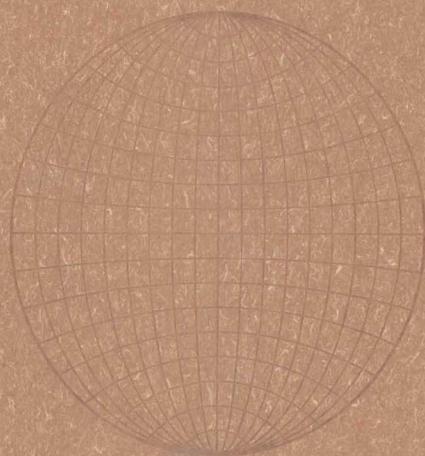


厦门大学中外合作办学研究中心
中外合作办学质量工程系列丛书

中外合作办学 法律问题研究

*Research on Legal Issues in
Chinese-Foreign Cooperation in Running Schools*

陈大立 著



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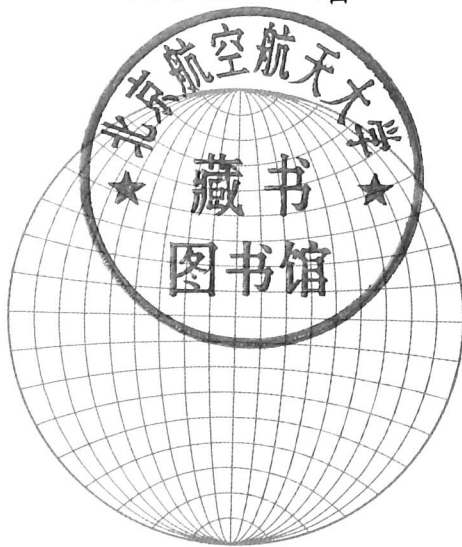
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内容简介

我国在教育服务领域的国内立法与国际法上的义务是否有效衔接? 中外合作办学监管面临哪些问题和挑战? 如何完善中外合作办学监管立法和治理体系? 本书从国家法的角度切入,结合中外合作办学管理工作的实际,系统、深入地研究了中外合作办学监管和法律问题,是国内第一本关于中外合作办学法律问题的学术专著。本书不仅对充实和完善中外合作办学理论体系具有开创性意义,对中外合作办学相关法律法规的出台、完善和理解也具有重要的借鉴意义和现实价值。

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序



改革开放 30 多年来,我国教育对外开放初步形成了全方位、多层次、宽领域的格局,教育国际合作与交流取得了显著成绩。出国留学人员遍及 100 多个国家和地区,来华留学生源地国家和地区达 200 个,与俄罗斯、美国、英国、欧盟等国家和地区建立了政府间高级别人文交流对话机制,与 41 个国家和地区签署了学历学位互认协议。全球五大洲已有 120 个国家和地区建立了 440 所孔子学院和 646 个孔子课堂,注册学员达 85 万人。中外合作办学也是教育国际合作与交流的一种重要形式,对推动我国办学体制改革、拓宽人才培养途径,促进教育对外开放都发挥了积极作用,一定程度上满足了人民群众多样化的教育需求。

2003 年国务院颁布《中外合作办学条例》,明确中外合作办学属于公益性事业,是中国教育事业的组成部分,实行“扩大开放、规范办学、规范管理、促进发展”的方针,鼓励引进优质教育资源。十多年来,特别是《国家中长期教育改革和发展规划纲要(2010—2020 年)》颁布实施后,中外合作办学逐步形成了高水平、示范性办学快速发展的势头,宁波诺丁汉大学、西交利物浦大学、上海纽约大学、昆山杜克大学、上海交通大学密西根学院、中山大学卡内基梅隆学院等一批高

质量办学机构陆续设立,社会关注度、信誉度、品牌度有较大提升,目前全国中外合作办学机构和项目共计 1 979 个,在校学生总数 55 万人,高等教育阶段中外合作办学的毕业生超过了 150 万人,有效促进了教育改革发展、推动了教育开放。

与此同时,也应该看到个别地方和单位存在办学目的不端正、片面逐利倾向、办学质量不高的问题。如何坚持依法治教、依法管理,推动中外合作办学健康有序发展,仍然是目前亟待研究的重要课题。本书从法律角度探讨合作办学相关问题,对完善合作办学的法制建设是有益的尝试。

十八届三中全会对教育改革做出了战略部署,新一届政府全面推进各领域的改革,简政放权,明确了合作办学管理体制的发展方向。在高等教育领域,国家鼓励在新兴、紧缺、薄弱专业开展中外合作办学,列入“985”、“211”工程的高等学校应从国家建设高水平大学的目标出发,开展高质量、高层次的合作办学。希望通过继续深化改革,中外合作办学能够实现结构更加优化、布局更加合理,质量评估和认证体系趋于完善,质量监管和信息公开平台基本建成,对高等教育改革发展的促进作用更加明显,对国家和地方经济社会发展的贡献度进一步提升。

教育部副部长 郝平

2014 年 3 月

PREFACE



In the past thirty years since reform and opening-up policy was issued, we have gradually formed an all-directional, multi-tiered and wide-ranging pattern in education. We have achieved outstanding accomplishments in international cooperation and exchanges. Chinese students study in more than 100 countries and regions while foreign students from about 200 countries and regions study in China. China has established high level people-to-people dialogues with Russia, USA, UK, and EU and so on. China has signed agreements on mutual recognition of education and degrees with 41 countries and regions. By now, 440 Confucius Institutes and 646 Confucius Classrooms that have about 850 000 registered students have been established in 120 countries and regions. Chinese-foreign cooperation in running schools is also an important way to develop international cooperation and exchanges in education. It plays a crucial role in promoting education reforms, expanding talent-training patterns and enhancing opening-up in education. To some extent, it helps to meet diversified educational demands in China.

In 2003, the State Council of China promulgated *Regulations of the People's Republic of China on Chinese-Foreign Cooperation in Running Schools*, pointing out that Chinese-foreign cooperation in running schools is an undertaking beneficial to public interests and forms a component of China's educational cause. For Chinese-foreign cooperation in running schools, the State adopts the policies of opening wider to the outside world, standardizing the operation of running schools, exercising administration according to law and promoting its development. The State encourages joint institutes and programs to bring in high-quality foreign educational resources. In the past 10 years, especially since the *Outline of the National Plan for Medium and Long-Term Education Reform and Development* (2010—2020) was issued and implemented, Chinese-foreign cooperation in running schools has been developing increasingly with high level and high standard. A series of high-quality cooperative institutes have been set up, like the University of Nottingham Ningbo China, Xi'an Jiaotong-Liverpool University, NYU Shanghai, Duke Kunshan University, University of Michigan-Shanghai Jiao Tong University Joint Institute, Sun Yat Sen University-Carnegie Mellon University Joint Institute of Engineering, greatly enhancing its reputation. So far, there are 1 979 cooperative institutes and programs with about 550 000 current students and more than 1.5 million college graduates, which effectively promotes reforms and opening-up in education.

But at the same time, we are also supposed to pay attention to some problems, like profit-driven motivation and poor quality, etc.



Therefore, we still face a big challenge on how to legally manage cooperative institutes and programs so as to push it to develop healthily. This book discusses problems in Chinese-foreign cooperation in running schools from a legal point of view, which is a good try in developing the law system in this field.

On the Third Plenary Session of Eighteenth Central Committee, Chinese government made a strategy on education reforms, clarifying the reform direction of management system in Chinese-foreign cooperation in running schools. The government will push the reforms and the universities will be in charge of it. In higher education, China encourages cooperation in majors that are new, rare and weak. Key Universities listed in “985” and “211” projects are supposed to develop high-quality cooperative programs with an aim to establish high-level universities. Through the deepening of reforms in Chinese-foreign cooperation in running schools, we will hopefully do a better job in its structure optimization, reasonable layout, evaluation and accreditation systems as well as establishment of a quality supervision and information platform so that it will make more contributions to national and local economic and social development.

Deputy Minister of Ministry of Education Hao Ping

March, 2014



前 言



当今的国际法范围随着全球化进程的深入日益扩大,国际法所涉及的领域已经从最初对维持和平的关注扩展到包括现代国际生活的所有利益。国际法所包含的主题范围在扩大,不仅限于狭义上的与国家领土有关的问题,而是逐渐扩展到人权领域、环境领域、空间探索以及对大洋和深海海底资源的开发等。世界贸易组织成立后,服务贸易被纳入国际法体系,教育服务贸易成为一个新的课题。国家间的教育交流不仅成为国际贸易的一部分,还受到具有普遍约束力的国际条约的调整。教育也成为国际法发展进程中得到关注的一个新的重要领域。我国加入《服务贸易总协定》,开放教育服务,并颁布了《中外合作办学条例》。我国在教育服务领域的国内立法与国际法上的义务是否有效衔接,中外合作办学监管面临哪些问题,如何完善法律制度,这些都是亟待研究的问题。

自 2003 年《中外合作办学条例》颁布以来,中外合作办学取得了长足发展。截至 2013 年 9 月 5 日,经过审批并实施的合作办学项目和机构有 1979 个。但中外合作办学也存在层次不高、质量参差不齐的问题。这里面的原因既有我国对教育服务贸易的定位如何认识的问题,也有政府职能转变的问题,更有合作办学立法还存在疏漏的问

题。完善合作办学的监管立法需要梳理合作办学发展的历史、再次界定合作办学的定义,从国际法的角度研究合作办学立法应遵循的原则和应建立的制度。

合作办学的监管经历了从被动到主动、从行政手段为主逐渐走向法治的过程。清末政府对国外来华办学采取了无庸立案的被动政策,无法可循,消极对抗。此后北洋政府制定了《外国人捐资设立学校请求认可办法》,国民政府公布了《私立学校规程草案》,新中国政府发布了《关于处理接受被美国津贴的文化教育救济机关及宗教团体的方针的决定》,我国在合作办学教育主权的争夺中逐渐占据主动。改革开放后,国外机构来华办学日益增多,我国加入世界贸易组织并颁布《中外合作办学条例》,合作办学走上法治化道路。从国际法的大背景下来看,教育主权、教育权、促进国际合作的义务等贯穿了整个合作办学法治发展的全过程。《联合国宪章》、《经济、社会及文化权利公约》、《世界人权宣言》都有必要在合作办学监管的原则和制度中得到更好的体现,《服务贸易总协定》和我国加入世界贸易组织的议定书等则直接约束着我国国内法规如何制定。

当前的合作办学立法中存在国际法与国内法的“转化瑕疵”问题,《中外合作办学条例》的有关规定与我国在《服务贸易总协定》下的承诺不衔接,主要体现在有关合作办学项目的规定与商业存在不一致、公益性质与商业性质不一致以及“中”“外”的含义不一致。针对合作办学“转化瑕疵”的问题,本书展开论述了如何完善监管立法。本书提出了监管立法应遵循的主要原则,包括教育主权原则、教育公益性原则、保障受教育权原则和透明度原则,以及监管立法应建立和完善的主要制度,包括认证制度、审批制度和评估制度。进一步分析了合作办学监管出现争端后应如何解决的问题。最后在归纳完善立法的主要思考的基础上,总结了我国合作办学立法和实践对跨境教育习惯法则发展的贡献。

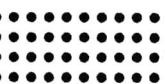


FOREWORD



With the deepening of internationalization, the scope of international laws is also expanding, reaching all the areas of international sphere beyond the traditional areas of land, peace and security. It covers human rights, environmental protection, and space and ocean exploration and so on. With the establishment of WTO, service trade is also being included in international laws. Trade in education services is becoming a topic for legal research. The educational cooperation is not only a kind of trade among nations, but is also regulated by international treaties. China has signed GATS, opened its education service and promulgated *Regulations of the People's Republic of China on Chinese-Foreign Cooperation in Running Schools*. Research needs to be done on how to maintain the balance of international laws and domestic laws in this area, what difficulties faced by the supervision on Chinese-Foreign Cooperation in Running Schools (CF CRS) and how to improve the legal system.

With the promulgation of the regulation in 2003, CF CRS has witnessed great development. In 2013, more than 1 850 joint schools and



programmes are running in China. But quality of education provided by them is still a problem, which is caused by the understanding of the orientation of trade in education services, transformation of government functions and omissions on legislation of CFCRS. Laws need to be improved according to the history and redefinition of CFCRS. Principles and system should be studied from the perspective of international law.

The legalization of CFCRS has been going through the process from passive to active, and from administrative means to rule of law. In the late years of Qing Dynasty, the government turned its back to foreign education institutions and stated that they were not entitled to run schools in China. Later several legal documents were promulgated by the then Chinese governments. China gradually held the upper hand in fighting for its sovereign rights on educational affairs. Only after China entered WTO and promulgated *Regulations of the People's Republic of China on Chinese-Foreign Cooperation in Running Schools*, the legalization of CFCRS was formalized. In terms of the background of international law, education sovereignty, education right and the duty to promote international cooperation has been going throughout the whole process of the development of CFCRS rule of law. *Charter of the United Nations*, *International Covenant on Economic, Social and Cultural Rights* and *Universal Declaration of Human Rights* should be reflected in the principles and system of the supervision of CFCRS. GATS and China's entry into WTO protocol directly constrain how to develop China's domestic laws and regulations.

The problem that lies in the current legislation of CFCRS is trans-



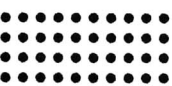
formation of international laws and domestic laws, including the inconsistency between regulations on CFCRS and commercial presence, inconsistency between nonprofit nature and commercial nature and inconsistency of the definition of Chinese and Foreign. The author believes the perfection of the domestic law needs to follow the principles of education sovereignty, non-profit, the guaranty of basic educational rights and transparency. The main mechanism needs to be established, including the accreditation system, the authorization system and the assessment system. On this basis, the author analyzes how to solve the disputes on supervision of CFCRS. Finally, the author summarizes the contribution by China's practice to the development of international law in this area.



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