

# **Reasonable Government or Limited Government in Licensing? A Critical Survey of the Draft Administrative Licensing Law of P.R.C.**

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## **I. Introduction**

One of the heated topics in the field of administrative law at present in China is administrative licensing. Recently a draft law on administrative licensing has come out. The State Council which is responsible for the drafting has ratified the Draft and has submitted it to the Legal Work Commission, a working body under the Standing Committee of the Congress for comments. It is expected to be passed by the Congress in the near future. Today I would like to speak on this topic. There are three major issues to be addressed:

- (1) Why is China legislating on administrative licensing? What are the objectives to be achieved?
- (2) In what ways does the Draft respond to the problems and the objectives?
- (3) In what direction is the Draft leading China?

The Draft has both substantive concerns and procedural concerns. Here I am not going to look at both aspects. Instead I will concentrate on the substantive concerns, i.e., the legislative establishment of a licensing system. First I will explore the background of the Draft. Then I will go on to look at the provisions of the Draft. I will focus on the two chapters concerning the establishment of a licensing system. Lastly I will give my comments on this legislative enterprise.

Before proceeding to look into the substantive issues, I assume that there is one preliminary question to be answered: What do we mean by administrative licensing?

As with other conceptual questions, it is not easy to figure out a simple answer here. In preparing the Draft, we conducted research into the systems and practices in other countries (by the way, we also invited some foreign scholars to participate. The respected Prof. Michael Crommelin is amongst those who have made valuable contribution). Unfortunately we could not find a similar law in the West. In the common law countries you have some Licensing Acts which are confined to such specific matters as liquor licensing, or entertainment licensing, but there is no general law regulating all sorts of licensing. So I suppose that it is necessary to clarify the Chinese concept.

Administrative licensing is one of the conceptual tools used to describe the functions and processes of the administrative agencies, just like administrative legislation, administrative adjudication, administrative sanctions, and administrative enforcement. In this sense, administrative licensing is distinguished from the civil licensing of private property. For the purpose of understanding what we mean by administrative licensing, one may find the Federal APA of the USA an illuminating reference. It defines licensing to include agency processes respecting the grant, renewal, denial, revocation, suspension, annulment, withdrawal, limitation, amendment, modification, or conditions of a license. To fully understand the agency process or agency activities, one has to be clear about the varied contents and forms of "licenses". The APA gives the following definition to a license:

the whole or a part of an agency permit, certificate, approval, registration, charter, membership, statutory exemption, or other form of permission.

Basically these two definitions are acceptable to us for they are sufficiently broad to include what we have in mind. Now you can find an express definition in Article 2 of the Draft Administrative Licensing Law, which reads:

Administrative licensing in this law includes administrative acts in response of the requests of individuals, legal persons and other organizations in permitting them to undertake particular activities, certifying their specific qualities and capacities, or granting them a specific status or identity.

In Article 16, administrative licensing is further divided into five categories of activity, i.e., ordinary licensing, special licensing, certifying of qualities and capacities, technical reviewing and ratifying, and registration.

## **II. Excessive Regulation With Little Regularity**

Why does China legislate on licensing? The short reply is: because there are intolerably excessive licensing requirements by the government and extreme irregularity and massive corruption in the exercise of licensing power.

If people are regulated by the government from the cradle to the grave in the West, the Chinese people are controlled from pregnancy to death. No need to recall the dreadful memory of planned economy in which everything was distributed according to plans. Suffice it to find the number of categories of licenses scattering in laws, regulations and rules. According to the research conducted by the Legal Affairs Office of the State Council, which was charged with the Drafting of the Administrative Licenses Law, there exist more than three thousand types of license under various names. There have been a lot of complaints about these burdensome licensing requirements. Normally more than a hundred stamps are needed for the construction of a building in cities. It was reported that a taxi driver in Shenyang City (Northeast China) is required to carry with him over twenty permits and licenses and should be ready for inspection any time on road<sup>1</sup>.

It is noteworthy that the many licensing requirements are laid down not only by laws but mostly by government regulations and rules, and local regulations and rules. Just to take the State Committee of Economy and Trade as an example. The Committee recently produced an internal research report respecting its law enforcement functions. It reported that legal sources conferring it law-enforcement functions include 21 laws, 31 regulations made by the State Council, 46 departmental rules made by itself and 52 agency normative documents. Its law enforcement functions are composed of 107 items of licenses and approvals, nine items of ratification, 3 items of compulsory enforcement, 107 items of sanctions and 4 items of adjudication. Except for the Mining Law, the Electricity Law, the Safe Production Law, the Tobacco Monopoly Sale Law and the Clean Production Law, enabling laws use general and broad terms in conferring the Committee law enforcement functions. Most of the functions derive from administrative regulations made by the State Council, departmental rules and other normative administrative documents. So, inevitably, the law enforcement system is confusing and uncertain.

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<sup>1</sup> So Many Licenses in a Taxi, Economic Daily, 22<sup>nd</sup>, May, 1996.

The reason why administrative regulations and rules dominate in present China is three-fold: First, there is a great inadequacy of laws. Second, government departments and agencies try to expand their power and maximize their own interests. Third, the judiciary is too weak to check the executive.

It is not an exaggeration that the executive has been its own source of power in terms of licensing. There are no uniform procedures and accepted standards governing the designation of licensing requirements. That is an outright challenge to the rule of law. As the Chinese economy becomes further marketized, we could no longer live with this situation.

**Coupled** with the excessiveness of licensing requirements is the irregularity and corruption in the use of licensing power. Irregularity is reflected in the following respects:

- (1) duplication of licensing
- (2) lack of uniformity and consistency
- (3) lack of transparency
- (4) no public participation, alienating
- (5) time-consuming, sometimes no time limit
- (6) unreasonably costly, extra fees collected
- (7) applicants being uncertain in the anticipation of the result, and license holders unsafe in the “new property”
- (8) ineffective policing of licensing, and poor protection from the abuse by the licensees.

As in any other area where there is broad discretion, corruption becomes rampant in those agencies that exercise great licensing power. Throughout these years all Chinese must have been familiar with such phrases as “official trafficking” (guandao) and “trafficking of licensing documents” (daopiwen). Official trafficking refers to trafficking of scarce resources by enterprises of government agencies, or military units enterprises and government agencies. As these enterprises enjoy prerogatives in obtaining licenses, they easily make profit. Trafficking of licensing documents is an underground business which is highly profitable and undertaken by those who are closely related to the leaders of the party or the government. There are frequent reports of corrupt officials who seek rent from licensing. If there is no profound reform in licensing, the principle of fair competition in a market economy is doomed.

Another typical phenomenon of corruption is the fierce competition for licensing power amongst government departments. In the legislative process, either of the congress or the government, or at the central level or at local levels, it is not rare for different government departments or agencies to fight hard for licensing power. Why? I can not say that all quarrels are selfishly motivated, but I do believe on many occasions people quarrel because licensing means fees, means opportunities to rent, means the significance of the agency.

**Frustrated** by these problems, the Administrative Legislative Research Group-----a non-profit organization closely related to the Legal Working Commission under the Standing Committee of the Congress-----decided to initiate the Drafting of Administrative License Law in 1997. It was important to the Group that it ensure:

- (1) the creation of licensing requirements be strictly controlled, and the total number of licenses be dramatically cut.
- (2) the procedure of licensing be simplified, open, economic and convenient

One year later, the Drafting was taken over by the State Council. For some time there was no progress. Thanks to the challenge brought by China’s re-entry to the WTO, the State Council was

forced to reactivate the reform of the licensing system. At this stage, one may be optimistic that the law will come out.

### **III. The Establishing of A Licensing System**

Let's look at the Draft now to see how it responds to the existing problems and the demand of reform. The Draft law is comprised of ninety-six articles and divided into nine chapters<sup>2</sup>. A brief reading of the text shows that the Draft is focused on the two concerns mentioned above.

Regarding the excess of licensing, the Draft took two important counter measures. One is to lay down the basic guidelines for the establishment of licensing requirements, and the other is to clarify the allocation of power in respect of capacity to impose licensing demands.

#### **1. The Guiding Principle of Licensing**

The Draft seeks to set up a basic legal structure of licensing that best fits the somewhat transformed and somewhat transforming ethical and economic structures of the polity. It is proclaimed that the establishing of a licensing system should respect the laws of the market, the initiative and creativeness of the people. Inspired by this spirit, the Draft highlights the principle of public interest governing the establishing of licensing. The public interest principle dictates that a licensing system may be established only when the overwhelming consideration is the public interest. If individual autonomy does not harm the public interest, or if there are alternative efficient mechanisms of regulation and remedy, administrative licensing is not justified.

In order to guarantee the respect for this principle, the Draft provides that it is mandatory for the Drafting bodies to conduct broad reaching inquiries, and report to the legislative body of the necessity and the social and economic effects of the intended new licensing system.

As the Chinese economy is still in transition, licenses in the economic area may easily lose their reason for existence. In consideration of the special economic environment, the Draft imposes an additional obligation on the body which establishes a licensing system to re-examine economic licenses every two years and if there is no more need for it, the license should be abolished. As a matter of fact, the re-examination of licensing started in 2001 when the Task Force of Administrative Licensing System Reform was established as a working organization of the State Council. In February 2002, the Task Force decided to select the State Committee of Economy and Trade as an experimental basis of reform. Now a resolution has been reached by the Committee that more than 40 percent of the licenses in its jurisdiction are to be done away with.

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<sup>2</sup> The structure of the License Law(Draft)is as follows:  
Chapter I. General Principles  
Chapter II. The Scope Concerning the Establishment of Licenses and the Classification of Licenses  
Chapter III. The Power to Establish Licenses  
Chapter IV. The Implementing Agencies of Licensing  
Chapter V. Ordinary Procedure of Licensing  
Chapter VI. Special Procedure of Licensing  
Chapter VII. Policing of the Licensee  
Chapter VIII. Collection of Fees  
Chapter IX. Legal Responsibility

## **2. Allocation of Legislative Power**

The Draft is deeply concerned with the allocation of legislative power between various bodies in respect of licensing. Legislative power has two aspects. One is the power to establish a licensing system, i.e., power to designate an area for licensing control; another is the implementing legislation, the power to make detailed rules, standards and procedures concerning an existing licensing requirement. There has been much controversy over the question of what institutions at what level should be empowered to establish a licensing requirement, but there is little dispute over the power to pass implementing legislation. In relation to the first difficult and controversial question, the Draft provides the following solutions:

### **1. Congressional Priority**

Given that there is sufficient reason to justify the creation of a licensing system, the National Congress (including the Standing Committee) is competent to create every kind of license.

### **2. Automatic Vacuum-Filling Theory**

In order to avoid lawlessness, in the absence of national laws, the State Council may establish a licensing system by way of administrative regulation and by decisions of general binding effect concerning the matters that are permitted by this law to be regulated through licensing.

### **3. Reservation of power to the Congress and State Council**

The power to pass laws or administrative regulations with respect to certain areas of licensing are reserved to the Congress and the State Council:

- (1) the establishment, modification and termination of legal persons and other organizations;
- (2) the scope of productive activity and operation of individuals, legal persons and other organizations;
- (3) matters that should be regulated under a uniform system or by the central government such as finance, tax, security, stock, customs, foreign trade and foreign currency.
- (4) prescription of qualifications, capacities and conditions for practitioners who provide services to the public
- (5) the design, construction, lodgment and use of equipment and facilities that relate to the public safety and health

### **4. Limited Space for Local Rules and Departmental Rules**

In the absence of laws and administrative regulations, local congresses and governments which have legislative power may establish licensing requirements through local regulations and rules concerning matters other than those reserved for the National Congress and the State Council.

In the absence of laws and administrative regulations, ministries of the State Council may create a licensing system with the prior approval of the State Council.

## **IV. Reasonable Government V. Limited Government**

If the Draft becomes law at last, what impact is it likely to have? Will it direct China toward rule of law? It appears to me that the Draft looks to government of reason rather than rule of law in the sense that institutional restraints are imposed upon the government.

We see that the Draft is frustrated by the question--- “In what circumstances is a license necessary?” and that it is ambitious to redirect the decision-making process concerning the

establishment of a licensing system toward a rational deliberation. While in full sympathy with the Draft in respect of the rationalization of the legislative process, I am skeptical of and in some sense worried about the real impact of the Draft.

Firstly, what legal effect does it have on the legislative and rule-making bodies? For example, if the National Congress makes a wrong decision to impose licensing requirements in a certain area, is there any remedy? As there is no judicial review of legislative acts, no remedy is accessible for people to challenge the validity of a law. How about administrative regulations made by the State Council? Although the Constitution provides that the Standing Committee of the Congress is empowered to set aside those administrative regulations made by the State Council that contradict laws passed by the Congress, there is no procedure open to the public for this to occur. In reality there has been no precedent for the Standing Committee to exercise its supervisory power. As far as judicial remedies are concerned, administrative regulations are excluded from the scope of judicial review by the Administrative Litigation Law. From a purely legal perspective, the principle is of no binding effect. It is a matter of self-restraint.

Secondly, as substantive reasonableness and justice is very sophisticated and varies with the subject of legislation, it is impossible for us to set concrete standards for all subsequent decisions. Let's translate the question of reasonable decision-making into a question of power: who are the decision-makers? If we leave the choice for the public to make, nobody is to be blamed. The Draft goes contrary to this. Its intention is to impute to those decision-making institutions a reason of governance. In terms of power allocation, the Draft is reactionary in that it consolidates and legitimates the dominance of the executive over the Congress. Despite the fact that priority is given to the Congress, executive dominance is not lessened at all in practice as the Draft adopts a theory of automatic vacuum-filling by the executive. In a land devoid of democracy, congressional priority is simply a veil of shade for the automatic vacuum-filling theory. It is as difficult as asking the tiger for its skin as it would be for the Congress to take over legislative territory from the State Council, especially as far as licensing matters are concerned.