





行政特许的私法分析

Administrative Franchise in Civil Law Perspective

王智斌 著

行政特许的私法分析

宪





丛

Administrative Franchise in Civil Law Perspective



## 图书在版编目(CIP)数据

行政特许的私法分析/王智斌著. 一北京:北京大学出版社,2008.11 (宪政论丛)

ISBN 978 -7 -301 -14269 -1

I. 行… II. 王… III. 私法 - 研究 IV. D90

中国版本图书馆 CIP 数据核字(2008)第 144293 号

书 名: 行政特许的私法分析

著作责任者:王智斌 著

责任编辑:杨立范 王建君

标准书号: ISBN 978-7-301-14269-1/D·2138

出版发行:北京大学出版社

地 址:北京市海淀区成府路 205 号 100871

网 址: http://www.pup.cn

电 话: 邮购部 62752015 发行部 62750672 编辑部 62752027

出版部 62754962

电子邮箱: law@ pup. pku. edu. cn

印 刷 者:三河市新世纪印务有限公司

经 销 者:新华书店

650 毫米 × 980 毫米 16 开本 15.5 印张 250 千字 2008 年 11 月第 1 版 2008 年 11 月第 1 次印刷

定 价: 32.00元

未经许可,不得以任何方式复制或抄袭本书之部分或全部内容。

版权所有,侵权必究

举报电话:010-62752024 电子邮箱:fd@pup.pku.edu.cn

2003 年 8 月 27 日,我国通过了《行政许可法》,确立了在行政许可领域个人自治优先、市场优先、自律优先与事后机制优先的原则。这一立法价值取向使《行政许可法》获得了高度评价和广泛赞誉。按照《行政许可法》的规定,行政特许是适用于有限自然资源开发利用、公共资源配置以及直接关系公共利益的特定行业的市场准入等需要赋予特定权利的许可,是行政许可的一种特殊类型。2007 年 3 月 16 日通过的《物权法》规定了属于国家所有的自然资源,并将依法取得的建设用地使用权、海域使用权、探矿权、采矿权、取水权、养殖权、捕捞权确立为用益物权,在民事基本法中明确了适用行政特许的自然资源的范围以及经行政特许取得的自然资源使用权的用益物权性质。《行政许可法》和《物权法》的相关规定为我国行政特许制度勾勒了基本框架。

我国是以社会主义公有制为经济基础的国家,矿藏、水流、海域、无线电频谱资源属于国家所有,土地、森林、草原、滩涂、荒地等自然资源基本上属于国家所有,因此,行政特许在我国具有特别重要的意义。然而,囿于我国传统行政体制的影响,《行政许可法》和《物权法》的规定不甚完备,相关法律法规不配套,理论研究不足,特别是传统行政管理观念的顽强表现等多方面的原因,《行政许可法》实施过程中发生了一些背离立法精神的问题。这些问题的存在,不仅影响了行政特许制度的有效实施和功能发挥,而且衍生了行政不当干预民事、公权侵害私权、人为制造垄断、妨碍市场开放和公平竞争等弊害,直接影响到我国经济体制改革的成败。因此,加强对行政特许制度的理论研究,实在是我国法学界的时代课题。

《行政许可法》的颁布,极大地推动了我国学习和研究行政许可理论的热潮。但是,无论是在行政法学领域还是在民法学领域,都尚未见将行政特

许作为一项专门制度进行系统理论研究的著述。行政特许是行政法上的一项制度,但是,其许可对象作为一类重要的财产,又是民法的调整对象,行政特许的法律效果则是被许可人依法取得使用自然资源和公共资源的民事权利。因此,行政特许制度的设计、运作既要遵循行政法的原则、理念,又要与私法自治的理念和民法的有关制度相契合。正是在这个意义上,从私法的视角对行政特许制度进行系统研究不但具有合理性,而且具有必要性。显而易见,这是一个横跨公法和私法两个领域,难度很大且前期理论研究成果相对匮乏的课题。王智斌同志知难而上,选择这个具有挑战性的时代课题进行研究,勇气可嘉。

王智斌同志于1996年获得民法硕士学位,具有良好的法学素养和扎实的民法理论功底,毕业后从事了多年的地方立法工作,积累了丰富的法治实践经验,并在公私法结合研究方面作了一些探索,取得了一些富有理论和实践意义的成果。2004年,王智斌同志以优异成绩考取西南政法大学民商法专业博士研究生之后,根据她的知识结构和工作经验,我就建议她将民法和行政法的结合作为自己的研究方向,并相互取得共识。之后,她即开始了艰苦的理论准备和资料收集工作。通过三年的奋力拼搏,终于完成了其博士论文《行政特许的私法分析》。该博士论文受到评阅人和答辩委员的一致好评,本书就是在其博士论文的基础上形成的。

本书首次从私法视角对行政特许制度进行了全面、系统的研究,在行政特许的理论中引入了私法的理念,并在私法的理论框架中对行政特许的客体、功能、法律构造、特许权的法律性质和地位等基本问题进行了深入的探讨和理论构建,形成了一个较为完整的行政特许理论体系。在此基础上,对我国行政特许立法和实践的改进和完善提出了建设性的构想和建议。这些研究成果对完善我国行政特许法律体系有重要的参考价值,对改进我国目前行政特许的实践也将产生积极的影响。本书在实现公法与私法研究之间的互动互融方面作出了可喜的探索,甚至可以说开辟了一个新的研究领域,创造了一种新的研究方法。对于行政法学的研究现状我不敢妄加评论,但就民法学的研究而言,系统地研究公法或其某项制度对民事权利的影响和意义或者反过来民法的理论和制度应当如何在公法中发挥作用这样的成果确实罕见。市民社会是一个统一的整体,规范市民社会生活的法律应当协调一致,相互配合,共同为实现法律的调整目标服务。但是,学科的划分使

此为试读,需要完整PDF请访问: www.ertongbook.com

学者们画地为牢,不同学科的学者之间鸡犬之声相闻,老死不相往来,严重制约了法学的整体发展水平和法律对社会生活的调整能力。《行政特许的私法分析》一书在跨学科研究方面进行了大胆的探索并初战告捷,这对我们具有示范意义。从这个意义上说,本书在研究领域和方法方面的创新意义甚至超过其具体的学术理论贡献。

许明月教授认为本书"在很大程度上丰富并更新了我国行政许可制度的法学理论体系,并可能在学术界引起广泛的学术争鸣"。但愿许教授的预言成真!认真的争鸣是学术进步的催化剂,更何况本书毕竟是一个初出茅庐的青年学者的创新之作,有些观点需要进一步深入分析论证,有些观点可能值得商榷或者将被否定。其实这些都不重要,重要的是作者所研究的问题能够引起重视和争鸣,在争鸣中,作者和所有参与争鸣的人都将得到提高,中国的法学研究也将在这种争鸣中不断进步,日益成熟起来。我们期待着这种局面早日到来。

看到学生的进步,是老师最大的快乐,分享学生的成功,是老师最大的幸福。当王智斌请我为她的新书作序时,我非常高兴,欣然应允,并将我对这本书和王智斌本人的一些感受写在前边。

谨此为序。

张玉敏 2008 年春

本书首次对行政特许制度进行了系统研究。现行法上,行政特许是指 对"有限自然资源开发利用、公共资源配置以及直接关系公共利益的特定行 业的市场准入等需要赋予特定权利的事项"由政府依法定的条件和程序确 定并将权利授予特定主体的制度(《行政许可法》第12条第2项)。行政特 许是配置资源的重要制度,具有以下三个方面的基本作用:(1)配置稀缺资 源,解决市场囿于其自身的局限所无法解决的"公共物品的悲剧"问题; (2) 相对公平地配置稀缺资源,从而保障市场的公平竞争和市场主体的合 法权益;(3)对于获得许可的个人,其权利受到法律保护,任何人不得侵犯。 在社会主义市场经济体制中,行政特许在资源配置领域发挥着越来越重要 的作用。与行政特许制度所具有的重要性相比,当前我国行政特许的立法、 法学理论研究和实践尚未形成完整有序的体系,尤其是作为传统公法制度 的行政特许不足以达到有效配置资源、保护公民应有的权利和自由的目的。 为此,本书在私法的理论框架中对行政特许作了系统研究。重点研究了行 政特许的概念、客体、功能、构造以及经行政特许取得之特许权的性质和地 位,初步形成了较完整的行政特许理论体系,并提出了完善我国行政特许立 法的构想和改进行政特许实践的建议。

全书分为三部分,除引论外,共九章。第一章至第六章为本论,着重在理论上解决三个问题:(1) 哪些有限资源应由行政特许配置;(2) 以什么方式来公平配置;(3) 被许可人取得的是什么样的权利。第七章为应用论,运用行政特许的基础理论,以出租车经营权为例进行实证分析。第八章、第九章为建构论,分析《行政许可法》中与行政特许相关的制度及其缺憾,提出完善相关法律的建议。

引论部分,旨在说明研究的目的、意义和思路。概要介绍行政特许的内

涵、特征和作用,通过论述当前在行政特许制度中存在的问题及危害,分析 其成因,指出对行政特许进行私法分析的必要性和迫切性。在此基础上提 出研究解决问题的思路。

第一章通过与民事许可的比较,考察行政特许的概念。民事许可通常为财产权许可,如专利权许可和特许经营。民事许可的双方当事人法律地位平等,完全适用私法自治原则,许可的权利基础是私人财产权,从而区别于许可方恒定为国家,以国家治权为基础的行政许可。本书认为,行政许可包括两种类型,即财产权许可和行为自由许可。行政特许与一般许可相对,作为说明概念,是对《行政许可法》第12条第2项内容的概括,即有限自然资源开发利用、公共资源配置以及直接关系公共利益的特定行业的市场准人等需要赋予特定权利的事项。作为工具概念,是指行政许可中的财产权许可,一般许可为行为自由许可。本章指出,国家身份具有特殊性,既可以是公法主体,也可以充当民事主体。当国家基于其财产权作出许可时,是民事许可还是行政许可,取决于国有财产是私产还是公产。

本章首次对行政特许进行了理念类型化,这一理论创见有助于把握行政特许的本质。

第二章从行政法与民法关于公产的论争入手,分析行政特许的客体。根据财产使用目的的不同,国家掌握的财产可分为国家公产与国家私产。国家公产是直接供公众和公务使用的财产。国家私产是不直接供公众和公务使用而作为财政收入目的使用的财产。公产具有在公共使用期间所有权不可转让且不受时效约束的特点。在公产应受何种法律支配的问题上,有一元论和二元论之分。一元论以法国为代表,主张公产仅适用公法。二元论以德国为代表,主张公产既适用公法也适用私法。本书提出,我国应以二元论为基础建立国家公产制度。行政特许的客体为供特别独占使用的共用公产。据此,政府基于其私产所作的许可为民事许可,需经公产管理者许可才能进行公共利用的许可为普通行政许可,政府对共用公产的特别独占使用许可为行政特许。

本章根据我国国有自然资源所有权的意义和特点将其界定为公产,实现了行政特许客体的统一,同时消除了以往民法理论以一元论为前提将国有自然资源界定为私产带来的理论矛盾及与行政法理论的冲突。

第三章以知识产权的经济分析为进路,分析行政特许的功能。知识产

权与行政特许都是国家法律直接规定的一种垄断利用权,但具有不同的功能:知识产权通过国家赋予私人产权形成纯公共物品(知识产品)的生产激励并内化正外部性。行政特许通过私人产权的界定配置拥挤的公共物品(特定的国家公产)并将负外部性内部化。知识产权的申请和注册程序不是行政许可而是对民事权利进行确认的行政行为。本章指出,不同类型的资源为资源配置政策提供了考量因素,自然资源只有如何分配的问题,制度资源则有是否应有此资源以及如应有此资源又如何分配的双重问题。广义的有限公共资源属于制度资源,为保障公民的权利和自由,要求对设定行政特许的合理性进行实体论证并有相应的程序保障。

本章首次对有限公共资源的含义进行了界定,有利于明确行政特许的适用范围。本书指出,有限公共资源具有广义与狭义两种意义。狭义是指自然资源以外的人工共用公产。广义上是指成立于人工共用公产、垄断行业的市场准入机会之上具有数量限制的行政许可本身。本章还首次提出了行政特许与有数量限制的普通许可的区别在于是否建立在特定公产之上。

第四章通过对行政特许中契约关系的审视,分析行政特许的构造。本书认为,行政特许具有两阶段的法律构造,即第一阶段由国家作为公共管理者准许相对人利用特定资源,第二阶段由国家作为资源所有者向被许可人转让财产权利。基于这一构造,为更好地体现公平与公正,维护交易安全,在《行政许可法》规定的行政特许应通过招标、拍卖等公平竞争方式作出决定外,还应完善以下两项配置制度:一是将民事合意作为授予行政特许的必经程序,即行政机关在通过公平竞争程序确定被许可人后,应与其签订协议,具体约定资源的开发利用方式、期限、有偿使用费、违约责任等内容;二是将登记作为授予行政特许的必须程序。

本章首次提出应建立统一的行政特许授予制度,完善了行政特许的配置机制。本章指出,已有法律法规对行政特许事项的配置仍以公法审批方式为主,无法达到有效配置资源的目的,应按《行政许可法》要求的公平竞争程序进行修改。

第五章在公权私权的语境下,分析特许权的性质。本书认为,财产权是 具有经济价值的权利。财产权包括公法上的财产权和私法上的财产权,但 公法上的财产权并不都是公权,基于公法产生而被赋予私法效力的财产权 属于私权。特许权即是一种基于公法产生而被赋予私法效力的财产权。特 许权的授予在程序上具有行政和民事双重性,但权利内容为私权,同时,因 其事关社会公共利益,故在取得、转让、行使等诸多方面被课以种种公法上 的义务,因而又具有某种公权属性。

本章探讨了行政特许的可转让性问题。指出行政特许的可转让性是基于其着眼于对物的开发利用条件而不具备人身属性,并与招标拍卖方式相配套。而目前我国的相关立法多与此原则不符,应予修改。

第六章以物权债权二元结构为背景,分析特许权的地位。在大陆法系财产权所具有的物权与债权、所有权与他物权、用益物权与担保物权的二元结构中,自然资源特许权的客体为他人所有的物且具有特定性,应定位于用益物权。对于以权利为客体的行政特许经营权,借用物权法上的体系化技术,应定位于"准物权"。在物权法定原则及物权法定主义缓和的潮流下,特许权具有用益性,为基础物权,应实行法定主义。现代公示系统的进步,为特许权从债权上升为物权提供了支持。在《物权法》中应当确立各类自然资源特许物权,并规定兜底条款,同时规定以权利为客体的无形物准用物权法的规定,在此前提下,特许物权法定之"法"可放宽到行政法规与地方性法规。

本章反思了传统财产权理论和体系,将自然资源特许权定位于用益物权,将政府授予的特许经营权定位于"准物权",并提出在《物权法》将行政特许权的基本类型法定的前提下,可将物权法定的法源放宽,这有利于适应我国经济发展的需要生成新型物权。

第七章运用行政特许的基础理论,对出租车经营许可进行剖析。本书认为对出租车实行数量管制是必要的。由于数量限制,出租车经营权就成为政府掌握的一种有限公共资源。对这种有限公共资源的配置,以审批出租车经营主体,由其所属车辆进行营运的配置模式,必然衍生出分配不公、许可与社会需求脱节等诸多矛盾和弊端。对出租车经营许可应按行政特许的机制来配置,即以招标、拍卖等有偿竞争方式发放附有期限的许可,并允许转让出租车经营许可证。

本章分析、反思了当前北京等地出租车管理中产生矛盾的内在因素,对 我国城市出租车行业的管理提出了改革建议。

第八章以私法为视角,研究行政许可法中的制度创新与缺憾。"听证程序"、"信赖保护"以及"拍卖招标"方式发放特许是《行政许可法》的三大制

度创新。本书认为,听证程序为行政权力与公民权利之间的良性互动提供了制度渠道,但立法中存在听证程序的规定不全面的问题。在特许权的配置中引入招标、拍卖等公平竞争的市场化方式,在具有遏制腐败、优化资源配置的同时,存在特许配置方式过于单一,特许范围不明,特许条件不当的问题。信赖利益补偿制度的确立赋予了行政许可以财产权利属性,但原则上禁止许可转让的规定,仍延续了传统上许可的行政配置属性看法。此外,利益补偿还存在法律依据不明的问题。这些立法中的缺憾都势必增加实践中的困惑和法律实施的难度。

第九章在前面章节研究的基础上,提出完善行政特许制度的建议。较完善的行政特许制度应当具备规范的法律形式,并能有效地配置资源。为从制度安排上达到行政特许的理想效果,我国应当逐步建立公私法兼容的行政特许制度,即以二元论为基础完善行政特许客体的种类范围,在方式上结合运用公法手段和私法手段,在权利保护上建立公法私法兼容的制度体系。以此为目标,本章针对当前行政特许领域存在的诸多问题,提出了对《物权法》、《行政许可法》、自然资源保护以及公用事业方面法律法规的完善建议。

本书首次从私法的视角对行政特许制度进行了全面、系统的研究,在行政特许理论中引人私法理念,并在私法的理论框架中对行政特许的主体、客体、权利性质和内容以及权利取得的条件、程序进行了系统分析和理论构建。实现了民法学与行政法学研究成果之间的互动与互融,进一步丰富和完善了行政法和民法理论,填补了我国行政特许理论研究方面的空白。无论是研究的全面性、系统性,还是以私法为视角的研究方法,均属首创。

在研究过程中,本书不仅从实践中总结和提炼了行政特许领域存在的一系列疑难问题,而且尝试作了解答,研究成果富有创新性、开拓性和实用性。本书在理论层面和制度层面的创新点主要有:一是在行政特许的定义方面,受民事许可的启发,将行政特许界定为财产权许可,完成了对行政特许的理念类型化。二是在行政特许的范围方面,界定了有限公共资源的含义,提出了行政特许与有数量限制的普通许可的区分标准。三是在行政特许的客体方面,提出应以二元论为基础建立国家公产制度,在此前提下将国有自然资源界定为公产,实现了行政特许客体的统一。四是在行政特许的配置方面,提出应建立统一的行政特许授予制度,将民事合意与登记作为授

此为试读,需要完整PDF请访问: www.ertongbook.com

予行政特许的必经程序,提出了强化私法配置手段的必要性及其完善方式。 五是在行政特许的效力方面,反思了大陆法系财产权理论及构造,将自然资源特许使用权定位于用益物权,将行政特许经营权定位于"准物权";提出在《物权法》对行政特许使用权作出概括性规定的前提下,在行政特许范围内可将物权法定之"法"放宽到行政法规和地方性法规;提出对行政特许的利益补偿应在《物权法》确立的民事法律途径的基础上进一步完善。这些观点和制度的整合与创新,为形成规范有序的行政特许法律体系,指导行政特许实践的发展,提供了有益的理论参考。

一、"我这会问题,你可能可以说话,一定还是一定过程的人。""我们就是一个我们就是一个人。" "我我们是我们的人,我们也是一个人的人,我们也是一个人的人,也是不是一个人的人。"

| TA 手担 (基) LITEL LEAD (A MODELL CONTINUES C

TOTAL AND METERS AND THE STATE OF THE STAT

**我就学说** "我一家我是他还不是我们的人。""我们就是我们的人。"

性理 () 2005년 1일 전 (1997년 - 1997년 - 1997년 1일 1997년 1997년 1일 1997년 1일 1997년 1일 1997년 1일 1997년 1일 1997년 1일 1997년 1 현 10 왕보는 1일 전 (1997년 - 1997년 - 1997년 1

配置方面,此些这些点点。在已经早年已经中以上将及事合证与上层性为是

## **Abstract**

This article first explores systematically many fundamental aspects of administrative franchise. In the existing law, the administrative franchise means the license which is given with the particular rights about the market access to the particular industries which include the development of limitted natrual resources, allocation of public resources and those are related to the public interests (Adminitrative License Law 12 section 2 article). The administrative franchise is one of the most important resources assign systems, it has three basic functions : (a) allocate the limitted resources, avoid the "tragedy of public goods"; (b) allocat the limitted resources in a fair and square way, thereby safeguard the fair competition of market economy and the legal rights and interests of the market body; (c) the franchise is protected by law even the owner of property can't trespass on it. The administrative franchise has become more and more important in the system of socialism market economy. Contrast to the importance of the administrative franchise, the legislation theoretics research and the practice of the administrative franchise has not been in a well-ordered way. Therefor, this article is researching the administrative franchise systematically in the utilize of the principles from private law. The whole article is working over the concept, object, function, quality and validity of administrative franchise, shaping the theoretical frame of administrative franchise initially and making some legislational suggestions.

The whole article is composed of 3 parts, 9 chapters except for the introduction. Chapter1 to in chapters 6 study three issues: (a) what kind of resources is needed allocate by the administrative franchise; (b) how to allocat the limitted resources in a fair and square way; (c) the character of franchise. Chapter 7 u-

ses the basic theories of administrative franchise; it takes the power of management of taxi as the empirical analysis. Chapter 8 and 9 expands to the whole field of administrative license, then it analyzes the systems in Administrative License Law which are related to the private law, and making some legislational suggestions.

INTRODUCTION is aimed to illustrate the purpose, importance and thinking of this research. First, summerize the meaning characteristic and function of administrative franchise. Then, demonstrate the problems and harmness in the existing system of administrative franchise analyze the cause and point the necessity and the urgency of analyzing administrative franchise in private law. Finally, put forward the way to solve this problem on the basic of above.

FIRST CHAPTER analyzes the concept of administrative franchise by comparing with the civil license. Civil license is usually the property license, such as the license of patent and the franchise. The subject of cl is the equal civil objects so it can apply the principle of autonomy in private law. The basic of right of license is the individual property right, so it can be told from the al whose party is the state and the basic is the administrative power. This article considers that administrative license includes two types which are the license of property of right and the one of behavioral freedom. The administrative franchise is as the opposite concept of normal license. administrative franchise is the summary of the content of "12th section, 2nd article" in the Administrative License Law as the introduction of concept and it means the license of transfering the property right as the concept of tool. Normal license is the one of behavioral freedom. This chapter points out that the identity of the state is special, because it can only be the main body in public law, it can also be the civil subject. Whether it is the civil license or the property right license when the state makes the license based on the property right is depend on whether the state-owned property is the private property and public property.

This chapter accomplishes the idealizational typehood of administrative franchise. It helps to grasp essence of administrative franchise.

THE SECOND CHAPTER analyzes the subject of administrative fran-

chise through the controversy of state-owned public property. The property controlled by government can be divided into the public property of government and private property of government according to thr different ways of using. The public property of government is supplied to the public and official business directly while the private property of government is using in that way indirectly. The theory of public property believes that the ownership of public preoperty is non-assignable and is not bound by prescribtion. The dualism is supported by this article. There are the monism and the dualism over the issue about what law dominates the public property. The former one is represented the public law. The latter one is represented by German, and it adovates that the public property is applied for both public law and private law. This article agrees the dualism. The object of administrative franchise is the welfare public property for the special exclusive use. Object of administrative franchise is the public property which is sreved for the public exclusively. The license which is based upon the private property from the government is called "Civil License", the one which is not uesd for the public until licensing of the manager of public property is called "Normal License". The one which is based upon the exclusive use of welfare public property from government is called "administrative franchise".

This chapter definites the state-owned natural resources as public property based on the features and meaning of them. It uniforms the subject of administrative franchise and diminishes the theoretic controversy which is made by the theory that state-owned natural resources is private property in the premise of monism and the controdiction with administrative theories.

THE THIRD CHAPTER analyzes the function of administrative franchise, comparing with the IPR. Although IPR and administrative franchise are both the monopolistic using power which is set and given by state law directly, the object of IPR (intellectural product) is the pure public goods and has the positive external features. It needs the private property rights given by state to impulse the production and also the restrains of right in order to maintain the inherent attribute of public goods of IPR. The object of administrative franchise (the specific governmental public propertyt) is the quasi-public goods and it has

the negtive external feature. It needs the allocation from state to the rare resource and internalizes the external feature in the wan of definiting the private property right. The process of application and register in IPR system is not the administrative franchise but the administrative act to administrative franchisefirm the civil right. Then, it researches the sort of resource only has the problem of how to allocate, and the systematic resource and how to allocate this resource if there is so and puts forward the view that the settle of administrative franchise should be restrained and how to restrain.

This chapter confines the definition of limited public resource firstly; it helps to make a clear distinction of the bound of administrative franchise. It deems there are definitions on sensu lato and sense stricto. In latter one, it means the artificial welfare public property except for the natural resources. In former one, it means the administrative franchise itself with quantitive limitation which is based on the artificial shared public property and market access oppotunity of monopolized industry. This chapter mentions that the difference between administrative franchise and the normal license with quantitive limitation is based on whether it establishes on the specific public property.

THE FOURTH CHAPTERA analyzes the struture of administrative franchise by examining contract relationship. Because the administrative franchise has two stages legal structures. 1, the country permits the relative parts to use the specific resource as the public manager. 2, the country transfers the property right to licensee as the owner of resources. To improve the system of granting administrative franchise is supposed to enhance the utilization of private ways, and to confirm the civil consensus and register as the necessary process, except the administrative agencies should make decisions in way of fair competitions, such as biding and auction to the franchise according to the Administrative License Law.

This chapter suggests that it should be built up the uniform system of granting the administrative franchise firstly. Administrative License Law should regulate to this. Nowadays, the existing legislation should be modified according to the fair competition process in Administrative License Law.

THE FIFTH CHAPTER analyzes the charater of administrative franchise in the language situation of public right and private right. This article deems that the property right is right which has the economic value. And the property right is composed of the one in public law and the one in private law and is given the validity on private law, but the right which is based on the public law is not totally the public right. If the right is granted by the private law, it is a private right. Obtaining the administrative franchise means obtaining the right to explore and utilize and the right to manage, so it is a right which has the substantial content of exemplifies the economic interest directly namely the property right. By examining the contents and related theories of the franchise of government, it deems that the grant of franchise has the dualism in administrative and civil law. But the content of right is private right. Furthermore, it burdens some responsibilities on public law in obtaining, remising and exercising because it has the relationship with public interests. So it has the feature of public right.

This article seems the alienability of administrative franchise is based on the facts that it focuses on the conditions of exploring and utilization and it does not have the individual characters. It is suit for the wan of tendering and auction. Some related legislation are not suit for this principle, so they should be modified.

THE SIXTH CHAPTER analyzes the status of the franchise while it has ite setting of dualistic structure of RealRight and the Obligation Right. The tradional property right system of civil law system has the dualistic structure: the realright and the obligation right, the ownership and jus in realiena. The object of natural resource franchise is the goods which is belonged to others and has the specificity. So it should be the right of beneficial use rather that the quasi-ownership. The franchise with object of right. Franchise should be the quai in rem by method of systematize the right of pledge in right as quasi right of pledge and the right to mortgage in right as quasi right to mortgage. In the tide of appeasing the legalism of Jus in Re, the franchise has the feature as the realright of usufruct. And it is the fundamental realright. So it is important to carry out the principle of legality of right. At the same time, the development of modern public anoucement system is quite supportive to the process in which the obligation