

The Status of the Right to Education in Japan

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Similar to many other states, the protection of fundamental human rights of each person consists a basic principle in the constitutional legal system in Japan.¹ The right to education is not only a fundamental human right in itself but also has a role to encourage protection of other fundamental rights. In Japanese constitutional law, to receive an education is a right legally guaranteed to children, at the same time, to let them receive ordinary education is an obligation of parents, and institutional protection such as the establishment of schools, financial support, etc., is a responsibility of the State and local governments.

Article 26 of the Constitution of Japan (hereinafter, the “Japanese Constitution” or the “Constitution”) provides the “the right to receive an equal education”, and it is embodied by educational administrative statutes, especially the Basic Act on Education (BAE).² Article 26, which would be the *Grundnorm* (fundamental norm) of education in Japan, provides,

1. All people shall have the right to receive an equal education correspondent to their ability, as provided by law.
2. All people shall be obligated to have all boys and girls under their protection receive ordinary education as provided for by law. Such compulsory education shall be free.³

Human rights protection is realized primarily by States, however, it is done not only through domestic legal system but also complemented by international human rights conventions: in the context of the right to education in Japan, it will be essential to focus on the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the Convention on the Rights of the Child (CRC). Based on the case-law and generally accepted doctrines, the right to education protected by such Conventions shall be applicable within the Japanese legal system.⁴ Thus, as the right to education in international human rights law shall be of wider application than the right to receive an education,⁵ the latter should be interpreted in conjunction with the former so that such rights can be fulfilled better in the domestic sphere.

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1 On the protection of human rights in Japan, See, Oda, Hiroshi, *Japanese Law*, 3rd ed., Oxford University Press, 2009, pp.7ff.

2 It is also translated into the “Fundamental Law of Education”. Traditionally the BAE has been regarded as the most fundamental law and a quasi-constitutional act in the area of educational administration. However, the BAE was amended in 2006; strictly, it was abolished and new version of the BAE came into effect on the initiative of the conservative and nationalistic Cabinet. Some authors question the quasi-constitutional character of the amended / new version. See, Komikawa, kōichirō, ‘Kyōkihō “kaisei” to Shin-jiyūshugi, Shin-kokkashugi’ [The Fundamental Law of Education: Neo-liberalism and Neo-Statism], 33 *Nihonkyōikuhōgakkai Nempō* [Education Law Review] (2004).

3 English translation is quoted from “Prime Minister of Japan and His Cabinet”: http://www.kantei.go.jp/foreign/constitution_and_government_of_japan/constitution_e.html

4 Iwasawa, Yuji, *International Law, Human Rights and Japanese Law: The Impact of International Law on Japanese Law*, Oxford University Press, 1998, pp.28ff.

5 Verheyde, Mieke, *A Commentary on the United Nations Convention on the Rights of the Child: Article 28 The Right to Education*, Martinus Nijhoff Publishers, 2006. Nowak, Manfred, ‘The Right to Education’: Asbjørn Eide *et al* eds, *Economic, Social and Cultural Rights*, Martinus Nijhoff Publishers, 1995. Horio, Teruhisa, ‘Kempō, Kyōiku-kihōhō, Kodomo-no-Kenri-Jōyaku o Tsuranuku-mono: Kokumin-no kyōikuken-ron no Saikōchiku ni mukete [Revision Plans of the Fundamental Law of Education and the People’s Right to Education] in: 35 *Nihon-kyōikuhōgakkai Nempō* [Education Law Review] (2006).

The substantial contents of the right to education in Japan can be sketchily organized into three points; (1) freedom of education from the State's intervention, (2) the institutional guarantee of the condition of education, and (3) the equality of opportunity in education.⁶ First, freedom of education from the State's intervention tends to be related to academic freedom (Article 23 of the Constitution). In this context, the core meaning of the right to education is the realization of children's right to learning. The original subject who assumes such role should be the people (citizens). The State shall be the trustee of people's right to education, thus, it should abstain from excessive intervention in the contents of education.⁷ Therefore, the role of the State in the area of education should be the institutional guarantee, i.e., to prepare necessary institution, financial support and so on. It can be seen as influence of the right to life (Article 25 of the Constitution) to the right to education. Third, the equality of opportunity in education can be understood as the linkage of the right to education and the principle of non-discrimination, equality as a basic principle of human rights protection. It requires substantial equality, in other words, those different shall be treated in a different way and unreasonable, unjustified distinction shall be prohibited. According to the Japanese Constitution and BAE, "people shall have the right to receive an equal education correspondent to their ability". The State is required to take positive measures in order that those who are kept from education become enabled to have access to educational establishment and receive an education. That clause should not be interpreted as it permits to select or separate children on the basis of their ability, but guarantee of the right to education should be done for the purpose of the children's development with consideration on the personality of each child.⁸

6 Kobayashi, Takeshi, *Kempō to Kokusai-jinken o Manabu [A Study on the Constitution and International Human Rights]*, Kyoto: Kōyōshobō, 2003, pp.59-61.

7 Horio, Teruhisa, *Gendai-kyōiku no Shisō to Kōzō [The Thought, Ideology and Structure of Modern Education]*, Tokyo: Iwanamishoten, 1992, pp.215-217. See also, Horio (edited and translated by Steven Platzer), *Educational Thought and Ideology in Modern Japan: State Authority and Intellectual Freedom*, University of Tokyo Press, 1988, pp.222-245

8 Singh, Kishore, 'The promotion of equality of opportunity in education' (Report of the Special Rapporteur on the right to education), UN Doc., A/HRC/17/29, 18 April 2011, available at: <http://www2.ohchr.org/english/bodies/hrcouncil/docs/17session/A-HRC-17-29.pdf>. Horio, *ibid.*, pp.219ff.

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[Abstract]

Article 26 of the Constitution of Japan, which provides the right to (receive an) education, has caused debates about the contents and the structure of the rights and authorities on education. While at least on text, Article 26 prescribes the 'right to receive an education', educational doctrines have argued that the substantial meaning of the Article is wider than the tenor and some of them have advocated that the Article should be regarded as it provides the 'right to education'. The author considers that their views are basically correct, but their grounds tend to be ideological or historical. Of course, we must not marginalize the importance of such reasoning, however, the grounds coming from positive law will also be essential when we interpret the right provided by laws in order to strengthen our argumentation.

Human rights protection is actually realized primarily by States through their constitutions, but it is done not only through their domestic legal system but also complemented by international human rights conventions. Japan has already ratified various human rights conventions; in this context, the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the Convention on the Rights of the Child (CRC) will be important because they are the conventions providing the right to education and to which Japan accedes. Based on the dominant interpretation of the Japanese Constitution, conventions which Japan has ratified shall be applicable within its domestic legal system, and the statutory acts shall be interpreted in the way compatible with such conventions.

The author will show the following three points;

- 1) The introduction of debates on the interpretation of the right to (receive an) education in Article 26 of the Constitution of Japan,
- 2) The relationship between domestic and international law within the legal system of Japan and the domestic applicability of human rights conventions, and
- 3) The right to education in Japan based on a compatible interpretation of Article 26 of the Constitution with ratified conventions.

Through these, the author will confirm that the right to education, which is not restricted to the right to receive an education, shall be guaranteed in Japan on the grounds of positive law.