal acts by administrative agencies and safeguarding public interests against the harm of illegal acts by either a plaintiff or a defendant, the overriding purpose of the restrictions on withdrawal is undeniably to protect the interests of the plaintiff. Given the vulnerable position of the plaintiff in administrative litigation, litigation cannot proceed further once the plaintiff is coerced to withdraw, thereby frustrating the legislative purposes of protecting the plaintiff's interests and monitoring administrative acts. Therefore, it is necessary for a third party – the court – to intervene to correct the imbalance of power between the plaintiff and the defendant in order to ensure the continuation of administrative litigation.

B. The Law is Rendered Illusory

While the Law requires the court to be a vigilant gate-keeper in the review of applications for withdrawal, the number of instances of withdrawal is astonishingly high in reality. Based on Table I, since the enactment of *Administrative Litigation Law*, the national rate of withdrawal in administrative cases in first instance has never fallen below 30%. It reached its peak at 57.3% in 1997. According to the reports by a number of administrative law judges, the rate of withdrawal once surged to a staggering level of 81.7% in certain regions.⁸ Compared with the data recorded prior to the enactment

rules in statutes or regulations, or exceed or abdicate its delegated power, or harm public interests or other individuals' legal interests; 3) the defendant has already changed or has decided to change the concrete administrative act that is being challenged, and it notifies the people's court in writing; 4) no third party expresses dissent.”).

⁷ See XINGZHENG SUSONG FA GUANCHE YIJIAN XIJIE (行政诉讼法贯彻意见析解) [ANALYSIS ON THE IMPLEMENTATION OPINIONS OF THE ADMINISTRATIVE LITIGATION LAW] 111-12 (Huang Jie ed., China People's Public Sec. Univ. Press 1992); see also JIANG MING'AN (姜明安), XINGZHENG SUSONG FAXUE (行政诉讼法学) [ADMIN. LITIG. L.] 164- 65 (3d ed. 1993).

⁸ See Sun Linsheng & Xing Shuyan (孙林生 & 刑淑艳), *Xingzheng Susong Yi Chesu Fashu Jiean Weishenme Jugao Buxia? Dui 365 Jian Chexiao Xingzheng Anjian de Diaocha Fenxi* (行政诉讼以撤

of the *Administrative Litigation Law*, not only did the rate of withdrawal in administrative cases not decline after the enactment, but on the contrary, it grew steadily over a long period of eight years, and still remains consistently high today (the rate slightly dropped after 1998, but it has always remained higher than the pre-enactment level). Hence, it is impossible to discern any real contribution from the legislation.

Table I. National Data on the Acceptance and Concluding of Administrative Cases in First Instance⁹

诉方式结案为什么居高不下? 对365件撤诉行政案件的调查分析) [Why Does the Number of Administrative Cases that End with Withdrawals Remain So High? An Examination of 365 Administrative Cases that Were Withdrawn], 3 XINGZHENG FAXUE YANJIU (行政法学研究) [ADMIN. L. REV.] 34 (1996).

⁹ The source of the data is the Statistics Division of the Office of Research of the Supreme People's Court (最高法院研究室). Some of the data for the years from 1988 to 2009 are also found in China Law Year Book (中国法律年鉴). When there are discrepancies among the data from different sources for some of the years (e.g., the number of accepted cases in 1998), this paper relies on the data supplied by the Statistics Division of the Office of Research of the Supreme People's Court.

"Cases Accepted" does not include administrative cases that were raised solely for administrative compensation before 2001. "Rule for Plaintiff" include rulings revoking or modifying administrative acts, rulings compelling administrative agencies to carry out their legal duties, and rulings recognizing that the administrative acts in question were either illegal or void. "Rule for Defendant" include rulings upholding administrative acts, rulings recognizing that administrative acts in question were legal or effective, and rulings dismissing plaintiffs' complaints. "Other Means of Concluding (Others)" includes determinations that dismiss, terminate, or transfer suits and other means through which cases are concluded without determinations on the merits, and this category does not include withdrawals.

In its judicial interpretations issued in 2000, the Supreme People's Court added the recognition of the dichotomies between legal and illegal, void and effective, with regard to administrative acts. However, it was not until 2002 that the pertinent data began to be collected. It is probable that such cases were included among "Others" in prior years. Since the proportions of rulings involving recognitions have been very small (e.g., in 2007, rulings recognizing acts to be illegal or void amounted to 1.6%, and rulings recognizing acts to be legal or effective amounted to 0.4%), so the impact of such rulings on statistical results is insubstantial. With regard to the rate of withdrawal, which is the focal point of this paper, there is a high level of consistency among the data provided by various sources. The source of the data is the Statistics Division of the Office of Research of the Supreme People's Court (最高法院研究室). Some of the data for the years from 1988 to 2009 are also found in China Law Year Book (中国法律年鉴). When there are discrepancies among the data from different sources for some of the years (e.g., the number of accepted cases in 1998), this paper relies on the data supplied by the Statistics Division of the Office of Research of the Supreme People's Court.

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Year	Cases Accepte d	Cases Conclud ed	Wit hdra wal (%)	<i>Withdra wal on Plaintiff s' own (%)</i>	Rule for Defenda nt (%)	Rule for Plaintiff (%)	Dismi ssal and Other (%)	Dis miss al (%)
1987	5240	4677	21.3		59.2	14.0	5.5	
1988	8573	8029	27.0		48.9	16.7	7.4	
1989	9934	9742	30.4		42.4	20.0	7.2	
1990	13006	12040	36.1		36.0	20.0	7.9	
1991	25667	25202	37.0		31.6	21.2	10.2	
1992	27125	27116	37.8		28.1	22.0	12.1	
1993	27911	27958	41.3		23.6	23.8	11.3	
1994	35083	34567	44.3	62.4	20.6	21.3	13.8	
1995	52596	51370	50.6	57.7	17.3	17.6	14.5	
1996	79966	79537	54.0	51.7	14.5	18.3	13.2	8.7
1997	90557	88542	57.3	56.6	12.7	16.8	13.2	8.5
1998	98350	98390	49.8	60.7	13.6	17.0	19.6	11.0
1999	97569	98759	45.0	64.6	14.9	18.2	21.9	12.0
2000	83533	84112	37.8	69.0	16	19.7	26.5	13.3
2001	85760	86614	33.3	74.7	17.1	17.9	31.7	14.7
2002	100921	95984	30.7	76.5	24.7	16.1	28.5	15.2
2003	87919	88050	31.6	83.9	27.8	14.3	26.3	10.7
2004	92613	92192	30.6	84.4	25.8	15.9	27.7	11.0
2005	96178	95707	30.2	88.7	27.8	17.8	24.2	11.4
2006	95617	95052	33.8	91.2	27.2	14.6	24.4	12.3
2007	101510	100683	37	94.2	29.1	12.6	21.2	9.1
2008	108398	109085	35.9	92.9	28.8	11.5	23.8	8.3
2009	120312	120530	38.4	93.4	21.9	9.2	30.5	9.1
2010	129133	129806	44.5	92.8	20.5	7.8	27.3	7.7

In its judicial interpretations issued in 2000, the Supreme People's Court added the recognition of the dichotomies between legal and illegal, void and effective, with regard to administrative acts. However, it was not until 2002 that the pertinent data began to be collected. It is probable that such cases were included among "Others" in prior years. Since the proportions of rulings involving recognitions have been very small (e.g., in 2007, rulings recognizing acts to be illegal or void amounted to 1.6%, and rulings recognizing acts to be legal or effective amounted to 0.4%), so the impact of such rulings on statistical results is insubstantial. With regard to the rate of withdrawal, which is the focal point of this paper, there is a high level of consistency among the data provided by various sources.

More noticeably, since the enactment of the *Administrative Litigation Law*, few courts have handed down rulings that denied applications for withdrawal. Among all the articles on withdrawal in administrative cases that this author has read, no paper has ever mentioned even one concrete case in which withdrawal was denied. This author has discussed the issue with several senior judges from the administrative divisions of the Supreme People's Court and a few high courts and intermediate courts. A number of them stated that they had never heard of such cases; some stated that there might have been one or two such cases in certain provinces, but such cases were certainly extremely rare.

Viewing in abstract, both the grant and the denial of withdrawal are consequences of the exercise of courts' power of review, so legal rights of the plaintiff are protected to the same extent in both scenarios. However, once the actual circumstances in a withdrawal case are considered, a different picture emerges. For the purpose of statistical analysis, the cases withdrawn by plaintiffs are divided into two categories, "withdrawals on plaintiffs' own" and "withdrawals filed by plaintiffs after the defendants revoke or modify the challenged administrated acts." While in the latter category, a plaintiff wins the suit *de facto*, a plaintiff ordinarily gains no benefit at all in the former case. As Table I suggests, since the data became available in 1993, the proportion of "withdrawals on plaintiffs' own" among all withdrawal cases has remained above 50% every year. The rate has since then continued to rise and even exceeded 90% in recent years.

The above analysis suggests that the court's power to review withdrawals in administrative cases has been rendered entirely illusory, and the legislative intent of the restrictions on withdrawals in the *Administrative Litigation Law* is completely frustrated.

C. Concerns and Contradictions

The high rate of withdrawal in administrative litigation was already noted even during the period between the promulgation and the enactment of the *Administrative Litigation Law*.¹⁰ With the

¹⁰ See Anhui Sheng Renmin Gaoji Renmin Fayuan Xingzhengting (安徽省高级人民法院行政庭) [The High Court of Anhui Province Administrative Division], *Xingzheng Susong Chesu Zhong de Jige Wenti* (行政诉讼撤诉中的几个问题) [Several Issues with Regard to Withdrawals in Administrative Litigation], in *XINGZHENG SHENPAN SHIJIAN YU YANJIU* (行政审判实践与研究) [THE PRACTICE AND RESEARCH IN ADMINISTRATIVE ADJUDICATION] (Huang Jie (黄杰) & Li Daomin (李道民) eds., 1991); Chongqing Shi Zhongji Renmin Fayuan Xingzhengting (重庆市中级法院行政庭) [Intermediate Court of Chongqing City Administrative Division], *Guanyu Xingzheng Susong Zhong Chesu Jige Wenti de Taolun* (关于行政诉讼中撤诉几个问题的讨论) [A Discourse on Several Issues with Regard to Withdrawals in Administrative Litigation], in *Xingzheng Shenpan Shijian Yu Yanjiu* (行政审判实践与研究) [The Practice and Research in Administrative Adjudication] (Huang Jie (黄杰) & Li Daomin (李

constant increasing rate of withdrawal in administrative cases brings increasing concerns and pleas regarding the issue of withdrawal in the mid-1990s. Some articles employed the term “abnormal withdrawal” to describe the phenomenon. In their investigation into the root of this problem, almost all authors pointed to the court’s failure to act as a good gatekeeper as an important contributory factor, and when discussing potential solutions to this problem, almost all authors urged the court to heighten scrutiny over applications for withdrawal and deny those applications that fail to meet the conditions for withdrawal.¹¹

The widespread concern over the issue of withdrawal in administrative litigation not only demonstrates the expectation that judicial scrutiny should correct the imbalance of power between plaintiffs and defendants in administrative litigation, but also reflects the predicament of the institution and the disillusion in reality. In light of the legal rules, the authors urge in good faith that the court should heighten the scrutiny over applications for withdrawal. However, judges, probably even including the authors of those articles, take a lax approach to withdrawals in light of the reality.

道民) eds., 1991). For scholarly works, see Zhang Shuyi (张树义) & Tang Yongjin (汤永进), *Zai Jiannan Zhong Qianjin: Zhonghuo Renmin Gongheguo Xingzheng Susong Fa Shishi Xianzhuang Yu Fazhan Fangxiang Zonghe Fenxi Baogao* (在艰难中前进: 中华人民共和国行政诉讼法实施现状与发展方向综合分析报告) [*Progress in Face of Challenges: a Comprehensive Analytical Report with Regard to the Current Conditions and Future Development of the Administrative Litigation Law of People’s Republic of China*], in FAZHI DE LIXIANG YU XIANSHI: ZHONGHUA REMIN GONGHEGUO XINGZHENG SUSONG FA SHISHI XIANZHUANG YU FAZHAN FANGXIANG DIAOCHA YANJIU BAOGAO (法治的理想与现实: 中华人民共和国行政诉讼法实施现状与发展方向调查研究报告) [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] (Gong Xiangrui et al. eds., 1993).

¹¹ Jiang Shiyuan & Zhang Xiaoming (姜世元 & 张晓明), *Xingzheng Susongzhong de Chesu* (行政诉讼中的撤诉) [*Withdrawals in Administrative Litigation*], 5 RENMIN SIFA (人民司法) [PEOPLE’S JUDICATURE] 23 (1990); Zhang Lefa (张乐发), *Dui Chesu Xingzheng Anjian De Fenxi Ji Yijian* (对撤诉行政案件的分析及意见) [*Analysis and Opinions on Withdrawals of Administrative Cases*], 3 PEOPLE’S JUDICATURE 19 (1992); Zhu Shifen (朱世芬), *Yuangao Chesu Budang, Fayuan Buying Yuyi Zhunxu* (原告撤诉原因不当, 法院不应予以准许) [*When the Reasons for Withdrawal Is Improper, the Court Should Not Authorize the Withdrawal*], in ANALYSIS AND COMMENTARIES ON ADMINISTRATIVE CASES (Jiang Ming’an ed., 1993); Han Yong (韩勇), *Xingzheng Chesuduo de Xianxiang Burong Hushi* (行政诉讼撤诉多的现象不容忽视) [*The Large Number of Withdrawals in Administrative Litigation Should not be Ignored*], 6 SHANDONG ADJUDICATION (1994); Huang Jiawan, Guo Naijun & Wu Rongsheng (黄家万, 郭乃军 & 吴荣生), Municipal Court of Yancheng City, Jiangsu Province, *Qianxi Xingzheng Susong Anjian De Budang Chesu* (浅析行政诉讼案件的不当撤诉) [*A Brief Analysis of Improper Withdrawals of Administrative Cases*], 2 POL. & L. (政治与法律) 22 (1995); Xie Jianzhen (谢坚贞), *Xingzheng Chesuzhong Cunzai De Wenti Ji Duice* (行政撤诉中存在的问题及对策) [*Several Issues in Withdrawals of Administrative Cases and the Solutions*], 5 L. & ECON. (法律与经济) (1996); Liu Jingzhu & Yang Cheng (刘京柱 & 阳城), *Xingzheng Chesu Jugao Buxia De Yuanyin Ji Duice Jianyi* (行政诉讼案件撤诉率居高不下的原因及对策建议) [*The Reasons for the Continuously High Rate of Withdrawal in Administrative Litigation and Policy Recommendations*], 4 XINGZHENG YU FA (行政与法) [ADMIN. & L.] 36 (1997).

Otherwise, it would have been impossible to have so few rulings that deny withdrawal. Laying before us is the enormous gap between the law on paper and the law in reality.

A substantial amount research has revealed that the court not only simply rubber stamps the application for withdrawal filed by the plaintiff, but it even sometimes tries to convince plaintiffs to withdraw.¹² There have been instances of the court asking an agency to make certain concessions as conditions for the plaintiff's withdrawal, and in absence of any concession from the agency, instances of the court attempting to sway a plaintiff by bluntly informing him that "if you do not withdraw, you will lose the case". In one extreme case, the court even expressly encouraged promised the plaintiff to withdraw his case: "as long as you withdraw, we will return all of your litigation fees."¹³ In order to circumvent the rule that mediation is inapplicable in administrative litigation, the court internally refers to its conduct as "coordination," which is in effect mediation without the use of a written mediation agreement affixed with the seal of the court.

Nonetheless, it may be unfair to attribute all the blame to the court's failure to scrutinize withdrawals according to the law. When the court attempts to convince a plaintiff to withdraw, the court may be motivated by external pressure, a desire to improve its relations with an agency or the fear of "negative social implications." Whichever the actual motivation, the court's approach can be regarded as a strategy to preserve its authority by making concessions, given the dilemmas it faces in its precarious position. A court that is vulnerable and lack of judicial authority is incapable of offering much protection to litigants and exercising supervision on the agencies.

III. IN BETWEEN HIGHER COURTS AND LOCAL GOVERNMENTS

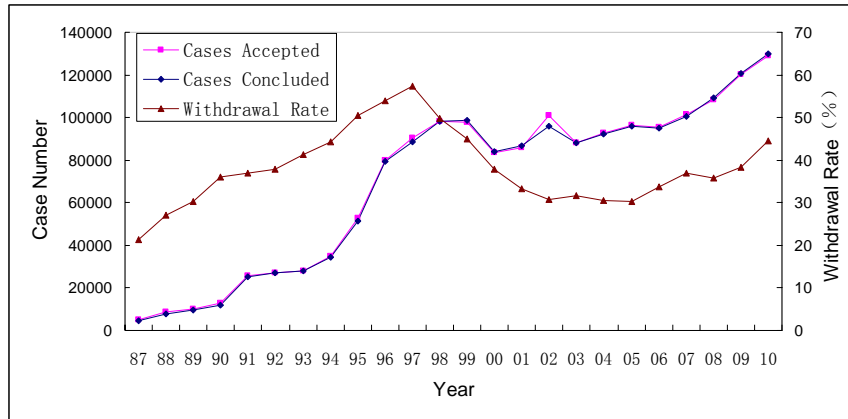
The analysis conducted so far has not taken account of the role of the higher courts as a factor. In practice, the higher courts have adopted various policies to improve the conduct of administrative litigation, and these policies seem have had some real-world effect. To illustrate the relationship between judicial policy and the rate of withdrawal more comprehensively, this paper adopts a wider perspective and examines the influence of judicial policy on the

¹² See Zhang (张), *supra* note 11; see also Li Hailiang & Luo Wenlan (李海亮、罗文岚), *Guanyu Feizhengchang Chesu Xingzheng Anjian de Falü Sikao* (关于非正常撤诉行政案件的法律思考) [Thoughts on the Issue of Abnormal Withdrawals], 4 ADMIN. L. REV. (行政法学研究) 67 (1997).

¹³ Xie (谢), *supra* note 11.

acceptance and conclusion of administrative cases as well as its influence on various forms of conclusion, including withdrawal.

Graph I. The National Data on Administrative Cases over Years



Graph I allows a number of observations to be made. First, the number of administrative cases in first instance (including both the number of accepted cases and of closed cases, which were roughly of the same amount) grew continuously from 1987-2010; marked growth was recorded rapid in certain years (e.g., 1991, 1995-96); the number declined slightly in some exceptional years (e.g., 2000, 2002). Second, the rate of withdrawal in administrative litigation was, however, volatile; the rate rose continuously before 1997; there was a clear decline a few years later, but the rate rebounded in recent years. Such salient changes are noteworthy.

A number of explanations, based on the responses of local courts to both local governments and higher courts, can be given for the observations identified above. Local courts faced particularly strong pressure from local governments and higher courts, and their actual capacity to adjudicate administrative disputes and protect citizens' rights - hereby defined as "judicial capacity" - was severely constrained. However, local courts were also obligated to respond to the demands made by higher courts to a certain extent. The clash of the two conflicting forces resulted in the wax and wane of the number of cases and the rate of withdrawal.

A. No Case for the Administrative Division to Adjudicate

Compared with its pre-enactment level, the number of administrative cases doubled in 1991. The impressive growth may be reasonably attributed to the *Law's* enactment in October 1990, which expanded the scope of administrative actions that were

cognizable in court and enhanced awareness of administrative litigation among the general public. However, the Legislature's expectation of excessive inflow of administrative cases did not materialize. In the three subsequent years, the number of accepted cases hovered around the 1991 level. In each of the three years, there were over 20,000 administrative cases across the entire nation, leaving each court with less than 10 cases on average. Some local courts even encountered no administrative case at all over an entire year, leaving its administrative division in a prolonged recess. Some courts allowed their administrative divisions to adjudicate cases such as divorce and private prosecution crimes, while others even abolished their newly established administrative divisions.

Compared with the level in 1990, at the time of enactment of the *Administrative Litigation Law*, the rate of withdrawal for administrative cases did not rise significantly over this period. During the early period of the *Law's* enactment, the court probably rejected the more difficult cases and instead only accepted cases that it could handle with confidence.¹⁴ As a result, there were relatively few instances of the court having to persuade a plaintiff to withdraw due to practical difficulties in handing down a judgment.

B. Raising the Number of Accepted Cases

The lack of administrative cases undermined the legitimacy of the nascent institution of administrative litigation and threatened the status of administrative law judges as an emerging professional group. As a result, this problem attracted widespread concern and discussion in the judicial system. Within the judicial hierarchy - from the Supreme People's Court to the local courts - it is not hard to find reports and speeches that urge the courts to boldly accept cases and widely expand the sources of cases. In October 1993, the Supreme People's Court held the Second National Judiciary Conference on the Adjudication of Administrative Cases, during which the Deputy Chief Justice pointed out that "Currently, there are few administrative cases in some regions . and an important reason is the failure of many courts to accept cases that should have been accepted . . . This problem must be solved with forceful measures."¹⁵

¹⁴ See FAZHI DE LIXIANG YU XIANSHI: ZHONGHUA REMIN GONGHEGUO XINGZHENG SUSONG FA SHISHI XIANZHUANG YU FAZHAN FANGXIANG DIAOCHA YANJIU BAOGAO (法治的理想与现实: 中华人民共和国行政诉讼法实施现状与发展方向调查研究报告) [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] (Gong Xiangrui et al. eds., 1993).

¹⁵ Ma Yuan (马原), Jiaqiang Xingzheng Shenpan Gongzuo, Genhao De Wei Gaige Kaifang He Jingji Jianshe Fuwu (加强行政审判工作, 更好地为改革开放和经济建设服务) [To Improve

Therefore, all levels of courts must “actively and boldly accept cases according to the law and reduce the difficulties in bringing administrative suits.”¹⁶ In addition, the directors at some local courts and intermediate courts also emphasized that “whether a court can accept cases boldly is currently the primary benchmark for whether the law can be persistently and strictly applied in administrative adjudication, and it is also the quintessential sign of whether the court has made substantial breakthrough in administrative adjudications.”¹⁷

When it comes to the operation of the institution, the courts of certain regions took a large number of measures. Most notably, a number of provinces established quota for the amount of accepted cases at every level. Since 1992, Hunan Province has conducted evaluations of administrative adjudication in the entire provincial judicial system. In addition, it has also established official competitions among local courts, aiming at no more than 100 administrative cases every year for each court.¹⁸ Among all the courts, the performance of Intermediate Court of Huaihua City is illustrative. That court places the chief judge in charge of administrative trials, and for a period of time, it conducted internal competitions to encourage progressive practices. “Each local court is assigned a baseline number for its administrative cases based on the geographic size and population of its jurisdiction. The court’s performance is graded on a scale of 100. . The score is also one of the criteria in deciding whether directors and presiding judges receive promotions.”¹⁹

Within a short period of time, “to raise the number of cases” became the most prominent slogan in administrative adjudication as well as the overriding goal for local courts. It hardly needs pointing out that different regional courts employed different tactics. While

Administrative Adjudication and Better Serve the Reform and Economic Development], Address at the National Judiciary Conference on Administrative Adjudication (Oct. 1993).

¹⁶ *Id.*

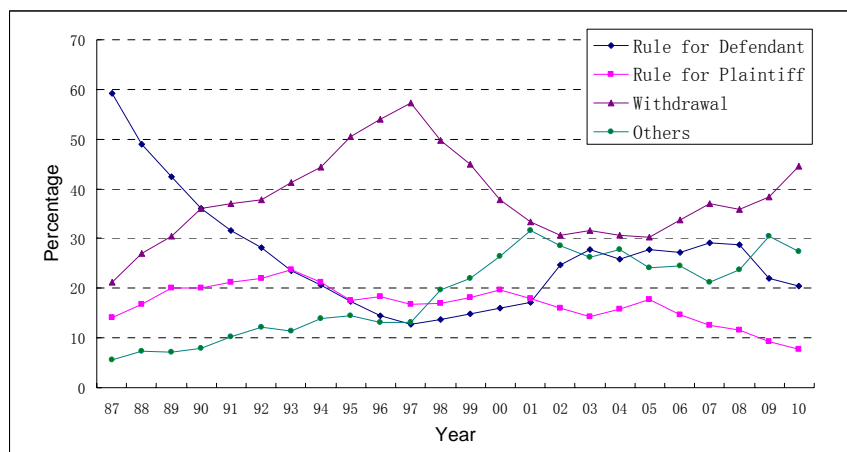
¹⁷ Wang Jianzong (王建宗), Deputy Chief Judge of the High Court of Shandong Province, Address at the Provincial Judiciary Conference on Administrative Adjudication (Mar. 28, 1995).

¹⁸ The High People’s Court of Hunan Province (湖南省高级人民法院), *Nuli Gaishan Zhifa Huanjing Kaichuang Wosheng Xingzheng Shenpan Gongzuo Xinjunian* (努力改善执法环境开创我省行政审判工作新局面) [Striving to Improve the Environment for Law Enforcement and Starting a New Era of Administrative Adjudication in Our Province], in EXPLORING ADMINISTRATIVE ADJUDICATION IN CHINA: A COLLECTION OF MATERIALS FROM THE 1999 NATIONAL JUDICIARY CONFERENCE ON ADMINISTRATIVE ADJUDICATION (The Supreme People’s Court Administrative Division ed., 2000).

¹⁹ Shi Weibin (石维斌), *Woshi Zenyang Zhuang Xingzheng Gongzuo De* (我是怎样抓行政审判工作的) [How Do I Improve Administrative Adjudication], in EXPLORING ADMINISTRATIVE ADJUDICATION IN CHINA: A COLLECTION OF MATERIALS FROM THE 1999 NATIONAL JUDICIARY CONFERENCE ON ADMINISTRATIVE ADJUDICATION (The Supreme People’s Court Administrative Division ed., 2000).

some actively solicited eligible cases²⁰, others split joinders and class actions into discrete cases according to the number of individual plaintiffs. Some decided to withstand pressure and boldly accepted difficult cases. The most convenient approach was, however, to accept a case as soon as a party filed the lawsuit. Based on Haidian District Court of Beijing City's experience in actively accepting cases and persistently expanding the sources of cases, "after adopting the rule of separating acceptance and adjudication, whenever we are not immediately sure of whether a case is an administrative case or not, we accept the case first and make a determination when adjudicating the case. Through this approach, a stable source for administrative cases is established".²¹ The rapid increase in the number of accepted administrative cases as shown by the statistics reflects the effectiveness of these measures.

Graph II. National Percentage Distribution of Various Methods of Concluding Administrative Cases in First Instance



C. Reducing the Rate of Withdrawal

Notwithstanding few difficulties in acceptance of cases, the courts have faced considerable obstacles to issuing decisions in a

²⁰ Li Guoguang (李国光), Deputy Chief Judge, High Court of Shanghai City, Address at the Third Shanghai Judiciary Conference on Administrative Adjudication (Mar. 10, 1994).

²¹ Beijing Shi Haidian Qu Renmin Fayuan (北京市海淀区人民法院) [Haidian District People's Court, Beijing], *Tuidong Xingzheng Shenpan Quebao Sifa Gongzheng* (推动行政审判 确保司法公正) [Promoting Administrative Adjudication and Guaranteeing Judicial Justice], in ZHONGGUO XINGZHENG SHENPAN YANTAO (中国行政审判研讨) [STUDIES ON CHINESE ADMINISTRATIVE ADJUDICATION] (Zui Gao Renmin Fayuan Xingzheng Shenpan ting (最高人民法院行政审判庭) [Administrative Division of Supreme People's Court] ed., 2000).

large number of these cases. Since such cases are beyond the court's judicial capacity, the more cases the court accepted, the lower the proportion of the cases that are concluded with judgments (including judgments that uphold, revoke, or modify administrative acts). This rate declined continuously from 56% in 1990 to its lowest point of 27.4% in 1997. When the court found itself incapable of issuing a judgment, it had to resort to alternative methods, such as dismissing the suit or terminating the adjudication. As such the most common method was, undoubtedly, to persuade a plaintiff to withdraw. According to one study, in face of a difficult case, the court occasionally employed delay tactics, such as declining to hold a session, to issue the judgment or even to record the case, until the plaintiff withdrew.²² The growth of withdrawal rate became noteworthy, as the rate exceeded 50% after 1995.

The high withdrawal rate alarmed the higher courts. The Deputy Chief Justice of the Supreme People's Court in charge of administrative adjudication repeatedly expressed his concern about the exceptionally high withdrawal rate in his speeches at internal meetings of the judicial system. While he did not object to the use of coordination *per se*, he emphasized that the court should issue judgments boldly, and that the court should not, in an unprincipled manner, urge a plaintiff to withdraw.²³ Since 1995, the concern about the high withdrawal rate has been frequently discussed in speeches by directors and official reports of the court.²⁴ In order to lower the withdrawal rate, a new round of actions was initiated across the country. Certain regions use the reduction of withdrawal rate as one of the criteria in the evaluation. As the High Court of

²² Gan Wen (甘文), *Woguo Xingzheng Susong Zhidu Fazhan Jincheng Diaocha* (我国行政诉讼制度发展进程调查) [An Examination of the Development of Administrative Litigation in China] in Zouxiang Fazhi Zhengfu: Yifa Xingzheng Lilun Yanjiu Yu Shizheng Diaocha (走向法治政府: 依法行政理论研究与实证调查) [TOWARDS GOVERNANCE BY LAW: THEORETICAL STUDIES AND EMPIRICAL INVESTIGATION OF LAW-BASED ADMINISTRATION] (Ying Songnian (应松年) & Yuan Shuhong (袁曙宏) eds., 2001) ("[A]ccording to a court, there are three cases in which the date of withdrawal application even preceded the date of case acceptance.").

²³ Personal communication from the then Deputy Chief Justice of the Supreme People's Court Professor Luo Haocai (罗豪才).

²⁴ See e.g., Guangxi Gaoji Renmin Fayuan (广西高级人民法院) [The High Court of Guangxi], *Guangxi Fayuan Guanche Shishi Shixing Xingzheng Susong Fa Qingkuang Huibao* (广西法院贯彻实施行政诉讼法情况汇报) [A Report on the Implementation of the Administrative Litigation Law in Guangxi Courts], (October 1995) (pointing out that "there is a large percentage of adjudicated cases that conclude through mediation" and that this phenomenon is "abnormal").

Jilin Province recounted its experience, “In early 1997, the provincial high court specifically issued a directive, in which the courts, especially the local courts, were strictly required to maintain the withdrawal rate below 30%. In addition, satisfaction of this requirement became an important condition in awarding honors. . . The withdrawal rate of administrative cases in first instance in our province declined from 48% in 1997 to 26% in 1998, and the rate was 28% in the first eight months of 1999”.²⁵

While there are only a few sources that recount courts’ solutions to the concern of high withdrawal rate, the above-mentioned method probably represents the typical approach. After 1998, the withdrawal rate fell substantially, and the percentage of cases that were concluded with judgments rose slightly. These changes can be explained as the consequences of the judicial policy aiming to reduce the withdrawal rate.

D. A Hydraulic Relationship

The judicial policy appears to have generated an impact, but the picture becomes less rosy if two other changes are also taken into consideration.

First, there was an abnormal decline in the number of accepted cases in the following years. Several reasons could be identified to account for the drastic decrease in the number of accepted cases in 2000.²⁶ Nonetheless, the following reason should not be excluded: when faced with difficult cases, the court could no longer always resort to the old tactic of persuading plaintiffs to withdraw. Given the little discretion vested with the courts and the greater difficulties in handling the cases, some courts have closed their doors on difficult cases, which was another old tactic.

²⁵ Jilin Sheng Gaoji Renmin Fayuan (吉林省高级人民法院) [The High People’s Court of Jilin Province], Jilin Sheng Fayuan Jinjinian Xingzheng Shenpan Gongzuo Qingkuang (吉林省法院近年行政审判工作情况) [The State of Administrative Adjudication in Jilin Province in Recent Years] (Dec. 1999) (presented at the National Judiciary Conference on Administrative Adjudication) (on file with author).

²⁶ One of them might be the enactment of the *Administrative Reconsideration Law* in October 1999, which precluded administrative litigation in a few areas. Article 30 of the *Law* provides that when the State Council or a provincial government makes a decision to apportion, adjust, or take natural resources, reconsideration by the provincial government to confirm ownership rights or usufruct rights within its jurisdiction constitutes the final authority.

Second, contrary to our reasonable expectations, while the difficult cases are often denied, the percentage of cases that conclude with judgments failed to significantly increase. On the other hand, other means of concluding, such as dismissal and termination of adjudication, have been widely explored. In 2002, cases that were concluded with “other means” accounted for approximately ¼ of the total number of administrative cases. Among them, the percentage for dismissed suits, i.e., the cases which the court had already accepted but later pushed away, reached a record high of 15.2%. Such cases are counted towards the number of accepted cases and the number of concluded cases. Under the double pressure with respect to the number of accepted cases and the withdrawal rate, the court regarded dismissal as an ideal solution. However, the general public would regard administrative litigation not only as window dressing, but also a trap.

After several rounds of struggle, the system seems to have reached equilibrium in the 2002-2006 years. Since 2002, the number of administrative cases has remained around 100,000, while the withdrawal rate on the national level has stabilized at around 30%. In 2006, the Chinese courts concluded a total number of 95,052 administrative cases in first instance, which only accounted for 1.8% of the over 5,180,000 cases concluded by the courts in that year. On average, each local court handled only around 30 administrative cases. Even among these cases, 33.8% ended up as withdrawals.²⁷

The above analysis of the relationships among the number of accepted cases, the number of concluded cases and the withdrawal rate is telling. There has been little improvement of the institutional environment for administrative litigation, weak judicial independence and authority as well as limited judicial capacity. As a natural consequence, courts often resort to withdrawal as the solution to the challenges that arise in individual cases. The higher courts and the administrative judges who were concerned about the legal practice emphasized that courts should engage in self-reflection and urged all levels of courts to strictly apply the law. Their efforts seem to have exerted appreciable influence over the local courts with

²⁷ See Xiao Yang (肖扬), Chief Justice, Supreme People's Court, *Zuigao Renmin Fayuan Gongzuo Baogao* (最高人民法院工作报告) [Report on The Supreme People's Court] in the Fifth Meeting of the Tenth National People's Congress (Mar. 9, 2005), <http://www.civillaw.com.cn/article/default>.

respect to such issues as the number of accepted cases and the withdrawal rate. However, the courts often face a hydraulic relationship and fail to make improvements on the fundamental level. Even where administrative means was employed, significant achievements were difficult to obtain. In the absence of fundamental changes to the judicial system, the actual function of the administrative litigation is bound to be limited.

IV. THE “COORDINATION TURN” IN ADMINISTRATIVE LITIGATION

For a sustained period of time, while coordination had been widespread within the judicial system, this mechanism failed to receive formal recognition. Given the legitimacy deficit, judges frequently facilitated coordination but rarely advocated it explicitly. Since 2006, there has been a shift in the trend away from the previous approach, which gave little acknowledgment to the contribution of coordination, towards one of regarding coordinated settlement as the “new mechanism” through which courts handle administrative cases.

Notwithstanding the long recognition of the merits of coordination by some judges, it was the policy determination by the central government that directly led to the resort to coordination in administrative litigation. In September 2006, the General Office of the Central Committee of the Chinese Communist Party and the General Office of the State Council issued “The Opinions on Prevention and Resolution of Administrative Disputes and Perfection of the Mechanisms for Resolving Administrative Disputes.”²⁸ After the introduction of administrative litigation, this was the first time where the two General Offices issued a specific directive on administrative adjudication. In response, all levels of governments and courts took quick actions to adjust their policies. The Supreme People’s Court held a video conference, “Strengthening Administrative Adjudication and Properly Handling Administrative

²⁸ Guanyu Yufang He Huajie Xingzheng Zhengyi, Jiangquan Xingzheng Zhengyi Jiejue Jizhi De Yijian (关于预防和化解行政争议、健全行政争议解决机制的意见) [Opinions on preventions and settlements of administrative disputes and perfecting the mechanism of the settlement of administrative disputes] Zhong Ban Fa (中办发) (2006) 27 (The full content of this directive has not been disclosed, and the state-operated media seems not have reported on it. Nonetheless, the main content of this directive can be inferred from the reports on the implementation of this directive by local administrative agencies and courts).

Disputes,”²⁹ and it subsequently issued several directives. First and foremost, with regard to collective disputes over administrative acts in such areas as the taking of rural lands, the demolition of urban buildings, corporate reorganizations, labor and social benefits, and environmental protection, local courts were asked to “make best efforts to resolve the disputes through coordination,”³⁰ or “to employ coordination to the greatest possible extent.”³¹ Under the slogans such as “Harmonious Justice” and “Great Mediation,” the Supreme People’s Court specifically issued a directive to encourage the use of mediation in litigations. According to the directive, the court should “encourage the parties to reach a settlement,” in addition, the court should keep experimenting with innovative methods to settle litigations and continue perfecting the mechanisms through which administrative cases reach settlements.³²

To institutionalize these adjustments in judicial policy, the Supreme People’s Court issued “The Rules on Several Issues in Withdrawals

²⁹ *Gaige Chuangxin Xingzheng Shenpan Zhidu, Wei Goujian Hexie Shehui Tigong Youli Baozhang* (改革创新行政审判制度 为构建和谐社会提供有力保障) [*Reform and Innovate Administrative Adjudication to Effectively Facilitate the Construction of a Harmonious Society*], CHINA COURT (中国法院网) (Oct. 26, 2006), <http://www.chinacourt.org/public/detail.php?id=221403> (last visited Mar. 19, 2010); Zuigao Fayuan Yuanzhang Qiangdiao, Nuli Tansuo Xingzheng Shenpan Zhidu Gaige Chuangxin (最高人民法院院长强调 努力探索行政审判制度改革创新) [The Chief Justice of the Supreme People’s Court Emphasizes That Efforts Must Be Made to Reform and Innovate Administrative Adjudication], <http://www.chinanews.com.cn/other/news/2006/10-25/809965.shtml> (last visited Mar. 19, 2010).

³⁰ *Zuigao Renmin Fayuan Guanyu Tuoshan Chuli Quntixing Xingzheng Anjian De Tongzhi* (最高人民法院关于妥善处理群体性行政案件的通知) [The Notice of the Supreme People’s Court with Regard to the Proper Treatment of Administrative Cases Involving Collective Disputes] (promulgated by Sup. People’s Ct, Dec. 5, 2006, effective Dec. 5, 2006) (Chinalawinfo).

³¹ *Zuigao Renmin Fayuan Guanyu Jiaqiang He Gaijin Xingzheng Shenpan Gonzuo De Yijian* (最高人民法院关于加强和改进行政审判工作的意见) [The Opinion of The Supreme People’s Court with Regard to the Improvement of Administrative Adjudication] (promulgated by Sup. People’s Ct., Apr. 24, 2007, effective Apr. 24, 2007) 2006(6) SUP. PEOPLE’S CT. GAZ. 14.

³² *Zuigao Renmin Fayuan Guanyu Jinyibu Fahui Susong Tiaojie Zai Goujian Shehui Zhuyi He Hexie Shehuzhong Jiji Zuoyong de Ruogan Yijian* (最高人民法院关于进一步发挥诉讼调解在构建社会主义和谐社会中积极作用的若干意见) [Several Opinions of the Supreme People’s Court with Regard to the Further Enhancement of the Positive Effects of Mediation in the Construction of a Harmonious Socialist Society] (promulgated by Sup. People’s Ct., Mar. 1, 2007, effective Mar. 1, 2007) 2007(4) SUP. PEOPLE’S CT. GAZ. 25; *see also* *Zuigao Renmin Fayuan Guanyu Wei Goujian Shehui Zhuyi Hexie Shehui Tigong Sifa Baozhang de Ruogan Yijian* (最高人民法院关于为构建社会主义和谐社会提供司法保障的若干意见) [Several Opinions of the Supreme People’s Court with Regard to the Provision of Judicial Guarantee for the Construction of a Harmonious Socialist Society] (promulgated by Sup. People’s Ct., Jan. 15, 2007, effective Jan. 15, 2007) 2007(3) SUP. PEOPLE’S CT. GAZ. 15 (an earlier directive briefly mentioning “the exploration of Coordination mechanisms in administrative litigation”).

of Administrative Litigation” in January 2008.³³ In the form of judicial interpretation, the Court expressed formal approval of the use of coordination in administrative adjudication. In particular, Article I provides, “when the people’s court determined that the concrete administrative act under challenge was illegal or improper, it may suggest the defendant to modify its concrete administrative act.” On August 18, 2008, the Supreme People’s Court issued “The Methods of Evaluating the Conduct of Administrative Adjudication (Provisional)”. According to this evaluation mechanism, the rate of appeals and the rate of motions for retrial are categorized under the negative factors, but the rate of withdrawal is categorized under the positive factors, which further incentivizes judges to take advantage of coordination to resolve administrative cases.³⁴

Meanwhile, a small number of local courts even formulated specific policies to encourage and incentivize judges to resolve administrative cases through coordination. For example, in early 2006, the High Court of Liaoning Province issued a notice which incorporated the percentage of administrative cases that conclude through coordination as one of the factors in “The Comprehensive Evaluation Method for the Conduct of Administrative Adjudication.” As a result, there was a dramatic increase in the percentage of administrative cases that were concluded through coordination in this provincial judicial system.³⁵ In March 2007, the High Court of Shandong Province issued an outline of important issues for the conduct of administrative adjudication in the province, in which it

³³ Zuigao Renmin Fayuan Guanyu Renzhen Guanche Zhixing Guanyu Xingzheng Susong Chesu Ruogan Wenti de Guiding de Tongzhi (最高人民法院关于认真贯彻执行《关于行政诉讼撤诉若干问题的规定》的通知) [The Notice of The Supreme People’s Court on the Strict Implementation of *The Rules on Several Issues in Withdrawal of Administrative Litigation*] (promulgated by Sup. People’s Ct, Jan. 31, 2008, effective Jan. 31, 2008) art. 2, 2008(3) SUP. PEOPLE’S CT. GAZ. 19.

³⁴ According to sources, the system of evaluation includes the following factors: factors relating to adjudicating individual cases, which are scored according to the conditions of cases that have been randomly selected; statistical data relating to the quality and the efficiency of adjudications, including the rate of appeals, the rate of amending rulings after retrials, the rate of adjudications exceeding the time limit, the rate of petitions, and the time period for case concluding, etc; factors relating to social influence and social perception, which may either increase or decrease the total scores; and anti-corruption factors with regard to the judges.

³⁵ Li Ming (李明), *Liaoning Sheng Gaoji Renmin Fayuan Xingzheng Shenpan Xietiao Jieanlv Shangsheng* (辽宁省高级人民法院行政审判协调结案率上升) [*The Percentage of Administrative Cases That Conclude Through Coordination in the High Court of Liaoning Province Rising*], LIAONING RIBAO (辽宁日报) [LIAONING DAILY] (Oct. 31, 2006), http://www.chinapeace.org.cn/zhzl/2006-10/31/content_4220.htm.

pointed out that the practice of coordination would be widely adopted to resolve administrative litigation, and that the court system should make its greatest efforts to raise the rate of withdrawal in administrative cases in first instance above 50%.³⁶ The High Court of Hunan Province discussed its experience in the National Judiciary Conference: “Bring the coordination of administrative cases within the scope of ordinary work; make the success rate for the coordination of administrative cases an important factor in evaluating the conduct of administrative adjudication by intermediate courts and local courts . directly link these evaluations with the mechanisms of awards and sanctions.”³⁷

Under the pretext of experimenting with coordination mechanisms, new means of coordination have often emerged. One such means was unheard of in the past, but it has become wide spread in recent years: even when the administrative act is clearly flawed, if the defendant promises not to take any enforcement action after coordination, the court upholds the administrative act and the plaintiff does not appeal. Even though such mechanisms may allow the plaintiff to obtain some real benefits, the legality of coordination is out of the question. In exceptional cases, the administrative agency does not keep its promise but the court finds itself powerless to intervene; the judiciary becomes an object of ridicule. Leaving aside the few successful stories, it is often called into question whether coordination can afford substantial protection of the plaintiff’s rights, or effective resolution of social conflicts. According to the data provided by the Supreme People’s Court, in the past 5 years, the withdrawal rate of administrative cases in first instance maintained above 1/3; the cases in which the defendant voluntarily revoked or modified the initial administrative case

³⁶ Wang Doudo (王斗斗), *Quanwei Renshi Huiying Xingzheng Susong Xietiao Hejie Sanda Yidian* (权威人士回应行政诉讼协调和解三大疑点)[A Person in Authority Answers Three Major Questions about Coordination in Administrative Litigation], FAZHI RIBAO (法制日报) [LEGAL DAILY] (Mar. 29, 2007), http://www.legaldaily.com.cn/bm/content/2007-03/29/content_574579; see also Ma Li (马丽), *Shenfayuan Tuichu Xingzheng Susong Hejie Xinjizhi* (省法院推出行政诉讼和解新机制) [The Provincial Court Introduces a New Mechanism to Settle Administrative Cases], <http://sdfy.chinacourt.org/public/detail.php?id=8037> (last visited Mar. 19, 2010).

³⁷ Hunan Sheng Gaoji Renmin Fayuan (湖南省高级人民法院) [The High Court of Hunan Province], *积极探索多元协调方法妥善处理行政纠纷案件* [Actively Searching for Diverse Coordination Mechanisms and Properly Handling Administrative Disputes], in *The Fifth National Judiciary Conference on Administrative Adjudication*, <http://www.chinacourt.org/html/article/200704/09/241475.shtml>, last visited Mar. 19, 2010.

account for less than 10% of all withdrawal cases. Besides, the rate of rulings in favor of plaintiff has fell to lower than 10% in the past two years (2009-2010), a figure that has never been recorded in the history of judicial review in China.

It is hard to deny that a few official judicial directives and speeches by high level judicial officials emphasize that the conduct of coordination should be consistent with the principles of legality, voluntariness and restraint, that the power of coordination should not be abused, and that the court is forbidden to coerce withdrawals, or to induce settlements through delay.³⁸ In practice, these policy concerns are, however, muted by the clamor for coordination, and they can hardly constrain judicial practice in any meaningful sense. There has been a corresponding shift in the approach taken by the state-controlled media. The previous concerns about the high withdrawal rate in administrative litigation have been abruptly taken over by praises of coordination.³⁹ The scholarly works of the

³⁸ Shandong Sheng Gaoji Renmin Fayuan Xingzhengting (山东省高级人民法院行政庭) [The High Court of Shandong Province Administrative Division], *Guanyu Zai Xingzheng Susong Zhong Yinru Hejie Jizhi Youguan Wenti De Diaoyan Baogao* (关于在行政诉讼中引入和解机制有关问题的调研报告) [An Examination on the Introduction of Settlement Mechanisms in Administrative Litigation], in 20 XINGZHENG ZHIFA YU XINGZHENG SHENPAN (行政执法与行政审判) [ADMINISTRATIVE REGULATION AND JUDICIAL REVIEW] (The Sup. People's Ct. Admin. Division ed., 2006); Wang (王), *supra* note 36 (citing the opinion of Jiang Bixin, the then Chief Judge of the High Court of Hunan Province); Zuigao Renmin Fayuan Guanyu Renzhen Guanche Zhixing Guanyu Xingzheng Susong Chesu Ruogan Wenti de Guiding de Tongzhi (最高人民法院关于认真贯彻执行《关于行政诉讼撤诉若干问题的规定》的通知) [The Notice of The Supreme People's Court on the Strict Implementation of *The Rules on Several Issues in Withdrawal of Administrative Litigation*] (promulgated by Sup. People's Ct, Jan. 31, 2008, effective Jan. 31, 2008) pt. 2, para. 2, 2008(3) Sup. People's Ct. 19 (The court should not "exclude or give up the review of legality," and that the court "should be strictly prevented and precluded from persuading or even coercing a party to withdraw").

³⁹ See e.g., Ye Kelan & Yu Ying (叶克兰、于英), *Zhi Fu Jiang Xietiao Jizhi Yinru Xingzheng Susong* (芝罘将协调机制引入行政诉讼) [Zhi Fu Introduces Coordination into Administrative Litigation], RENMIN FAYUAN BAO (人民法院报) [PEOPLE'S CT. DAILY] (Sept. 30, 2005), <http://oldfyb2009.chinacourt.org/public/detail>; Wang Hong (王洪) et al., *Xingzheng Anjian Zhuzhong Xietiao Tingqian Anhou licu Guanmin Hexie* (行政案件注重协调 庭前案后力促官民和谐) [Xiangfan Courts Emphasize Coordination in Administrative Cases: Promoting the Harmonious Relationship between the Government and the Citizen in the Courtroom and after Litigation], RENMIN FAYUAN BAO (人民法院报) [PEOPLE'S CT. DAILY] (Aug. 17, 2007), <http://oldfyb2009.chinacourt.org/public/detail>; Zheng Chunsun (郑春笋), *Mingaoquan An Yuanzhuo Yuanshen Xieshang Duihua Haokuansong: Dezhou Fyuan Xingzheng Anting Shenxin Moshi Cu Hejielv Jinbacheng* (民告官案圆桌审 协商对话好宽松: 德州法院行政案庭审新模式促和解率近八成) [Administrative Cases Adjudicated on a Roundtable and the Negotiation Route Very Flexible: the Rate of Settlement in Dezhou Court to 80%], FAZHI RIBAO (法制日报) [LEGAL DAILY] (Jul. 24, 2008), http://www.legaldaily.com.cn/bm/content/2008-07/24/content_908113; Yuan Dingbo (袁定波), *Jiekai Xingzheng Guansi Guaiquan 'Xietiao Jiejue Moshi' Shi Mingaoguan Buzai Kunnan* (解开行政官司怪圈 '协调解决模式' 使民告官不再困难) [Breaking the Conundrums in Administrative Cases and Making It Easier for Citizens to Sue the Government through the Mechanisms of Coordination] (Aug.

judges have largely shifted their attention towards legitimating coordination in administrative litigation.⁴⁰

The intent of this paper is not to categorically reject the use of coordination in administrative litigation, nor to articulate the legal limits of coordination. The question is not whether the law should authorize mediation or coordination, but whether the judiciary is capable of shouldering the duties conferred by the law. Mediation *per se* does not necessarily harm the plaintiffs' interests or the public interests, and thus the prohibition of mediation does not necessarily protect the plaintiffs' interests or the public interests. Even though both the rule that mediation is inapplicable to administrative litigation and the requirement that applications for withdrawal must be reviewed still stands, the court no longer emphasizes handing down rulings according to the law, or makes mention of the review of withdrawals. Instead, it emphasizes coordination. The resort to coordination in administrative litigation was partially animated by the intent to remedy the court's alleged obsession with the law at the expense of social consequences. However, the primary reason was that given the lack of judicial independence and authority, the court had no other alternatives. When the entire judicial system is

20, 2008), FAZHI RIBAO (法制日报) [LEGAL DAILY], http://www.legaldaily.com.cn/bm/content/2008-08/20/content_927762; Zhang Huipeng, Fan Zhen & Liu Demin (张慧鹏, 范贞 & 刘德敏), *Huajie Xingzheng Jiufen De Xintansuo: Guangdong Fayuan Kaizhan Xingzheng Xietiao Hejie Gongzuo Diaocha* (化解行政纠纷的新探索: 广东法院开展行政协调和解工作调查) [A New Route for Resolving Administrative Disputes: An Examination of Coordination in Administrative Cases in Guangdong Courts], RENMIN FAYUAN BAO (人民法院报) [PEOPLE'S CT. DAILY], Nov. 11, 2008; Jiang Daoce & Li Yingchun (姜道策 & 李迎春), *Zouping Fayuan Xingzheng Susong 'Xietiao Sifa' Cu Hexie Chesu Da 71%* (邹平法院行政诉讼'协调四法'促和谐 撤诉率达71%) [The Zouping Court Uses Four Methods of Coordination in Administrative Litigation to Promote Harmony, the Rate of Withdrawal Reaching 71%], ZHONGYANG DIANSHI TAI (中央电视台) [CHINA CENTRAL TELEVISION] (Feb. 26, 2009), <http://news.cctv.com/law/20090226/106073.shtml>.

⁴⁰ Zhou Gongfa (周公法), *Shilun Xingzheng Susong Hejie Zhidu* (试论行政诉讼和解制度) [A Discourse on the Institution of Coordination in Administrative Litigation], XINGZHENG FAXUE YANJIU (行政法学研究) [ADMIN. L. REV.] 4 (2005); Bai Yali (白雅丽), *Lun Zhongguo Xingzheng Susong Hejie Zhidu De Jianli* (论中国行政诉讼和解制度的建立) [A Discourse on the Construction of Coordination Institution in Administrative Litigation in China], XIANDAI FAXUE (现代法学) [MODERN JURISPRUDENCE] 3 (2006); Zhu Changlin (祝昌霖), *Lun Xingzheng Susong Xietiao Jizhi De Kexingxing* (论行政诉讼协调机制的可行性) [The Feasibility of Coordination Mechanism in Administrative Litigation], FUJIAN FAXUE (福建法学) [FUJIAN JURISPRUDENCE] 4 (2006); SHANDONG SHENG GAOJI RENMIN FAYUAN XINGZHENGTING (山东省高级人民法院行政庭) [THE HIGH COURT OF SHANDONG PROVINCE ADMINISTRATIVE DIVISION], *supra* note 38; Jiangsu Sheng Gaoji Renmin Fayuan Ketu Zu (江苏省高级人民法院课题组) [Research Group, the High Court of Jiangsu Province], *Xingzheng Susong Jianli Tiaojie Zhidu De Kexingxing* (行政诉讼建立调解制度的可行性) [The Feasibility of Introducing Mediation into Administrative Litigation], FALU SHIYONG (法律适用) [J. L. APPLICATION] 10 (2007).

singing praises of coordination, the court gives up not only its power of adjudication, but also its struggle to overcome the challenges in administrative litigation. Facing the fatal institutional defects, the judges collectively compromised, and the judicial ideals behind the requirement that withdrawals must be reviewed were lost.

V. CONCLUSION

The *Administrative Litigation Law* of China paints a rosy picture in which the individual and the government face each other in court, both submitting to the judgment of the law. Through litigation, adversarial relationships between individuals and the government are established within the legal system, and the legality of administrative acts is formally questioned. The court's determination of the legality of an administrative act, especially its declaration that an administrative act is illegal, both incentivizes the administrative agencies to govern according to the law and perfects the system of administrative law. In reality, however, such adversarial relationships are often not concluded through the court's rulings. Instead, they are concluded owing to the withdrawals of the plaintiffs. The abnormal withdrawals have not only left the plaintiffs' legal rights unprotected, but they have also rendered illusory any potential contribution that litigation might have towards the goal of governance by the law. As an institution, the review of withdrawals has met its defeat in China's reality, which reflects the general challenges facing administrative litigation. Courts' encouragement of coordination may be partly motivated by judicial philosophy, but it is primarily a collective compromise that courts have made in face of such challenges.

The lack of judicial authority is the crucial reason for the ineffectiveness of the review of withdrawals. If the court were to truly exercise its power to review withdrawals, the court's independence must be guaranteed. Otherwise, the review of withdrawal is out of the question, and the challenges in administrative litigation would never be overcome. With regard to these challenges, the Supreme People's Court issued a directive in November 2009 and pointed out that the failures of administrative litigation have resulted in increased number of petitions and irrational behaviors, which severely undermine social stability, and

that the various “shady policies” designed to limit the acceptance of administrative cases must be eradicated.⁴¹ However, it is questionable whether this directive would meaningfully protect the citizens’ right to sue, in addition to triggering changes to the statistical data for administrative cases.

The debate does not end here. Administrative litigation in China is deeply embedded in its contemporary social and political structure. The judiciary cannot correct the administrative abuses single-handed while effective mechanisms that constrain the administrative power are fundamentally lacking in the society. Furthermore, the judiciary is unlikely to enjoy independence and authority if no fundamental change is made to the social and political structure. Before any radical change is made, the judiciary continues to occupy a precarious position; its development is still fraught with difficulties, and its contribution to social changes also remains considerably limited. *The Administrative Litigation Law* announces the rule-of-law ideals, yet it has failed to become a means for China to establish constitutional governance. To eliminate the obstacles to administrative litigation, the judicial institutions themselves need to be improved but the substantial progress depends on the growth of civil society and the perfection of democratic politics.

⁴¹ Zuigao Renmin Fayuan Guanyu Yifa Baohu Xingzheng Susong Dangshiren Suquan De Yijian (最高人民法院关于依法保护行政诉讼当事人诉权的意见) [The Opinion of the Supreme People’s Court on Protecting the Parties’ Right to Sue in Administrative Litigation According to the Law] (promulgated by Sup. People’s Ct., Nov. 9, 2009, effective Nov. 9, 2009) 2010 SUP. PEOPLE’S CT. GAZ. 15.