

Legal Regulation of Improperly Established Restrictions on the Practice of Law

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Abstract: Practising restriction, as an important social governance tool, is not only a means of administrative management, but also an administrative punishment measure. By restricting the qualifications of specific subjects to engage in specific professions or industries within a certain period of time, it aims to maintain public safety, market order, and safeguard the professionalism and ethical standards of specific industries. For example, in the fields of drug management, food safety and financial services, the imposition of restrictions on the practice of lawbreakers helps to prevent risks and protect the public interest. However, restrictions on the exercise of a profession are directly related to the fundamental rights of citizens, in particular the right to freedom of occupation and the right to work, which are guaranteed by the Constitution, and restrictions on the exercise of such a profession must be defined at the legal and jurisprudential level and in strict compliance with the principle of the rule of law.

Keywords: Improper Creation; Restriction of Practice, Legal Review, Legal Regulation.

1. Introduction

Although restrictive measures are used as a means of administrative management, in practice, the setting of restrictions is not always appropriate. The scope is too wide, the period is too long, the setting of the basis is insufficient, the lack of necessary procedural safeguards and other "improper setting" phenomenon occurs from time to time. These inappropriate settings may not only cause unnecessary infringement of citizens' occupational freedom and labour rights, but also pose a serious challenge to the basic principles of the rule of law, such as the law of punishment, the principle of proportionality and the reservation of laws. The Legal Affairs Committee of the Standing Committee of the

has repeatedly paid attention to the issue of restrictions on the exercise of profession in its report on record-keeping and has clearly pointed out that "overly broad restrictions on the exercise of profession that lack necessity and reasonableness are contrary to the principles and spirit of the Constitution". This indicates that regulating the setting of restrictions on the practice of law has become an important issue in the construction of the rule of law.

In this paper, the core issue of improperly setting restrictions on the exercise of profession is aimed at exploring its definition, performance and harm from the perspective of legal regulation, and focusing on analysing its legal review benchmarks, combining with typical cases for evaluation, and ultimately proposing a path to improve the legal regulation of the setting of restrictions on the exercise of profession in China. By deepening the understanding of the restriction system, it enriches the theory of administrative law on the restriction of fundamental rights and administrative punishment; it is intended to provide reference for the legislature to improve the relevant legal system, the administrative authorities to regulate the law enforcement behaviours as well as the judiciary to review the relevant cases, so as to achieve a balance between the maintenance of public interests and the protection of the fundamental rights of the citizens. This paper will, in turn, discuss the definition of restrictions on the exercise of the profession and the issues raised, the core legal review benchmarks, typical case analyses, the improvement of regulatory paths and conclusions.

2. Definition and Manifestations of Improperly Imposed Restrictions on the Exercise of a Profession

2.1 Definition of What Constitutes the Improper Imposition of Restrictions on the

Exercise of a Profession

The improper establishment of restrictions on the exercise of a profession refers to situations in which the establishment of restrictions on the exercise of a profession violates the provisions of the law or the principle of the rule of law, resulting in unreasonable or excessive restrictions on the occupational freedom and other rights of citizens. Its meaning can be defined at both the legal and jurisprudential levels.

From the legal level, its connotation can be encompassed in three parts: violation of the authority to set, exceeding the legal scope, and violating the legal procedures. Firstly, violation of setting authority refers to the fact that the hierarchy of normative documents setting restrictions on the practice of the profession does not comply with the provisions of the law. For example, the Administrative Penalties Law stipulates that penalties restricting the exercise of a profession can only be set by laws, administrative regulations and local regulations, and that the power to set penalties in regulations is limited to warnings, notification of criticisms, or fines of a certain amount. If the regulations or other normative documents of a lower level exceed the authority to set restrictions on the exercise of the profession, it constitutes a violation of the authority to set. [1] Secondly, exceeding the scope of the law means that there is a lack of substantial connection between the industry or behaviour targeted by the restriction and the illegal behaviour of the party concerned, or the scope of the restriction exceeds the necessary boundaries authorised by the law. Finally, contrary to the statutory procedure means that in the process of setting or implementing the practice restriction, it fails to follow the procedural safeguards stipulated in the law, such as hearing, notification, and explanation of reasons, thus affecting the legality and reasonableness of the administrative decision.

At the level of jurisprudence, in order to define whether it is improperly set, the boundaries will be regulated in terms of the principle of proportionality and the principle of prohibiting improper association. The principle of proportionality requires that a proper balance be struck between ends, means and necessity, and that the restrictions on the exercise of the profession be set in proportion to the ends pursued in the public interest.

If it is disproportionate, the principle of proportionality is violated, as evidenced by the means of the restriction not being necessary for the achievement of the end, or by an imbalance between the harm to the rights of citizens and the public good to be preserved, resulting in an excessive restriction.[2] The prohibition of improper association regulates boundaries. [2] The principle of prohibiting improper association requires that the administrative organ, in exercising its power, shall not unreasonably associate unrelated matters or conditions with the administrative decision, so as to ensure the fairness and reasonableness of the administrative act. If the administrative organ takes into account factors irrelevant to the administrative purpose when making a decision to practise the restriction, or if there is a lack of intrinsic and substantial connection between the purpose of the restriction and the means of restriction adopted.[3] For example, if there is no direct connection between the offence and the occupation to be restricted, this may constitute an improper connection.

2.2 Main Manifestations of Improperly Established Restrictions on the Exercise of Profession

One of the prominent problems of improper setting is that the subject of the setting is improper, and in practice many regulations, local government normative documents and so on go beyond the authorisation of the Law on Administrative Penalties and other laws and regulations to set unauthorised restrictions on the exercise of their profession. As mentioned earlier, the Administrative Penalty Law has clear restrictions on the types of administrative penalties set by regulations, excluding restrictions on the practice of law. However, such ultra vires settings are common in practice, for example, Article 49 of the Measures for the Validation of Major Crop Varieties (Decree No. 4 of the Ministry of Agriculture in 2016, revised in 2019 and 2022) stipulates that: "Members and staff of the Variety Validation Committee who do not perform their duties in accordance with the law, who make false statements or who engage in favouritism or fraud shall be given sanctions according to the law; and they shall not be allowed to engage in variety validation within five years from the date of the decision on the sanction. the date of the disciplinary decision shall not be allowed to engage in

variety validation work within five years." [3] There are also a number of irrationalities in the content of restrictions on the practice of the profession. In terms of duration, this is manifested in the misuse of the "lifelong ban on the practice of the profession" or the setting of an excessively long period of restriction. For example, in 2021, the Report of the Legal Affairs Committee of the Standing Committee of on the Status of the Record Review Work in 2021 stated, "Some local laws and regulations stipulate that employees in special industries such as locksmithing, official seal engraving, trust consignment, gold and silver jewellery processing, and the acquisition of scrap metal, etc., who have been administratively or criminally punished for taking advantage of the convenience of the industry to carry out unlawful activities are prohibited from engaging in that industry for life." [3] There are also many unreasonable restrictions on the content of practice. that industry." [3] The lifelong restriction on the practice of a profession imposed on an offender is for life, and as long as the offender has the established facts of the offence and has been punished accordingly, the offender is prohibited from continuing to engage in the relevant activities for life. Lifetime restriction on the practice of profession for the offender is the most severe type of liability in the legal liability for restriction on the practice of profession. [4] This approach does not fully consider the possibility of reducing the risk of recidivism of the offender and the individual's motivation to reform, which may lead to a "one-time ban" and a lack of refinement of the examination rate. In terms of scope, it also adopts a "one-size-fits-all" approach to prohibit offenders from engaging in an entire industry or a number of industries, without distinguishing between specific job duties and the nature of the behaviour. Such broad restrictions often have little relevance to the original offence and go beyond what is necessary to prevent recidivism.[5] For the purpose of preventing recidivism, it is important that the law be applied in a way that is consistent with the original offence. [5] For what kind of illegal acts, to what degree of severity should be applied to what period and scope of employment restrictions, in the application of the standard is vague, lack of clear, specific judgement, and therefore also lack of a certain degree of operability. This makes the

administrative organs have too much discretion in applying the restriction on the practice of the profession, which may easily lead to inconsistent standards, abnormally light or heavy, and even administrative arbitrariness, resulting in the tendency of excessive application of the restriction on the practice of the profession, as well as the problem of pan-criminalised application.

3. Benchmarks for Legal Review of Improperly Established Restrictions on the Exercise of a Profession

The core of the legal regulation of the improper creation of restrictions on the exercise of profession lies in the establishment of scientific and reasonable review benchmarks. This includes both a review of the formal legality of the act of creation and a review of the substantive legitimacy of its content. The NPC Standing Committee's record review practice provides important guidelines for this purpose.

3.1 Formal Legitimacy Review: Setting Power Boundaries and Legal Reservations

The Law on Administrative Penalties amended in 2021 explicitly listed "restriction of practice" as one of the types of administrative penalties, which is a milestone in unifying and regulating the setting of restriction of practice. According to the Law, the penalty of restriction of practice can only be set by laws, administrative regulations and local regulations.[6] Among them, the penalty of restriction of practice can only be set by laws, administrative regulations and local regulations. The law is enacted by the highest authority to set various types of restrictions on the practice of the profession, including a lifetime ban on the practice of the profession. Administrative regulations are enacted by the State, which may make specific provisions on restrictions on the practice of the profession within the framework set by the law or under the authorisation of the law. Local laws and regulations Local laws and regulations are enacted by the highest authority and their standing committees at the provincial and municipal levels and may make specific provisions within the scope of the behaviours, types and ranges stipulated in the laws and administrative regulations, or may additionally set administrative penalties for the purpose of enforcing the laws and administrative regulations. From the legislative intent, the

subject qualification, administrative punishment is in principle, belongs to the county administrative organs above the inherent competence.[7] However, they are subject to stricter scrutiny when they set restrictions on the practice of a profession, especially severe measures such as lifetime bans.

The Administrative Penalties Law clearly stipulates that the types of administrative penalties that can be set by regulations (including departmental and local government regulations) are limited to warnings, notification of criticism and fines of a certain amount. This means that, in principle, regulations do not have the power to set penalties for restricting the practice of such behaviours. However, in practice, it is not uncommon for regulations or even normative documents with a lower level of effectiveness to set restrictions on the practice of the profession. For example, Article 48 of the Regulations on the Administration of Motor Vehicle Driver Training (Decree No. 32 of the Ministry of Transportation and Communications 2022) provides that: "If has behaved in the third paragraph of the preceding paragraph and the circumstances are serious, the directly responsible supervisory personnel and other directly responsible personnel shall not be engaged in the motor vehicle driver training business within five years of the original filing. training business." This phenomenon stems mainly from the need for rapid response and fine-tuned management in some areas of administration, as well as a deviation in the understanding of the provisions of the Administrative Penalty Law. Effectively restraining such behaviour requires strict enforcement of the Administrative Penalty Law and timely correction of ultra vires settings through mechanisms such as filing reviews. Among other things, a lifetime ban on employment is the most complete deprivation of a citizen's freedom of occupation, and its impact on individual rights is extremely far-reaching. Therefore, its establishment should follow the more stringent principle of legal reservation. Some scholars believe that even though the NPC Standing Committee's opinion on the record review limits the legal basis for the lifetime ban on employment to laws and administrative regulations, it should essentially be a matter of stricter legislative reservation, i.e., in principle, it should be stipulated at the level of "law". The Legal Affairs Committee of the

Standing Committee of the highest authority also pointed out in its review of the case of "lifelong ban on special industries" that it is not appropriate to stipulate "lifelong ban" in the fields where the laws and administrative regulations do not provide for restrictions on the practice of the profession, which reflects a prudent attitude towards the authority to set a lifelong ban on employment. This reflects a prudent attitude towards the authority to impose a lifetime ban. This reflects a prudent approach to the authority to impose lifetime bans. [8]

In this regard, the record-examination system of the Standing Committee of the highest authority is playing an increasingly important role in monitoring and correcting inappropriate restrictions on the exercise of profession. Through the review of local regulations, rules and other normative documents, it is possible to identify in a timely manner those provisions that exceed their authority, violate higher laws or are unreasonable in content, and to urge the enacting authorities to amend and improve them. For example, the 2024 Filing Review Work Report again focuses on the punishment of practice restrictions, and for the first time cites constitutional provisions to make it clear that practice restrictions that are too broad and lacking in necessity and reasonableness are unconstitutional. This is of benchmark significance in regulating the setting of restrictions on the exercise of profession and safeguarding the rights of citizens.

3.2 Substantive Justification Review: Application of the Principle of Proportionality

"Where infringement of professional choices is unavoidable, the legislator must always use the means of regulation that are least restrictive of fundamental rights". This statement is an expression of the principle of proportionality. The principle of proportionality is a fundamental norm in the field of public law limiting the rights of citizens and requiring that administrative acts be made in proportion. It contains three sub-principles of appropriateness, necessity and balance (the principle of proportionality in the narrow sense),[9] and specifically to the three stages of state intervention, if it is for the practice of the act, the court generally only carries out an ordinary proportionality review, that is, to see whether the means of intervention can be appropriate,

necessary and balanced to achieve the purpose; if it is for the subjective conditions of access, to examine the setting of restrictions on the practice of the pursuit of the public interests of whether the real, important and realistically compelling. Not only should the purpose of the intervention serve a particularly important public interest, for example, the maintenance of national security, public safety, financial market order, food and drug safety, protection of minors, etc. are usually considered legitimate public interest purposes, but also the court in the necessity review must look at whether at this point the purpose can be achieved simply by adopting restrictions on the practice of the profession, i.e., reviewing whether the restriction on the practice of the profession set up can help to realise the claimed purpose. The court must then look at whether the purpose can be achieved simply by adopting a restriction on the practice of the profession, i.e. examine whether the restriction on the practice of the profession is conducive to the achievement of its purported legislative purpose. If a restriction does not contribute at all to the attainment of the objective, it is not proportionate; finally, objective access restrictions on the choice of profession, which have the strongest impact on the individual, must be examined not only to see whether the objective can be attained by intervening in the freedom of exercise of the profession or in the subjective conditions of access, but also to see whether it is absolutely necessary for them to be considered proportional. This is the core of the proportionality test. It examines whether there are alternative measures that are less intrusive on citizens' occupational freedom and that would be equally effective in achieving the legislative aim. At the same time, whether the duration (e.g., one year, five years, lifetime) and scope (e.g., specific jobs, specific trades, all trades) of the restriction are the minimum necessary to achieve the purpose. For example, for offences in special trades, whether a lifetime ban is necessary, or whether a ban for a limited period of time or other regulatory measures are sufficient. In addition, in terms of the intensity of the review, genuine restrictive measures on the exercise of a profession are an infringement on the freedom of citizens to practise their profession, and should be strictly examined by the record-keeping and reviewing body; whereas, in the case of non-genuine restrictive

measures on the exercise of a profession, a lenient reviewing attitude should be adopted, with respect for the judgement of the legislature or the administrative organ, and "obviousness review" or "supportability review" should be adopted in respect of the justification of the purpose and appropriateness "or" "supportability review" around the legitimacy and appropriateness of the purpose. [10]

The public interest to be achieved by the restriction of the exercise of a profession is weighed against the consequent harm to the individual's rights, such as freedom of occupation. The restriction is balanced only if the public good achieved significantly outweighs the harm to individual rights. This principle may be violated if the cost to the individual is too great for the sake of a small public good. In applying the principle of proportionality to the review, a number of factors need to be taken into account, including: the nature of the offence, such as intentionality or negligence; the circumstances, such as first-time, occasional or habitual offenders; the degree of social harm; the degree of the perpetrator's subjective fault, the likelihood of recidivism and an assessment of the risk to the person; the degree of correlation between the offence and the restricted occupation; the closer the correlation, the greater the justification of the restriction; the potential harm that the restriction may cause to the person's (b) The possible impact of the restrictive measure on the person's basic life, family and social relations.[11]

3.3 Substantive Legitimacy Review: Application of the Principle of the Prohibition of Improper Association

The principle of prohibiting improper linkage in administrative law means that when an administrative subject makes an administrative act, there must be a substantial connection between the administrative purpose it intends to pursue, and factors that are not related to the nature of things should be formally excluded, so as to achieve both the administrative purpose and the protection of citizens' basic rights. For example, a good doctor loses the opportunity to save lives and help people by committing the offence of dangerous driving, while careful driving is not one of the necessary conditions for the normal performance of his duties, and it can even be said that there is no reasonable

correlation between the two, regardless of the legal or moral dimensions. If the administrative law obligation of restricting the practice of driving is imposed, the legitimacy of the legislation lacks social acceptance at the level of common sense, common sense and common sense. [12] Therefore, the principle is mainly used to examine whether the connection between the restriction measure and the offence and the purpose of the restriction is justified in the setting of the restriction on the exercise of profession.

The specific application of the principle of prohibiting improper association in the restriction of employment will be explored from the following three aspects, firstly, the examination of the substantial association between the offence and the restricted occupation, which is the core examination point. If there is a lack of intrinsic, logical and demonstrable correlation between the offending behaviour of the person concerned and the occupation to which he or she is to be restricted, the restriction may constitute an improper association. For example, there may be a lack of sufficient substantial connection between a prohibition on practising the profession of accountancy for traffic offences. [13] The second is to prevent restrictions on the practice of the profession on the basis of irrelevant factors such as status discrimination or moral defects: the person concerned should not be presumed to be unfit for all or certain professions that are not directly related to his/her offence simply because he/she has committed some kind of unlawful act, or has some kind of moral defects. The key considerations in setting a restriction-type penalty for a particular profession are, among other things, the disciplining of administrative counterparts for occupational offences and the effective protection of the public interest. [14] Restrictions should be based primarily on the need to prevent the recurrence of specific types of offences, rather than on generalised social exclusion. Finally, be wary of undue associations in the pursuit of abstract public goods or excessive risk defences: legislators and administrative authorities should not impose excessive restrictions on citizens' freedom of occupation simply to protect some abstract public good, such as "social morals", or based on undue and uncertain concerns about future risks, especially when such restrictions are not

linked to concrete or preventable harms. (c) The lack of a clear causal chain between the restriction and the specific preventable harm.

4. Conclusion

The core crux of the problem of inappropriately setting restrictions on the exercise of a profession lies in the lack of clarity in the definition of the authority to set such restrictions at the legislative level, the lack of clarity in the criteria for their substantive content, the lack of specificity in the requirements for procedural safeguards, and the potential for bias at the law enforcement level in the application of the relevant principles. These problems not only directly infringe upon citizens' rights to freedom of occupation and labour, but also challenge the basic principles of the rule of law, such as the statutory nature of punishment, the principle of proportionality and the prohibition of improper association, thus affecting the authority of the law and the fairness and justice of society.

As a necessary tool for social governance, the existence of restrictions on the practice of law is objectively reasonable. However, the realisation of the value of the tool cannot be achieved at the expense of the fundamental rights of citizens. The goal of the rule of law is to seek a dynamic balance between safeguarding the public interest and guaranteeing citizens' occupational freedom. This means that restrictions on the exercise of the profession must be set and enforced strictly within the framework of the rule of law, ensuring that the source of the authority is legitimate, the purpose is justified, the means are appropriate and necessary, the damage is minimal, and there is a substantial connection between the offence against which they are imposed and the risks they entail.

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