

Analysis of the constitutionality of the implementation of unified textbooks in higher education

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Abstract: This paper analyzes the constitutionality of the implementation of the unified textbook in higher education institutions with the help of Professor Zhang Xiang's classical trilogy analysis, namely, the framework of "scope of protection-restriction-justification of constitutionality of restriction" of fundamental rights. Firstly, we analyze the scope of the fundamental right of academic freedom and the subject matter of the right to unified textbooks. Second, we analyze whether the implementation of the unified textbook constitutes a restriction on the nature of the right to academic freedom. Finally, we analyze the constitutionality of the implementation of unified textbooks in higher education.

Keywords: right to academic freedom, restriction of fundamental rights, unified textbook, constitutional review

1. Introduction

With the development of higher education in China, the construction of teaching materials in colleges and universities has been strengthened, and the quality of teaching materials in various disciplines has been improved gradually from scratch. The so-called unified textbooks, also known as "ministerial textbooks" and "general textbooks", refer to the textbooks that are unified and published and used nationwide under the standardization of national curriculum or syllabus, and are prepared and approved by the national education administration. The textbook is the carrier of the curriculum and the basis of teaching, which is of great importance. However, there are some questions that need to be answered as to whether the implementation of unified textbooks in higher education institutions affects the right to academic freedom. The author will analyze the following aspects: firstly, whether the selection of teaching materials belongs to the scope of academic freedom of higher education; secondly, whether the implementation of unified teaching materials will restrict the exercise of academic freedom of higher education; thirdly, whether the implementation of unified teaching materials is in accordance with the law.

2. Scope of protection of fundamental rights

Higher education institutions have the right to academic freedom, and the right to academic freedom is a fundamental right of higher education institutions.

2.1. Connotation of the right to academic freedom

To understand what the right to academic freedom is, we must first understand what academic freedom is. "Academic freedom" is composed of "scholarship" and "freedom". For "academic", some German scholars propose that academic is the process of digging scientific truth and spreading the truth of knowledge, and academic is an act of pursuing the truth or spreading the knowledge of truth; Japanese scholar Sasaki Tsuru believes that academic is the guidance of digging scientific knowledge in human subconscious, which is the process of exploring and verifying scientific knowledge. The process of exploration and verification of scientific knowledge. From the legal point of view, "freedom" refers to the right of people in a certain society to conduct their activities according to their own will, which is guaranteed or recognized by the law. From the above, we can consider academic freedom as the right to conduct academic research and creation according to one's own will within the scope guaranteed or recognized by law. The right to academic freedom exists as a fundamental right under the law in all fields of study. German scholar Fichte suggests that the right to academic freedom has two connotations:

internally, universities must have the spirit of self-discipline; externally, universities should accept the restrictions of public power, but such restrictions should be moderate and reasonable. This coupling of ethical self-discipline and negative rights constitutes the core connotation of academic freedom in the constitutional sense.[1]

According to Article 47 of the Constitution of China^①, elaborating on the citizens' right to academic freedom. Citizens in China have the freedom to conduct scientific research, and "freedom of scientific research" is actually the Chinese expression of academic freedom. Most of the fundamental rights in the Constitution are rights of "public interest," such as the right to labor, the right to education, and other social rights, and the relevant legislation is established to guarantee them. In contrast to the constitutions of other countries, which focus more on the protection of "negative rights," the constitutional rights system of China provides for more "positive rights" and the state needs to protect the rights of citizens from infringement by others through positive actions, reflecting more Public rights Compared with the term "academic freedom", which is a private right, "scientific research" is more in line with China's socialist system and the social values of "public" and "collective". The term "scientific research" is more in line with our socialist system and the social values of "public" and "collective. Thus, there is no essential difference between the two, only that they are expressed differently. The right to academic freedom in higher education belongs to a subset of the constitutional right to freedom.

2.2. Subjects and contents of academic freedom of higher education institutions

The right to academic freedom in higher education is subsumed under the right to academic freedom as a part of the right to academic freedom, only that there are differences in the subjects of rights. The subjects of the right to academic freedom in higher education are mainly teachers and students of higher education institutions. However, it is controversial whether the subjects of academic freedom right of higher education include university legal persons, and this is not discussed here. The content of academic freedom in higher education mainly refers to a series of academic rights enjoyed by the subjects of academic freedom in higher education. It mainly includes the following aspects: First, the freedom to express academic ideas. In other words, teachers can express their academic research results in their own academic field through lectures, academic salons, or speeches and other public ways without any interference or threat from any organizations or individuals. Second, the freedom to organize and participate in academic activities. That is, the subjects of freedom rights in colleges and universities enjoy the freedom of education, teaching, scientific research or study, and this activity is engaged by different subjects of academic freedom rights in colleges and universities. It is mainly divided into two parts: teachers in colleges and universities are mainly engaged in the freedom of education and teaching, scientific research; students are mainly engaged in the freedom of studying and researching the academic direction they are interested in. The right to education and teaching belongs to the subordinate concept of the right to academic freedom in colleges and universities, which is mainly reflected in the way of free expression of academic research results. The right to scientific research, from the perspective of social freedom, means that the whole research process is completely independent and autonomous, without any influence from outside; from the perspective of individual freedom, it means that teachers or students have the right to conduct academic research in the same or similar subjects as the courses they teach, provided that they have completed the prescribed educational teaching or learning tasks. The right to freedom of learning mainly refers to the freedom to choose a major, the freedom to participate in educational and teaching activities, the freedom to choose a course, and the freedom to analyze and speak in class. The academic freedom of learning in higher education is the right of students to participate in academic discussions in the classroom, to express academic opinions, to participate in the research of the teacher's subject, and to publish the results of research, etc., while matching and completing the teaching content with the teacher.

2.3. The selection of teaching materials by universities belongs to the scope of academic freedom

Article 34 of our Higher Education Law^②, which regulates the selection of teaching materials in higher education schools. From this legal provision, teachers of higher education institutions have the right to choose teaching materials independently in their teaching management activities. The right to education and teaching in higher education, the subject of which is scholars, is a way to freely express

^① Article 47 of the Constitution provides that "Citizens of the People's Republic of China have the freedom to engage in scientific research, literary and artistic creation, and other cultural activities."

^② Article 34 of the Higher Education Law; higher education institutions are autonomous in formulating teaching plans, selecting teaching materials and organizing teaching activities according to their teaching needs.

the results of academic research, such as teaching and giving lectures. The right to academic freedom in higher education from the above analysis of the right to academic freedom in higher education, the independent selection of teaching materials is part of the right to education and teaching in the right to academic freedom. And in practice, before the full implementation of Ma Engineering textbooks, university teachers did have the right to choose the textbooks for undergraduate teaching to use.

3. Limitation of Fundamental Rights: Whether the introduction of unified textbooks has restricted the academic freedom of schools

In 2019, China's Ministry of Education's Measures for the Administration of Teaching Materials in General Higher Education Institutions^③ The third article establishes the basic attributes of teaching materials in colleges and universities. Article 4 provides for the implementation of the implementation of the horse project teaching materials. The State requires to vigorously implement the teaching materials of Project Ma, and whether the implementation of unified teaching materials by higher education institutions constitutes an undue interference with its fundamental right of academic freedom, the traditional research theory holds that the following factors need to be considered to determine whether it constitutes an infringement of fundamental rights: purpose, directness, legality, and compulsion, i.e., only the compulsory legal acts directly restricting fundamental rights done by the State intentionally can be taken as In other words, only the compulsory legal acts that are intentionally done by the state to directly restrict the fundamental rights can be reviewed for constitutionality as restrictions of fundamental rights.[2] However, with the development of society, the functions of the state have been given richer connotations, and very often the government agencies, in performing their administrative duties, do not intend to infringe upon the fundamental rights of citizens, but objectively produce substantial obstruction to their fundamental rights. Therefore, in the modern theory of restriction of fundamental rights, the criteria for determining the restriction of fundamental rights no longer emphasize the stereotypical "four natures" and other factors, but focus on the "results", that is, if the fundamental rights are actually restricted and In other words, if fundamental rights are actually restricted and obstructed, the state action that constitutes the restriction and obstruction may be defined as a "restriction of fundamental rights" and thus subject to constitutional review. Therefore, in this paper, the criteria of whether the fundamental rights constitute restrictions are no longer analyzed according to the traditional theory of restriction of fundamental rights, but according to the modern theory of restriction of fundamental rights, and whether the implementation of the unified textbook has impeded the exercise of academic freedom of higher education institutions is studied in terms of the actual impact results. Higher education institutions themselves have the right to academic autonomy, and the selection of textbooks belongs to the right to education and teaching in that right. Prior to the implementation of the 2019 textbook regulation, university teachers had some discretion in the selection of textbooks for the courses they taught. For example, when we studied criminal law as undergraduates, there were several textbooks written by Professors Zhang Mingkai and Gao Mingxuan. And for different schools, teachers have different teaching styles, and different teachers use different textbooks for the same subject. Since the implementation of the Measures for the Management of Teaching Materials in Higher Education Institutions after 2019, many subjects in universities are unified with the use of Project Ma teaching materials, such as administrative procedure law, jurisprudence, etc. Teachers who teach these courses have no right to choose teaching materials from now on. Restricting the teachers' choice of teaching materials actually restricts the teachers' right of education and teaching to a certain extent, which also restricts the exercise of their academic freedom. Therefore, from this "result", the implementation of the unified textbooks in higher education institutions has undoubtedly restricted the academic freedom of university teachers.

The Measures for the Administration of Textbooks in Higher Education Institutions, which stipulate the use of unified textbooks in universities, were issued by the Ministry of Education and are departmental regulations, while the legal basis for the right to academic freedom in higher education institutions is derived from Article 47 of the Constitution. From the viewpoint of the hierarchy of laws, the higher law is superior to the lower law, and the lower law cannot be enacted to contradict the higher law. The use of the unified textbook restricts the exercise of the right to freedom of higher education, and the management method that stipulates the restriction is obviously lower than the constitution, but it

^③ Article 3 of the Measures for the Administration of Teaching Materials in General Higher Education Institutions: "The teaching materials of colleges and universities must reflect the will of the Party and the State." Article 4: "The educational administrative departments of the State Council, provincial education departments, colleges and universities scientifically plan the construction of teaching materials, pay attention to the quality of teaching materials, and highlight the characteristics of teaching materials. The key teaching materials of the Marxist theory research and construction project are prepared, reviewed and used by the state in a unified manner."

imposes restrictions on the rights stipulated in the constitution, and the lower law enacts the content that is not stipulated in the higher law, which is obviously against the principle of superior law over the lower law in the Legislative Law. I also have doubts about the issue of conflict of laws.

4. Limitation of Fundamental Rights: The constitutionality of implementing a unified textbook in higher education

Through the previous analysis, the implementation of the unified textbook is a sub-right of the academic freedom of higher education institutions, and the implementation of the unified textbook has certain restrictions on the academic freedom of higher education institutions. After the first two steps of analysis, the third level of analysis is to determine whether there are "unconstitutional impediments" to the implementation of the unified textbook in higher education institutions, that is, to analyze the constitutionality of the implementation of the unified textbook in higher education institutions. If there is no unconstitutional deterrent, the act should be declared unconstitutional and invalid; if not, it should be declared constitutional and valid. In this paper, we will analyze the constitutionality of the implementation of unified textbooks in higher education at the following levels.

4.1 Legal reservations

Legal reservation means that the restriction on the fundamental rights can only be made by the legislature.^[3]1975 French Declaration of Human Rights^④ Article 5 as well as Article 6, from the combination of these two articles, we can assume that Article 5 expresses the meaning that the law protects citizens from infringement of their rights and that only citizens themselves can dispose of their fundamental rights. Every citizen has the right to participate directly or indirectly in the making of laws through elections. Under the principle of strict legal reservation, the only one who has the right to restrict the basic rights of citizens is the legislature, that is, if the state restricts the basic rights without the law made by the legislature, the act will be considered unconstitutional. According to the analysis of this principle, the right of academic freedom enjoyed by universities comes from the provisions of the constitution, and the only one who wants to restrict this right or has the right to restrict it is the legislature. If there is no clear provision in the constitution, the restriction of the academic freedom right of universities will be impossible and should be regarded as unconstitutional. The full implementation of unified textbooks is stipulated in the Measures for the Administration of Textbooks in Higher Education Institutions, which is a departmental regulation issued by the Ministry of Education. The departmental regulations restrict the constitutional rights, which is a subordinate law that restricts the content of the higher law.

In addition to the above principles, there are several other principles that can be used as criteria for reviewing the constitutionality of fundamental rights restrictions. For example, the principle of materiality, that is, only those "material matters" involving fundamental rights must be enacted by law, while general matters involving fundamental rights may be enacted by the legislature by authorizing the executive to enact administrative regulations. This doctrine was developed in response to the expansion of the functions of the modern state, which would be overburdened with legislation and ineffective if all matters related to fundamental rights were strictly required to be regulated by national legislation. Therefore, this legislative pressure and the administrative burden of the state can be effectively relieved by authorizing some administrative organs to make various documents according to local conditions. From this perspective, the implementation of the unified textbooks in higher education institutions has its reasonable legitimacy, i.e., the national legislature cannot regulate everything by law, and the implementation of the unified textbooks is not a fundamental right that should be regulated by the constitution. This is very important for the cultivation of national talents and the forging of a sense of community among the Chinese people, so we should be very careful about the selection of teaching materials. The implementation of the unified textbooks is stipulated in the "Measures for the Management of Textbooks in Higher Education Institutions" and issued by the Ministry of Education of China.

^④ Article 5 of the 1975 Declaration of Human Rights: "The law has the right to prohibit acts harmful to society. Any act not prohibited by law shall not be impeded, and no one shall be compelled to perform an act not provided for by law." Article 6: "The law is the expression of the public will. All citizens of the country have the right to participate in the making of laws in person or through their representatives."

4.2 Constitutional grounds for restriction

The constitutions of various countries generally contain enumerated provisions on the circumstances in which fundamental rights may be restricted, and these grounds for restriction constitute unconstitutional grounds for the state to block restrictions on fundamental rights. According to Article 51 of our Constitution[®] In this article, "the interests of the state, society, and the collective" can be interpreted as imposing certain restrictions on the basic rights of citizens in the public interest. The national textbooks play an indispensable role in the unification of the state, reflecting its restrictive function and being the centralized expression of its will. Teaching materials are a major influence on the educational development of young people and are of great significance for the formation of their values and the shaping of their view of national identity. Teaching materials are a national matter, and must reflect the will of the state, especially the three subjects of ethics and rule of law, Chinese and history, which are heavily ideological, if each subject teaching materials in each province is to compile their own, arbitrary selection, China's cultural differences still exist, the vast territory, the selection of teaching materials will become more and more different, and over time it is easy to create a split. Therefore, there is a good reason for the country to implement unified textbooks. By using uniformly written textbooks and building our common spiritual home based on them, we can shape the nation's cultural identity and promote cultural confidence, rather than cultivating others without a sense of national identity.

Education is one of the important ways to build a firm sense of community among the Chinese people, and plays a fundamental and pervasive role in building a firm sense of community among the Chinese people. From the perspective of pedagogy, education is not only a cause of cultivating people, but also has obvious political and cultural functions. The teaching materials used by teachers in the process of education and teaching are important tools for the implementation of educational activities, behind which is reflected the will of the Party and the state, and are important aids for the formation of young people's values. In the fall of 2017, the Ministry of Education stipulated that history and language teaching materials in primary and secondary schools are national unified teaching materials. In 2019, the management methods of teaching materials in primary and secondary schools and vocational institutions stipulate that, in addition to ideological and political, language and history curriculum textbooks, as long as the textbooks involve ideology inside, including national sovereignty and security, nationalities and religions, they must be unified by the state, unified validation, and unified use. After that, there were measures for the management of teaching materials in general higher education institutions, which provided for the teaching materials of Project Ma. From the development history of our national unified textbooks, it can be seen that the unified textbooks are the core content of the national textbook system construction and an important cornerstone of the national education development. From the above analysis, the unified textbook has a very important role in the national ideology, and the implementation of the unified textbook in higher education is in line with the "interests" in Article 51 of the Constitution, which can constitute a constitutional reason for restricting the fundamental rights, and is therefore constitutional.

4.3 Principle of Proportionality

In the practice of unconstitutional review, one of the criteria for reviewing legislation that restricts fundamental rights is the monist criterion represented by the German "principle of proportionality", which means that legislation that restricts fundamental rights should be reviewed on a case-by-case basis based on the principle of proportionality on the premise that all constitutions should be equally protected.

First, justification of purpose. The importance of the unified teaching materials can be seen from the analysis in the second part above. The implementation of unified textbooks is important for the unification of the country, the shaping of young people's values and outlook on life, and the forging of a sense of Chinese national community and the promotion of the unity of all nationalities. Therefore, the implementation of unified textbooks in higher education institutions has a legitimate purpose. Second, appropriateness. That is, the measures taken must be able to achieve the purpose or at least contribute to it and be the right means. The means to achieve the end must be appropriate and reasonable. The state is vigorously promoting the unified textbook in order to shape a sense of national identity from the ideological point of view, starting with the youth. Young people are the most easily misled, so it is important to shape the spiritual world of the future builders of the country. Moreover, the mere restriction of teaching materials does not prevent teachers from exercising their academic freedom in other areas.

[®] Article 51 of the Constitution: "In exercising their freedoms and powers, citizens of the People's Republic of China shall not harm the state, social or collective interests or the legitimate freedoms and rights of other citizens."

From this point of view, the ends and means are justified. Third, necessity. This means that, of all the ways to achieve a legal purpose, the one that least infringes on people's rights should be chosen. The implementation of the unified textbooks by the state does not substantially affect the exercise of academic freedom in higher education, or limit or deprive it of its essential content. The right to choose teaching materials is only a small part of the teachers' academic freedom, and it does not necessarily have a great impact on the exercise of their substantive rights. In addition, because of the large size of our country and the uneven distribution of our population, it would be very harmful to young people if the quality of the textbooks chosen were not good or if the national position on textbooks was not correct. Therefore, the implementation of a unified textbook is the easiest and most effective way to unify the country and shape the national identity of the citizens. In conclusion, from the above three points of view, the implementation of the unified textbook in higher education is in accordance with the principle of proportionality.

5. Conclusions

This paper analyzes the connotation and extension of the right to academic freedom in higher education, and takes the right to choose teaching materials into the scope of academic freedom in higher education. The implementation of the unified textbooks for certain subjects in higher education will undoubtedly have some effects on teachers' teaching activities. In terms of the principle of strict legal reservation, the implementation of the unified textbooks in higher education institutions is not in accordance with the provisions of the higher law. In terms of the principle of significance, the construction of teaching materials is a state matter, which has a great influence on the shaping and development of the national ideology. The national textbooks play an indispensable role in the unification of the country, reflecting the limiting function of the state and conforming to the principle of public interest, so it is reasonable to implement the unified textbooks. In terms of the principle of proportionality, the implementation of the unified textbook does not substantially restrict the academic freedom of university teachers, because the selection of textbooks is only part of their academic freedom, and does not substantially deprive them of the exercise of this right. The implementation of the unified textbook has an important role in the construction of national ideology and the promotion of socialist core values, and is more conducive to the implementation of the fundamental task of establishing moral education.

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