

Nature, Principle and Rule of Law Construction of the Right of College Withdrawal

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Abstract— At present, there are roughly three theories about the nature of the punishment right of college withdrawal, namely, the national administrative power theory, the university autonomy right theory and the special power relationship theory. Although the concept of "special power relationship" has not been quoted in the current legal concept in China, the way that universities exercise the right to drop out is largely influenced by the theory in practice. The right to drop out is a kind of compulsory punishment for students, which is the deprivation of the right of identity and the right of education. It should follow the principle of legal reservation and due process, and the examination of the right to drop out from colleges and universities should be examined both in substance and procedure. In judicial practice, the ambiguous nature of the punishment of the right of college withdrawal leads to different judgments in the same case, which undoubtedly affects the fairness and seriousness of the judiciary. In order to fundamentally solve the dispute of the right of withdrawal, we must clarify the nature of the right of withdrawal from colleges and universities, and then improve the basis for the exercise of the right of withdrawal from school. This paper expounds the nature of the right of punishment and the construction of the rule of law.

Keywords— College drop-out right, right to education, Rule of Law.

I. INTRODUCTION

The exercise of the right to withdraw students from school has caused more and more legal disputes. The focus of the dispute lies in the nature of the right of withdrawal and how to remedy when students encounter unequal withdrawal. The nature and orientation of the right of university withdrawal are different, which determines who owns the right of university withdrawal, and determines the relief way in the event of disputes. In 1999, "Case of Tian Yong v. University of Science and Technology Beijing for Refusing to issue Graduation Certificate and Degree Certificate". The dispute was caused by the fact that the University of Science and Technology Beijing had a fault in the procedure of exercising the punishment of students' dropping out, and the work of examination and handover was not fully implemented. Although the case ended in favor of the students, the significance of the case goes beyond the verdict itself. As a new administrative case, the practical and theoretical circles have paid high attention to it, but it has not received due attention and attention in the educational circles. In the "Tian Yong case", the court's review of the case was based on whether the punishment process exercised by the university was justified, what were the criteria for exercising the right to withdraw, and whether Tian Yong should be expelled or not. In reality, there are still more students like Tian Yong who are about to be dropped out or have already been dropped out. Whether the punishment of dropping out is too severe in these universities, and how should these students get relief? If every student appeals to the court like Tian Yong, it will undoubtedly intensify the pressure on the court to handle cases. It is far from enough to rely on individual cases to promote the reform of judicial practice. It is necessary to solve the problem of defining the nature of the right to drop out from the root and exercise the principle in order to push the right to drop out into the direction of legalization.

II. DEFINITION OF THE NATURE OF PUNISHMENT RIGHT OF COLLEGE DROPOUT

Regarding the nature of the punishment right of college dropout, there are three viewpoints in the academic circle.

A. Theory of state administrative power

According to the theory of state administrative power, the right to discontinue college students comes from the authorization of the state.¹ First of all, the right to drop out is actually from the Education Law, the Higher Education Law and the Regulations on Student Management in colleges and universities and other laws and regulations. Therefore, the so-called right to drop out of colleges and universities is only authorized by relevant national laws and regulations, and colleges and universities have certain discretion according to these regulations and their own school-running characteristics. Secondly, the punishment of dropping out, the reward mechanism, the issuing of degree certificate and graduation certificate of colleges and universities will eventually produce certain effect of administrative behavior, especially the exercise of the punishment right of compulsory dropping out of colleges and universities, for the administrative counterpart students, will produce the consequences of removing the identity of students in school, which has the public force, determination force and execution force in the sense of administrative law. Finally, the exercise of the right to withdraw from university has the characteristics of compulsion and unilateral will, which conforms to the characteristics of the exercise of administrative power, so the unilateral exercise of the right to withdraw from university obviously belongs to the scope of national power.

B. University autonomy right theory

According to the theory of autonomy of colleges and universities, colleges and universities have the right to withdraw from school as an internal right of colleges and

universities. After the establishment of colleges and universities is approved, colleges and universities have the right to "manage the school roll of the educatees and reward or punish them" as stipulated in Article 29 of the Education Law. The provisions of laws and regulations are the confirmation of the inherent rights of colleges and universities. Colleges and universities have the right to award or drop out because of the approval of the education department. Colleges and universities have the right of independent judgment, independent rules and management within the scope of their specific functions, which is necessary for the convenience of their own management and the maintenance of the normal order of the school.²Article 28 of the Education Law gives colleges and universities the right to manage themselves in accordance with the articles of association, and refuses any organization or individual's illegal interference in education and teaching activities. Therefore, the autonomy of colleges and universities can eliminate the interference and domination of the outside world to the maximum extent.

C. Special power relations theory

Special power relationship refers to the relationship in which one party generally dominates the other party based on specific legal reasons in order to achieve specific purposes and the other party must obey.³In the special power relationship, no matter whether the relationship is voluntarily chosen by the parties or is forced to come into being based on specific reasons, the parties do not enjoy the basic rights of citizens. The principle of legal reservation is not applied. When a party's rights are persecuted, it may not seek legal relief through ordinary legal channels. Administrative organs may issue orders and instructions freely according to their own needs, without interference from others or other organizations. According to Chinese laws and regulations, colleges and universities enjoy great autonomy in implementing reward and punishment behavior management for students. Students who refuse to accept the punishments imposed by the school can only file a complaint with the relevant departments, and the premise of filing a lawsuit is that students' personal rights, property rights and other legal rights have been violated by the school or teachers. Therefore, although the concept of "special power relationship" is not clearly proposed in the legal concept, the practice of universities is still greatly influenced by the theory.

In contrast, from the perspective of the source, characteristics and legal consequences of the punishment right of college dropout, the punishment right of college dropout should be classified into the category of state power, because the right of dropout involves depriving students of their status as students, is a punishment of students' right to education, is a unilateral administrative behavior of colleges and universities, with mandatory characteristics.

III. THE EXERCISE PRINCIPLE OF PUNISHMENT RIGHT OF COLLEGE DROPOUT

The exercise of punishment right of colleges and universities should follow the following principles:

A. Principle of legal reservation

The principle of legal reservation means that the constitutional legislation of the basic rights of citizens must be specifically stipulated by the legislature through laws, and all administrative acts undertaken by the administrative organs should be authorized by laws and regulations, and should be conducted strictly in accordance with the law, otherwise the legality will be questioned.⁴The law reservation in school administration means that according to the relevant provisions of the Constitution, the important matters belonging to the school have the obligation to comply with the law, and the administrative organ shall not arbitrarily do it. In fact, a student's university roll is a guarantee for his future employment and survival. Some scholars believe that the right to education stipulated in the Constitution is not only limited to the compulsory education stage, but also should include secondary education, higher education and special education stage. Therefore, forced dropout actually violates the citizen's right to education. As a serious restriction or even deprivation of citizens' basic rights, the exercise of the right to withdraw from school should follow the principle of legal reservation. Although the law stipulates that colleges and universities have the right to manage themselves according to the articles of association, the exercise limits and standards of this right should not be arbitrarily expanded, otherwise it will violate the principle of legal reservation. In the general administrative punishment, administrative compulsory measures, administrative litigation procedures are strictly in accordance with the limits of the law, but in the part of education administration, there is hesitation and lag phenomenon, the principle of legal reservation has not been implemented.

B. Principle of due process

The principle of due process means that when the administrative subject makes an administrative act affecting the rights and interests of the administrative counterpart, it must follow the due legal procedure, including informing the counterpart in advance, explaining the basis and reasons of the act to the counterpart, listening to the statement of the counterpart, defending the case, and providing the corresponding remedy for the counterpart afterwards, so as to ensure the openness, justice and fairness of the act.⁵In practice, the exercise of the right to withdraw from university is usually unilateral and mandatory, without giving students the opportunity to state the reason, and it is still to be verified whether the student's behavior is serious enough to be given the punishment of withdrawal. Without due process, it is difficult to guarantee students' right to know, report and remedy. In the "Tianyong case", the university's violation of the principle of due procedure was one of the reasons that led to the loss of the

lawsuit. In terms of the procedural requirements of administrative acts, the punishment of dropping out of University of Science and Technology lacked a key link, namely the act of serving, which led to the incomplete procedure of the punishment of dropping out. So that the counterpart cannot really participate in the process of withdrawal, resulting in its inability to exercise the remedy rights. Due to the compulsory and irretrievable nature of the punishment of college dropout, strict examination of its exercise procedures and guarantee of openness, fairness and justice can avoid the loss to students to the maximum extent, and also help schools to correct mistakes in time and improve their institutional construction.

C. Proportionality principle

The principle of proportionality, also known as "principle of minimum infringement", means that the administrative subject should take into account the realization of administrative objectives and the protection of the rights and interests of the relative party when implementing administrative actions. When the decision of administrative punishment may cause some adverse impact on the rights and interests of the relative party, the adverse impact should be limited to the minimum range, so that the "purpose" and "means" are in an appropriate proportion.⁶ Professor Cheng Yanlei pointed out in particular: "When exercising the right to withdraw from school, the school should fully consider the appropriate proportion between the educational purpose and management means, and should not impose a heavy penalty because of small, the penalty is not equal, and the responsibility is unbalanced. Article 54 of the regulations stipulates that schools must adhere to the principle of "combining education with punishment" and that punishments given to students should be "appropriate to the nature of students' illegal and disciplinary behaviors and the severity of their faults". This can be regarded as the legal basis of proportionality principle in exercising punishment right of colleges and universities. Therefore, the exercise of punishment right of students to drop out should be decided jointly according to the degree of students' violation of discipline, whether it is the first offense and the degree of influence. If a student's disciplinary behavior does not reach the level that requires the punishment of withdrawal, then the punishment of withdrawal should not be applied to the student, otherwise it is a violation of the principle of proportionality. If forced withdrawal must be applied, it should also consider a series of negative effects on students due to the punishment of withdrawal, and maintain a modest attitude and cautious use.

IV. THE LEGAL CONSTRUCTION OF PUNISHMENT RIGHT OF COLLEGE DROPOUT

Along with the steps of comprehensively governing the country according to law, the management and construction of colleges and universities must also be incorporated into the track of the rule of law. The construction of the rule of law should fully respect the basic rights of every citizen, and the management right of colleges and universities is no exception.

Forced dropout of colleges and universities is a great infringement on the rights and interests of students, so it cannot be arbitrarily implemented on the grounds of simple "autonomy" of colleges and universities, and the exercise of management power of colleges and universities must follow the basic rule of law principle.

A. Improve education legislation

Although the Constitution contains relevant provisions on citizens' right to education, there is no clear provision on the nature of the right to education, the way of implementation and the way of relief. At the same time, for the right to withdraw from school, there are also non-standard contents, non-standard forms and ununified provisions on the right to withdraw from school. It is more standardized in the form of "notice", "opinion", "decision", etc., which makes it difficult for students to find effective relief ways to protect their rights when they are infringed upon by improper power. The absence of uniform norms will also lead to unclear applicable laws when disputes occur, and the effectiveness of various norms is unclear. It will lead to conflicts of application between upper law and lower law.⁷ In addition, although the "Regulations on Student Management of ordinary Institutions of Higher Learning" stipulates that colleges and universities can give students the right to drop out according to their own management, it provides clear norms for the student management of colleges and universities, and stipulates that colleges and universities can formulate or modify the student management regulations on campus according to the regulations and their own situations. But such restrictions on the "mother" rights of the Constitution in the form of departmental regulations are clearly unlawful. However, if we completely deny the effect of the regulation, it will inevitably lead to the failure of university management students to rely on it. Therefore, the right to education, a basic right, should be stipulated in specific laws and regulations, and the supporting laws and regulations such as the specific operation method, legal consequences and students' relief channels should be improved together, so as to prevent the abuse of power by schools and protect the legitimate rights and interests of students. The right to education is a right that has a significant impact on the life of citizens. Therefore, citizens not only demand that the right to education be recognized in the Constitution and other laws, but also demand that when this right is violated, they can obtain legal relief.

B. Strengthen the judicial relief of college dropout disputes

For a long period of time, the decision of punishment against universities has not been included in the judicial process. In order to promote the legalization of university students' governance and strengthen the protection of university students' rights and interests, we should strengthen the judicial relief of the dispute over the punishment of university dropout. First of all, the management disputes of colleges and universities should be clearly incorporated into judicial activities. The behavior of depriving college students of the right to education and the right to student identity is not within the scope of autonomy management of colleges and universities. As mentioned above,

this power should be incorporated into the state power, namely the scope of administrative power, so the right to drop out of colleges and universities is within the scope of acceptance by the court. The court may not dismiss the case for reasons such as "not meeting the conditions for prosecution". Second, we should strengthen the procedural and substantive review of the exercise of the punishment of withdrawal from colleges and universities, examine the criteria for the punishment of withdrawal, and whether the disciplinary behaviors of the students involved in the punishment of withdrawal meet the criteria for compulsory withdrawal. In addition, we should also examine the legality of the procedure of exercising the right of compulsory withdrawal in colleges and universities, whether the handover work between superiors and subordinates is in place, and whether the notice is delivered. Whether students' right to know is fully protected. Finally, strengthen the review of the internal management regulations of colleges and universities. Whether the internal management rules of the university are too strict on students, and whether there is a chance for students to reform for minor disciplinary violations. The internal regulations of colleges and universities should be consistent with the causes and severity of dropout stipulated by law, otherwise it is an arbitrary expansion of the autonomy of colleges and universities, and in violation of the upper position law, not effective.

C. Improve the educational administrative review system

The right should have the relief. Students dissatisfied with the disciplinary decision of college dropout, should provide the way of relief, therefore, should improve the system of education administrative review, education administrative review should become one of the important contents in the system of education legal dispute settlement, the conflict between school administration and students' rights in colleges and universities is inevitable. Education authorities should not avoid this kind of conflict, but should take effective measures to solve the

conflict in time, so as to ensure the normal teaching order of colleges and universities.⁸For the disputes arising from the administrative legal relationship between colleges and students, the channels of administrative reconsideration should be provided for students, making it a very important non-litigation channel to remedy the rights of college students. The scope of examination of administrative reconsideration in colleges and universities should be expanded appropriately. It is necessary to examine the legality of the way and procedure of exercising the right to drop out in colleges and universities, and also to examine whether there is any conflict of effect rank in the applicable laws of colleges and universities.

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