

Vigilance of Power Abuse in Colleges and Universities

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Abstract. Any power, if unlimited, will be abused. Because the provisions are not clear and the procedural justice is difficult to protect, the statutory autonomy of the university self-management has gradually become the trend of abuse in recent years. Through the analysis of the abuse of the autonomy of the University self-management, this paper has revealed the possibility and inevitability of the "power abuse" in colleges and universities and further compared with the concept of ruling by law and the provisions of the new administrative litigation law, so as to derive the mode of the judicial review of the autonomy of the university self-management and to urge the perfection of the university management system.

Overview of the autonomy of the university self-management

From the course of the development of higher education system in China, the university self-management has experienced a development process from scratch, from small to large and from general to clear. The "Education Law" in 1995 gave the school and other educational institutions self-management power. The "Higher Education Law" in 1999 further clarified the autonomy of colleges and universities to set up the discipline and other seven aspects of the autonomy of the power. Whereas the "Regulations on the Management of Students in Colleges and Universities" promulgated in 2005 had further expanded the autonomy of the university self-management, in which there are 5 points directly defied "regulate by schools" and 13 points required "execute as the school regulations". The national laws and regulations of the Ministry of Education had given the university a great autonomy, but the legitimacy of the source of the autonomy of the university cannot be replaced by the legitimacy of the exercise. Colleges and universities having the right of self-management by law don't mean that they exercising the self-management right by law. In the view of sociology, the essence of power is the ability of the subject to influence and restrict himself or other subject's value and resources. The right of self-management in colleges and universities is the ability to use educational resources, organize the education to carry out, and finally realize the purpose of education. It is also an inevitable requirement of the core idea of academic freedom in colleges and Universities. Montesquieu proposed that "all the people with power love to abuse power, this is unchangeable experience" in his "The Spirit of Laws". The self-management right of colleges and universities is a kind of power, which guarantees the academic freedom at the same time; if there is no corresponding control mechanism, it will inevitably fall into the situation of power abuse. For example, the lawsuit of Tian Yong to the University of Science and Technology Beijing in 1998 (hereinafter referred to as the "Tian Yong case") had revealed the power abuse in ivory tower and also proved the judgment of "all unchecked power will be abused".

Abuse of the autonomy of the university self-management

From its essence, the self-management of colleges and universities is to maintain the normal order of education and to ensure the smooth progress of teaching activities. So what is order? From the view of jurisprudence, the American jurist Bodenheimer¹ thought that the order referred to consistency, continuity and uncertainty of some programs existed in the natural and social process. There are two different modes of order in the construction of the order of human life: "rigid order" characterized by strong repression and "flexible order" characterized by coordination and run-in. For a long time, the management of colleges and universities in our country is essentially a rigid order, advocating the collective standard and ignoring the individual demand; pursuing uniformity and contempting diverse personality; emphasizing the supremacy of power and ignoring the rights of students. This pursuit of "rigid order" in the specific historical period has indeed played a specific role in history, and thus created the rigidity inertia of the management system of higher education in China. But with the sustainable development of economical society, especially when the public's free consciousness and the idea of the rule of law have gradually awakened, it is out of time for colleges and universities still adhering to the rigid management system. And objectively, it hinders the development of free democracy of university management system.

The abuse of the power to manage rule-making in colleges and universities. On the one hand, the situation of colleges and universities' self-empowerment through compiling the management rules is very serious. Colleges and universities do not appropriately expand the scope of application of management rules and include in every aspects of study and life, like love and eating, into the scope of school administration. Meanwhile they do not appropriately increase the adjustment means of management rules and write in school rules of fines, confiscation or restriction of personal freedom which belong to administrative punishment law and other laws and regulations. The boundaries and strength of the self-management right of colleges and universities are constantly expanded. On the other hand, colleges and universities almost do not write self-restraint provisions in the management rules, thus the power and responsibility are seriously unequal. John Dickinson once said, "We need not only a system with fixed general rules, we also need the rules of the system being based on justice, in other words, on certain requirements and abilities of human nature." However, for many years, the pursuit inertia of the rigid order have precisely caused the lack of considerations for human nature and respect for basic human rights in internal management rules of many colleges and universities.

The abuse of the power to manage rule-exercising in colleges and universities. First of all, procedural justice hasn't got due respect; publicity, inform, appeal and other basic procedures almost got no one to pay attention to. The famous "Tian Yong case" is the typical case of "winning the entity but losing the procedure". Then the punishing right is excessively exercised, which improperly connected the rewards and penalties of different nature. For example, many colleges and universities take "violation of the provisions of the administration of public security" and "repeated violations of the school provisions" as a prerequisite for the expulsion of school. The former may "over-punish", equaling the illegal behavior to the crime and giving the heavy penalties of depriving basic rights to receive education. The latter equals a number of violations to crimes and give heavy penalties. Both of them are contrary to the principle of proportionality. The appropriate proportion between the educational purpose and the management measure are not considered and the student's legal rights are contempt and even violated.

The abuse of the power to manage dispute resolution in colleges and universities. Firstly it is the question of "whether there is or not". As previously mentioned, most colleges and universities

does not contain the management obligations that correspond with management power in the development of regulatory rules, which results in no rules to follow when disposing the management disputes, and in fact the students seek nowhere to appeal. Secondly it is the question of “wide or narrow”. At present, most colleges and universities require students to only appeal if they do not accept the decision of the school punishment decisions, including the internal and external appeal, thus ruling out the involvement of the judicial investigation and limiting the resolution of management disputes within educational administration system. The channels of dispute resolution are narrowed. Finally it is the question of “legitimacy”. “Nobody can make their own judges”. Colleges and universities play as the group legal person to implement educational activities, while there is no affiliation between college students and universities. When there is dispute between students and colleges and universities, to solve unilaterally based on the rules formulated by universities has natural question of legitimacy.

Restrictions on the autonomy of the university self-management

“Tian Yong case” has not only opened a precedent for the judicial review of the internal management of colleges and universities, its important influence has continued so far to lay a profound impact on today's judicial practice and even legislative preferences. In Dec 25, 2014, for the first time the Supreme People's Court defined in the guiding case No. 38 (“Tianyong case”) that “the relationship between colleges and universities and educated persons belongs to the education administrative management relation, and the educated persons have the right to bring administrative litigation if they refused to accept the management behavior of colleges and universities involving their basic rights, the colleges and universities being the proper defendant of administrative litigation”. After amendment, the “Administrative Litigation Law of the People's Republic of China” formally implemented in May 1, 2015 refined it. Article second made clear that the colleges and universities belong to the scope of the administrative litigation. Article twelfth included the right to receive education in the scope of judicial protection. Meanwhile Article fifty-third further included the basis of colleges and universities violating the students’ education rights, i.e. “the normative documents which are the basis of the administrative act formulated by the Department of the State Council and the local people's government and its departments”, into the scope of judicial review. The promulgation and implementation of the new administrative procedure law show clearly that colleges and universities are not “outside the (jurisdiction of the administrative) law”. Just like other administrative organs, their functions and duties of implementing laws, regulations and rules will be subject to judicial review.

Review on the autonomy of the university self-management

With the continuous deepening of education system reform and the rule of law philosophy, college students have paid more and more attention to the basic rights characterized by human rights and begun to question the power nature of the school education management and even the school itself. In facing with the problems of the school's educational² disputes, they insist on their own opinions more and choose legal channels to protect their rights. The 3rd and 4th plenary session of 18th CPC Central Committee have successively made an important deployment of expanding school autonomy, deepening the internal governance structure in colleges and universities and also made a major strategic policy of comprehensively promoting the rule of law and building a socialist country

under the rule of law. To this, we must consider the situation, review if the autonomy of the university self-management matches with the national higher education target.

Form review of the implementation subject and the implementation procedure. We should strictly follow the legislative intent of the "Education Law" and "Higher Education Law", limit the implementation subject of the autonomy of the university self-management to colleges and universities, thus excluding the subject qualifications of college teachers, administrative personnel or other internal departments. Therefore, in the process of power exercising colleges and universities should make clear authorization and regulation to individuals and department and should not grant the autonomy generally to the individual departments or individuals. The two power-exercising sides shall be protected of the right of participation, right to know, to appeal, right of compensation and the other fundamental rights in the implementation procedures.

Substantive review of the specific contents of the self-management right. Colleges and universities undoubtedly have the legal self-management right, but the exercise of self-management rights in colleges and universities is subject to restrictions. From the legislative intent, the "Education Law" and "Higher Education Law" gives the self-management rights to colleges and universities "in order to develop (higher) education". Any management issues that are contrary to the original intent of this legislation are not supported by the "Education Law" and "Higher Education Law". But until today, there are still many colleges and universities focusing on accommodation, not returning or returning late, etc.that do not belong to the statutory scope of self-management and including them into university management regulations. They regulate that "repeatedly violating the provisions can be expelled from school". Whereas only because not returning to the dormitory before 10 o'clock at night will be dismissed, is very absurd whether in theory or in the sense.

Collateral review of the normative documents of the higher education system. If we say that the new administrative litigation law Article twelfth has incorporated self-management behavior of colleges and universities into the scope of judicial jurisdiction, thus breaking the barriers of administrative management of higher education, then the Article fifty-third has further included the basis of the self-management of colleges and universities into the scope of judicial review. Article fifty-third of the new administrative litigation law defined the judicial review of "the normative documents which are the basis of the administrative act formulated by the Department of the State Council and the local people's government and its departments". And in Article sixty-fourth there was supplementary provision that "should the normative documents in this Article fifty-third be reviewed as illegal, they should not be taken as a basis for the identification of the legitimate administrative acts and recommendations should be proposed to the authorities". In our country, the judicial review of normative documents is a new thing. The regulations of the people's court on the "first examination, then judgment and last proposal" of the normative documents has established the judicial authority in the judicial field relative to the administrative power. For the current higher education system in our country, all that from the State Education Department to the County Board of Education belong to "the State Council departments and local people's government and its departments". Their normative documents, in addition to the State Council department regulations, of course, should be included in the scope of judicial review of educational administrative proceedings. The important significance of this provision is that colleges and universities will not

simply manage students, deal with disputes or punish students based on the normative documents issued by the superior. When it comes to the rights of students, especially the right to receive education, colleges and universities should be more prudent to apply the laws and regulations of the Education Law, the Higher Education Law and the university student management regulations and so on. As for the management regulations developed by colleges and universities which have the lower legal effect than the normative documents of education department, their legitimacy should be included in judicial review.

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