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Colleges and Universities Regulations: Limited Autonomy Of Chinese Colleges and Universities

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ABSTRACT. As academic paradise, universities have significant academic professionalism. Based on this, universities should have a high degree of autonomy to formulate and implement university regulations. Academic freedom can be realized only by this. However, the formulation and implementation of university regulations should be subject to the external supervision of legislation, administration, and justice, otherwise it will lead to abuse of the autonomy of universities, and the rights of students cannot be guaranteed, that is, autonomy of universities should be limited. Taking judicial supervision as an example, the autonomy of universities requires judicial intervention to review whether the conduct of universities is illegal, but there has always been a controversial issue: the judicial intervention can only be involved in the review when the students'basic rights such as the education right, or the judicial intervention when other rights are violated intervention? This article believes that "there is right, that is, there is infringement, that is, if there is infringement, that is, there is relief", judicial practice should break through the limitation of importance theory, and infringement of other rights besides students' education right should also be included in the scope of judicial review.

KEYWORDS: Colleges and universities regulations, Limited autonomy, Judicial review

1. Introduction

Since 1999, our country has implemented a reform policy of enrollment expansion in higher education. With the expansion of university enrollment and the awakening of students'rights awareness, disputes between students and universities are increasing, mostly due to the university's sanctions against students with self-made colleges and universities regulations in accordance with the "Education Law", "Higher Education Law" and "Regulations on the Management of Students in General Higher Education Institutions" (revised in 2017). Under this trend, we must deal with the reasonable boundary between respecting university autonomy and accepting judicial supervision, as well as paying attention to the retention of colleges and universities regulations, and breaking through the obstacles in the judicial protection of student rights as soon as possible.

2. The Legal Nature of University Regulations

In our country, colleges and universities are not administrative agencies, but they have the powers of educational administration according to the law. Chinese law defines universities as public institutions, but the status is still a problem that needs to be clarified. In order to solve the difficulty in confirming the qualifications of defendants in administrative litigation due to the unclear legal status of colleges and universities, the definition of"organization authorized by laws and regulations"has been used in judicial practice, and it is believed that all acts that laws and regulations authorize organizations to implement public powers, Both can regard it as an administrative act and file an administrative lawsuit.[1]The Supreme Court Guiding Case No.38-Tian Yong v. University of Science and Technology Beijing for refusal to issue graduation certificates and degree certificates confirms the legal status of universities as eligible defendants in administrative litigation.

Since colleges and universities are not administrative agencies, the school regulations formulated by colleges and universities cannot be counted as part of the legal system. Their nature should be a system that regulates the internal order of colleges and universities, which is called"autonomous norms"in academic theory. University regulations are internal norms, and their content naturally cannot conflict with the constitution, laws, regulations, rules and other normative documents. In addition, if the content of the school regulations involves areas that are not stipulated or clearly stipulated by laws, regulations or rules, it is a self-creative norm and cannot be regarded as illegal and invalid.[2]

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3. The Rational Choice of University Autonomy

Good university regulations are the institutional guarantee of the spirit of university autonomy with academic freedom as the core. However, university autonomy does not mean getting rid of the supervision of the legislative, administrative and judicial organs. The limited autonomy of universities is its true rational choice.

3.1 Colleges and Universities Have Higher Autonomy

The high degree of autonomy of universities is mainly embodied in: first, university governance should be de-administrative; second, the content of university governance is internal affairs of the university, that is, management autonomy; third, the goal of university autonomy is academic freedom, Autonomous management also serves academic freedom[3].In order to avoid improper interference in academic freedom, the legislative norms and administrative supervision of legislative and administrative agencies should be restricted. The judicial agencies should also follow the principle of safeguarding the autonomy of universities in the administrative lawsuits brought by students, and give appropriate professional judgments to universities. Respect, especially when it comes to academic issues. For example, Article 10 of the”Higher Education Law of the People's Republic of China(2018 Amendment)”(hereinafter referred to as the Higher Education Law)stipulates:The state guarantees the freedom of scientific research, literary and artistic creation, and other cultural activities in institutions of higher learning in accordance with the law. Article 11 stipulates: Colleges and Universities shall face the society, organize their own education according to law, and implement democratic management.

Taking judicial supervision as an example, in the case between Liang Sijie and Nanjing University of Aeronautics and Astronautics(2017)Su 01 Xing Zhong No.56,Liang was sentenced to detention by the school for cheating. The main thrust of the court’s judgment is: Although colleges and universities are competent administrative entities under certain circumstances, it does not mean that all their management and disciplinary actions against students fall within the scope of administrative litigation by the people’s court, because the management and discipline of colleges and universities sanctions include both the exercise of administrative power and the exercise of university autonomy. The two need to maintain a necessary balance based on specific cases. With regard to issues related to the direct loss of student status, such as the cancellation of student enrollment qualifications, withdrawal of students, and expulsion of student status, such actions should be regarded as administrative actions and fall within the scope of administrative litigation by the people's courts. As for the warnings, serious warnings and other disciplinary sanctions issued by institutions of higher learning to students that do not involve the change of student status, the behavior should mainly be regarded as an act of exercising the autonomy of the university,and it does not belong to the administrative litigation of the people’s court. range.It can be seen from the above case that the court abides by the principle of university autonomy and does not excessively interfere with the internal management of universities.

3.2 The Autonomy of Universities is Limited

According to the provisions of the Higher Education Law, colleges and universities have the autonomy of running a school. In order to realize the purpose of running a school, they independently carry out education, teaching management and scientific research. This belongs to the exclusive public power of colleges and universities, but the exercise of this power must conform to the state and society. The public interest must not be abused, as stipulated in Article 24 of the Higher Education Law. Therefore, the autonomy of colleges and universities should also be subject to the intervention and supervision of legislative, administrative, judicial and other public power organs. Taking legislative supervision as an example, it is mainly reflected in the state's decrees that recognize the autonomy of universities and academic freedom, while also delimiting a certain range of powers for universities. Article 10 of the Higher Education Law stipulates that scientific research, literary and artistic creation, and other cultural activities in institutions of colleges and universities shall abide by the law. Articles 13 and 14 stipulate that the state implements hierarchical management of education. Higher education institutions are managed by the State Council and the people's governments of provinces, cities, autonomous regions, and municipalities, and their respective responsibilities are clearly divided. Article 25 stipulates that the establishment of colleges and universities should meet the basic conditions prescribed by the Education Law.

The Supreme People’s Court No.38 Guiding Case No.38 Tian Yong’s court of first instance held in its judgment that, in accordance with Chinese laws, institutions of colleges and universities have the power to manage student status, implement rewards or sanctions for educated persons, and have the authority to issue corresponding awards to educated persons on behalf of the state. The responsibilities of the academic certificate and degree certificate. After passing the examination and enrolling, the educated will have the school status and obtain the qualification to study in the school. Although educators have the corresponding educational autonomy in the management of the educated, they must not violate the provisions of national laws, regulations, and rules.[4]

4. The Boundary between University Autonomy and Judicial Review

4.1 Theoretical Source

There are two particularly important theories that affect the boundaries of university autonomy and judicial review. One is the theory of special power relations. This theory began in Germany in the late 19th century and was put forward by Paul Laband. It was originally used to resolve the relationship between officials and the state.[5]Otto Meyer further proposed a complete theory of special power relations. He believed that, compared with general power relations, the relationship between colleges and students is a special power relation used by public law creations. Public colleges and universities are a kind of closed construction, and the relationship between students and colleges is a kind of “close and continuous relationship.”[6]After World War II, Karl Uller divided special power relations into basic relations and management relations, where basic relations refer to”persons involved in the occurrence, change or termination of the identity or status of individuals in special power relations”,and management relations refer to “Each special power relationship is to achieve its own administrative purpose.”[7]For the former, the principle of legal reservation must be followed, and the right to sue is relatively enjoyed. On this basis, the German Federal Constitutional Court established another theory in practice-the “importance theory”. Regarding “is important for the realization of basic rights “as a criterion, the legislature should adjust this part of the rights.[8]

For a long time, our country has followed the theory of special power relations, which is characterized by the national policy dominating the running and governance of universities. Disputes between students and universities are also regarded as internal affairs of universities, and the judicial system does not intervene. At present, the theory of importance has the greatest impact on my country's judicial practice.”The importance theory “takes the” importance of educational affairs “as the judicial” standard of density adjustment.”[9]For other matters, the judicial system does not interfere.

4.2 Different Practices in Practice

Affected by the theory of importance, China has divided the scope of judicial organs that can intervene in the management of college students: when it comes to the right to education of students, that is, “loss of college students' right to identity “or” loss of opportunity to receive education”, students can file a lawsuit From the perspective of importance theory, the judicial attitude towards the protection of student rights is restrained, that is, the court recognizes the high degree of autonomy of colleges and universities, and for those disputes caused by management and punishment that do not involve the right to education of students, It will not be accepted.[10]

The Judicial Court of Taiwan District of China clarified in Interpretation No.382 that the theory of importance was used as the standard for judicial review, which ended the past era when students were not allowed to request relief even if their rights were infringed. Limited to the infringement by the authorities, the student's identity must be changed before relief is possible. After that, the Chief Justice Interpretation No.684 broke through the importance theory and extended the protection of students' right of litigation from the right to education to other basic rights. In the coordinated opinion, the justice held that even if the administrative sanctions imposed by the university on students were not withdrawing from school or similar sanctions, the students should still be subject to the infringement of their rights in accordance with the “right to remedy “in the” Constitution “of Taiwan. Administrative litigation was filed at the time to allow students to” return to the field of fundamental rights protection.”[11]

This article believes that the protection of student rights is not limited to the right to education,” right means infringement, and infringement means remedy”, unless the judiciary makes a judgment in advance that “this part of the right has no judicial protection value”, otherwise It is impossible to convince students “why the justice does not provide relief for their rights other than the right to education”.[12]We should admit that: “Students' rights that may be affected by the school's public power measures, not only at the end of the right to education, but also those who are not involved in the right to education, are slightly affected....No specific measures should be used to affect student rights. The threshold of administrative remedy must be 'significant'. At most, a major impact can only be interpreted as a very minor and negligible infringement of rights, which lacks the need to protect the rights of administrative disputes.”[13]

The autonomy of universities should be limited autonomy. Based on university regulations that do not violate laws and regulations, during the implementation of the university regulations, neither entity nor procedure can infringe on the rights of students, otherwise the judiciary can intervene in reviewing university regulations and the legality of university behavior, and it is not limited to students Circumstances in which the right to education has been violated. Only in this way can the rights of students be guaranteed and the balance of autonomy of universities, judicial review and protection of students'rights can be further achieved.

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