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**THE INTERNATIONAL LEGAL OBLIGATIONS OF CHINA
REGARDING THE RIGHT TO EDUCATION**

**OBLIGAȚIILE LEGALE INTERNAȚIONALE ALE CHINEI
PRIVIND DREPTUL LA EDUCAȚIE**

**МЕЖДУНАРОДНО-ПРАВОВЫЕ ОБЯЗАТЕЛЬСТВА КИТАЯ
ОТНОСИТЕЛЬНО ПРАВА НА ОБРАЗОВАНИЕ**

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ABSTRACT:
**THE INTERNATIONAL LEGAL OBLIGATIONS OF CHINA
REGARDING THE RIGHT TO EDUCATION**

The paper includes three main sections. In the first one an overview of the right to education in international human rights law is presented. This part first explains the meaning and nature of the right to education in international human rights law, and then introduces the international legal origins of the right to education and the latest practical progress in international human rights law. The second section clarifies international legal obligations of states on the right to education. It proves that the content of the right to education is the obligation of the state to promote and protect the right to education. In section three the implementation of the right to education standard in international human rights law in China is presented. This section expounds China's theory and practice on the relationship between international law and domestic law, then summarizes the relevant legislation and practice, and finally expounds the current problems China encounters on the right to education and proposes corresponding solutions. The paper and points out that theoretical discussion on the right to education from the perspective of international human rights law has great practical significance.

Keywords: international human rights law, right to education, PRC, China, human rights in China, right to education in China

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РЕЗЮМЕ:

МЕЖДУНАРОДНО-ПРАВОВЫЕ ОБЯЗАТЕЛЬСТВА КИТАЯ ОТНОСИТЕЛЬНО ПРАВА НА ОБРАЗОВАНИЕ

Статья состоит из трех основных разделов. В первом представлен обзор права на образование в международном праве прав человека. В этой части сначала объясняется значение и природа права на образование в международном праве прав человека, а затем представляются международно-правовые истоки права на образование и его современное состояние. Во втором разделе разъясняются международно-правовые обязательства государств в отношении права на образование. В нем доказывается, что содержание права на образование заключается в обязанности государства поощрять и защищать право на образование. В третьем разделе представлена реализация стандартов права на образование в Китае. В этом разделе излагается теория и практика Китая в отношении взаимосвязи между международным правом и внутренним правом, затем обобщается соответствующее законодательство и практика и, наконец, излагаются текущие проблемы, с которыми сталкивается Китай в отношении права на образование, и предлагаются соответствующие решения.

Ключевые слова: международное право прав человека, право на образование, КНР, права человека в КНР, право на образование в КНР

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REZUMAT:

OBLIGAȚIILE LEGALE INTERNAȚIONALE ALE CHINEI PRIVIND DREPTUL LA EDUCAȚIE

Lucrarea include trei secțiuni principale. În prima este prezentată o privire de ansamblu asupra dreptului la educație în dreptul internațional al drepturilor omului. Această parte explică mai întâi semnificația și natura dreptului la educație în dreptul internațional al drepturilor omului, apoi introduce originile juridice internaționale ale dreptului la educație și cele mai recente progrese practice în dreptul internațional al drepturilor omului. A doua secțiune clarifică obligațiile legale internaționale ale statelor privind dreptul la educație. Demonstrează că conținutul dreptului la educație este obligația statului de a promova și proteja dreptul la educație. În secțiunea a treia este prezentată implementarea standardului dreptului la educație în dreptul internațional al drepturilor omului în China. Această secțiune expune teoria și practica Chinei cu privire la relația dintre dreptul internațional și dreptul intern, apoi rezumă legislația și practica relevantă și, în final, expune problemele actuale pe care le întâmpină China cu privire la dreptul la educație și propune soluții corespunzătoare. Lucrarea și subliniază că discuția teoretică privind dreptul la educație din perspectiva dreptului internațional al drepturilor omului are o mare semnificație practică.

Cuvinte cheie: dreptul internațional al drepturilor omului, dreptul la educație, RPC, China, drepturile omului în China, dreptul la educație în China

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1. Introduction

Education is a human right in itself and an indispensable means of realizing other human rights. Education plays a vital role in developing women's talents, protecting children from exploitative and hazardous work or sexual abuse, promoting human rights and democracy, protecting the environment, and controlling population growth. The importance of education is not just limited to practical aspects: having a well-educated mind that can think freely is the most enjoyable thing in life.

In the present research specific provisions on the right to education are scattered in the

international documents of the United Nations, mainly, but enriched with the developments by UNESCO, Council of Europe, etc. This paper focuses on the content of the right to education from the perspective of the International Covenant on Economic, Social and Cultural Rights. Secondly, and in discussing the issue of state obligations, only the substantive obligations are emphasized, without much analysis of the procedural obligations of the state.

The purpose of theoretical discussion on the right to education from the perspective of international human rights law is to clarify the state's obligations in the right to education, so as to better protect citizens' right to education. This paper takes the right to education in international human rights law as the topic of the paper as the former has important theoretical and practical significance, and the example of China is taken as a case-study.

2. Overview of the right to education in international human rights law

The meaning and nature of the right to education in international human rights law

What is the right to education? The relevant international human rights documents do not provide a complete definition, and there is no consensus in the field of international human rights. Domestic scholars also lack a unified understanding of the concept of the right to education. Professor Lao Kaisheng believes that since the concept of "rights" itself is controversial, it will inevitably lead to inconsistent expressions of the right to education. It is neither easy nor possible to give a single correct definition of the right to education. From the perspective of the elements of rights, he derived the basic meaning of the right to education, "citizens, as subjects of rights, have the ability and qualifications to receive education in accordance with the provisions of laws and regulations".¹ Qin Huimin explained the right to education from the perspective of state obligations, "In essence, the so-called right to education in modern society refers to the right of citizens, as subjects of rights, to require the state to take certain actions or perform certain obligations in accordance with the law in order to receive education."² Yang Chengming explained the right to education from the perspective of international human rights law, "The right to education in international law refers to the right of individuals or natural persons to receive education in accordance with international law and guaranteed by the state."³

The right to education has rich theoretical connotations. As a new form of right that emerged after the emergence of modern national welfare administration, its definition cannot be unique and unchangeable.⁴ As Chinese scholar Zheng Xianjun said, "The right to education is a rather vague concept and it is difficult to give an accurate definition. As long as we recognize that education involves the development of the human mind, it is equivalent to recognizing that the right to education is an important but difficult to accurately define right."⁵

From the perspective of the nature of the right to education, the right to education is closely related to citizens' political rights. American scholar Samuel Huntington believes that "the wave of democracy may simply be a reaction to the public receiving higher education. Because the higher the level of education a person has, the more likely he is to participate in political activities, and his attitude towards political issues will be firmer and more thoughtful"⁶. British scholar Douglas Hudson also believes that "proper education is a prerequisite for citizens to exercise their political rights and freedoms more rationally" and

¹ Lao Kaisheng: "The Right to Education and the Right to Education in a Changing Society", Beijing Educational Science Press, 2003, page 181.

² Qin Huimin: "Deep into the Depths of Educational Legal System: On the Evolution of Educational Rights", China People's Public Security University Press, 1998 edition, page 191.

³ Yang Chengming, ed., Human Rights Law, China Fangzheng Publishing House, 2004, p. 289.

⁴ See Fan Lubing's doctoral dissertation: Research on the Legal Remedy System for the Right to Education, page 21.

⁵ Zheng Xianjun: "Legal Protection of Citizens' Right to Education", Beijing People's Court Press, 2004 edition, page 72.

⁶ Michel Croce and Samuel Huntington: The Crisis of Democracy, translated by Ma Dianjun et al., Qiushi Press, first edition, 1989, page 97.

“well-educated people may be a prerequisite for maintaining democratic structures and ideas”¹.

Before the Age of Enlightenment, education in Europe was mainly undertaken by parents and the church. After the emergence of modern secular states, education was gradually regarded as a public service. On the issue of education, liberal scholars believe that parents should be responsible for providing education and have the freedom to choose the type of education within the scope permitted by law. The international human rights conventions adopted after World War II adopted the liberal concept of education and confirmed that the state has the responsibility to respect the right of parents to ensure that education is in line with their own religious and philosophical beliefs.²

In addition, not only does the domestic constitution of some countries stipulate the "equal right to education" of citizens, but also the international law stipulates the equal right to education of citizens. If the right to education is viewed from the perspective of equal rights, the right to education has the nature of the first generation of human rights, which is particularly reflected in the European human rights protection mechanism. When hearing the Belgium Linguistic Case, the European Court of Human Rights pointed out that the right to education stipulated in the First Protocol to the European Convention on Human Rights is different from the right to education stipulated in economic, social and cultural rights. It does not mean that the contracting parties have the obligation to ensure free education, but means that everyone under the jurisdiction of each contracting party has the right to obtain existing educational means within a specific time. Therefore, the main purpose of the right to education is to ensure fair use of existing educational facilities. In terms of the scope of the right to education, the European Commission on Human Rights pointed out that if a new type of education or a new department of education is generated, then everyone in the country has the right to obtain such education, but it is subject to meeting relevant conditions.³

The second-generation human rights attribute of the right to education has been widely recognized, which can be proved by the fact that global and regional human rights conventions classify the right to education as economic, social and cultural rights. The right to education is the most prominent example of cultural rights, and some scholars also believe that the right to education is also an economic right and a social right.⁴ As a second-generation human right, it advocates that human rights should be protected by the government through positive actions. The state should ensure that the educated enjoy this right without discrimination, and protect it through legislation and other necessary means.⁵

As a first-generation human right, the right to education requires that the state should not arbitrarily interfere; as a second-generation human right, the right to education requires the

¹ Douglas Hodgson, *The Human Right to Education*, Darmouth Publishing Company Limited, 1998, p. 18. Quoted from Bai Yangchengming (ed.), *Human Rights Law*, China Fangzheng Publishing House, 2004, p. 312.

² See Nataliya S. Semenova, Ekaterina V. Kiseleva. Ban on the Hijab at School: Human Rights Against Migration Background // *Mediterranean Journal of Social Sciences*, MCSER Publishing, Rome-Italy. Vol 6 No 4 S1 July 2015. P. 509-516. <https://www.elibrary.ru/item.asp?id=24935265>

³ See the Application 5492/72, Xv. Austria, Coll. 44 (1973), pp. 63-64. Quoted from Bai Yang Chengming, ed., *Human Rights Law*, China Fangzheng Publishing House, 2004, p. 313.

⁴ Scholar Lao Kaisheng believes that "the right to education is an economic right, and its essence is the right to require the state to provide necessary cultural and educational conditions and equal education plans from an economic perspective in order to strive for better survival ability." See Lao Kaisheng: "Education Law Theory", Jiangxi Education Press, 1993 edition, page 93. American scholar Thomas Janosky believes that "the right to education is an opportunity right among social rights, which includes enabling citizens to acquire work skills and cultural participation skills through primary, secondary and higher education assistance." See [US] Thomas Janosky: "Citizens and Civilized Society", translated by Ke Xiong, Liaoning Education Press, October 2000 edition, page 41.

⁵ See, e.g. Kiseleva E., Osipova M., Emelianova N. The Right to Education for Migrant Children in Light of the Latest General Comments by the UN Treaty Bodies // *Proceedings of the 2018 2nd International Conference on Management, Education and Social Science (ICMESS 2018)*. Series 'Advances in Social Science, Education and Humanities Research'. June 2018. DOI 10.2991/icmess-18.2018.393.

state to take positive actions, which will be reflected in the content of the right to education in international human rights law.

The establishment of the right to education in international human rights law

Since the adoption of the Universal Declaration of Human Rights in 1948, the content of the right to education has been continuously enriched and improved in universal international human rights law, and many international conventions have mentioned that everyone has the right to education. Prior to this, two major international conferences held after the end of World War II laid a good foundation for the establishment of the right to education in international human rights law.

The first meeting was the 1942 Conference of Ministers of Education of various countries. This meeting led to the establishment of UNESCO in 1945. The preamble to the UNESCO Charter mentions "full and equal educational opportunities for all", and UNESCO's objectives include "contributing to the promotion of peace and security through education, science and culture and injecting new vitality into national education". To achieve this goal, members must cooperate in educational activities and advocate equal educational opportunities without racial, gender, class or social distinctions.

The second conference was the San Francisco Conference on International Organization in 1945. Although the delegation did not explicitly propose the right to education, it creatively proposed a completely new legal status of human rights and fundamental freedoms without distinction of race, sex, nationality or religion, thus preparing for the development of the right.

After these two conferences, the United Nations, through the efforts of the Human Rights Commission, the Commission on the Status of Women and UNESCO, adopted a series of international conventions to enrich and improve the content of the right to education.

Article 26 of the 1948 Universal Declaration of Human Rights states: "Everyone has the right to education. Education shall be free, at least in the elementary and fundamental stages. Elementary education shall be compulsory. Technical and vocational education shall be generally available. Higher education shall be equally accessible to all on the basis of merit." "Education shall be aimed at the full development of the human personality and at strengthening respect for human rights and fundamental freedoms. Education shall promote understanding, tolerance and friendship among all nations, racial or religious groups and shall promote the activities of the United Nations for the maintenance of peace." "Parents shall have the right to choose first the kind of education their children shall receive."

The International Covenant on Economic, Social and Cultural Rights (hereinafter referred to as the "Covenant") has made certain adjustments to the order of the purpose of education and the content of the right to education stipulated in the Universal Declaration of Human Rights, and has also further improved the content of the right to education. Article 13, paragraphs 1 and 2 of the Covenant echo paragraph 1 of the Universal Declaration of Human Rights. While recognizing that everyone has the right to education, it also makes corresponding provisions for primary education, secondary education and higher education. Article 13, paragraph 3 of the Covenant points out that in order to guarantee parents' priority choice of the type of education for their children, it has also added the right to run private schools. The Covenant also stipulates through Article 14 the specific national obligations of the States Parties to formulate plans and take actions to implement free and compulsory education. It can be said that the provisions on the right to education in the International Covenant on Economic, Social and Cultural Rights are the most detailed among all universal international human rights that stipulate the right to education.

Article 18, paragraph 4, of the International Covenant on Civil and Political Rights provides for the right of parents and, where applicable, legal guardians to have a priority in choosing their children's education.

The Convention on the Rights of the Child has given new development to the right of

parents to have priority in choosing the education their children should receive.¹ Article 28 of the Convention further enriches the content of the right to education, namely that all children should have access to educational and vocational information and guidance ; take measures to encourage student attendance and reduce dropout rates; and require States parties to take appropriate measures to ensure that schools implement discipline in a manner consistent with the human dignity of children.

There are also other international conventions that also involve the right to education, such as the International Labor Organization's Convention No. 117 on Basic Aims and Standards of Social Policy, the International Convention on the Elimination of All Forms of Racial Discrimination, the Convention on the Elimination of All Forms of Discrimination against Women, the Convention Relating to the Status of Stateless Persons, and the UNESCO Convention against Discrimination in Education.

Since the Universal Declaration of Human Rights first expressed the right to education, many conventions have been adopted in universal international human rights law, continuously enriching the content of the right to education, making the right to education a basic human right protected by international human rights law and an indispensable part of contemporary human rights law.

Subjects of rights and obligations regarding the right to education in international human rights law

The state is the main member of the international community and the bearer of rights and obligations under international law. The state is the entity that directly, independently and comprehensively participates in political, economic, legal, cultural and social relations in the international community and plays a leading role in them. Therefore, the state is of course the main bearer of international rights and obligations.² From a legal point of view, a right must correspond to a certain obligation. "If a right is a legal right, it must be a right to the behavior of someone else, the kind of behavior that someone else is legally obligated to do."³ In the field of international human rights law, the relationship between rights and obligations has different characteristics.

Professor Gong Renren believes that "international law, as a law with the state as the basic subject, usually allows the state to enjoy rights and bear obligations at the same time. However, compared with other areas of international law, international human rights treaties have a very important feature, which is that on the one hand, obligations are directly imposed on the state, and on the other hand, the issue of individual rights protection is raised to the international level through the state, thus resulting in the division and change of the subject of rights and obligations"⁴. In a sense, individuals have become the subject of international law. Some scholars pointed out that with the development of international human rights law, international law has begun to transform from flat law to three-dimensional law, so that international law not only adjusts the relationship between countries horizontally, but also adjusts the relationship between the state and individuals vertically. It can be called the coexistence of flat international law and three-dimensional international law.⁵ In the rights and obligations relationship of the right to education, there is also a

¹ Development is mainly reflected in the fact that parents or, as the case may be, legal guardians bear primary responsibility for the upbringing and development of children; parents and legal guardians have the right and obligation to guide children in exercising their rights in a manner consistent with their different stages of acceptance; all actions concerning children must be based on the principle of the best interests of the children. See Xu Xianming, ed., *International Human Rights Law*, Legal Publishing House, 1st edition, 2004, p. 309.

² Wang Tieya, ed., *International Law*, Legal Publishing House, 1st edition, 1995, p. 65.

³ Kelsen, *General Theory of Law and State*, translated by Shen Zongling, first edition published by Encyclopedia of China Publishing House in 1996, page 84.

⁴ Gong Renren, "On the Application of International Human Rights Treaties in China", in Xia Yong (ed.), *Public Law*, Vol. 1, Legal Publishing House, 1999, p. 282.

⁵ Che Pizhao: "Legal Globalization and International Rule of Law", in Gao Hongjun (ed.), *Tsinghua Legal Review*, Volume 3, Tsinghua University Press, 2002, pp. 132-133. Quoted from Liu Huawen: On the

division of the subject of rights and obligations. On the one hand, individuals are the subject of the right to education, and on the other hand, the state becomes the subject of the obligation of the right to education¹.

The universality of the subject of the right to education is also reflected in the scope of the subject of the right. Human rights transcend the differences of race, skin color, gender, language, religion, political opinion, nationality, social origin, etc. and are established by all human society. Human rights are rights enjoyed by all members of a group of people, so the subject of human rights is universal. This theoretical universality is not a characteristic of the concept of "human rights" at the beginning, but has undergone a long development process. The history of the human rights movement is first and foremost a history of the continuous expansion of the subject of human rights.² The same is true for the subject of the right to education. In practice, girls, refugees, ethnic minorities, indigenous peoples, etc. are all subjects of the right to education. For these subjects, the international community should not only grant them the right to education in a universal sense, but also give them a preference in legislation to better protect their right to education. From the current practice of international human rights law, the international community is making unremitting efforts to fully realize the right to education of these subjects (such as girls, refugees, ethnic minorities, indigenous peoples, etc.).

3. States' international legal obligations regarding the right to education

In international human rights law, "no right can exist without corresponding government obligations"³. The state obligations of the contracting parties to realize the right to education stipulated in the Convention can be divided into two categories: substantive obligations and procedural obligations. In short, the former refers to the state's obligation to realize the right to education as stipulated in the Convention, and the corresponding content is the implementation of the Convention in the territory of the contracting parties; the latter refers to the various requirements made by the international community to the state to ensure the implementation of the Convention, and the means and steps to supervise and assist the contracting parties in terms of procedures, and the corresponding content is the international implementation mechanism of the Convention and its operation.⁴ Some scholars also call it domestic obligations and international obligations.⁵

The general obligation of the state to promote and protect the right to education

The discussion of the general obligations of the state did not begin with the right to education, but with general human rights. When discussing basic rights, scholar Henry Hugh believed that all basic rights involve many aspects, requiring the state to take measures, whether positive or negative, and impose different types of obligations on the state. Generally speaking, there are three types of obligations: the obligation to avoid deprivation, the obligation to protect, and the obligation to provide assistance to the deprived.⁶ On this basis, the three-part division of state obligations was applied to the discussion of the right to food in the relevant fields of economic, social and cultural rights. In 1984, in a discussion on the right to food at the United Nations, Norwegian human rights expert Eide proposed a new

Asymmetry of States' Obligations under the International Covenant on Economic, Social and Cultural Rights, Peking University Press, 1st edition, 2005, p. 3.

¹ The above has explained from the perspective of the principle of the subject of international law that the state is the subject of obligations for the right to education. In addition, relevant documents of international human rights law also make clear provisions on the status of the state as the subject of obligations.

² Qi Yanping: Human Rights and the Rule of Law, Shandong People's Publishing House, 2003, p. 44.

³ Katarina Tomasevski, Education Denied: Costs and Remedies, Zed Books Ltd, 2003, p. 51

⁴ See Liu Huawen, On the Asymmetry of States' Obligations under the International Covenant on Economic, Social and Cultural Rights, Peking University Press, first edition, 2005, p. 8.

⁵ See Liu Huawen, On the Asymmetry of States' Obligations under the International Covenant on Economic, Social and Cultural Rights, Peking University Press, 1st edition, 2005, p. 9.

⁶ Henry Shue, Basic Right subsistence, Affluence and U.S. Foreign Policy. Princeton University, 1980, p. 52. Quoted from Liu Huawen, On the Asymmetry of State Obligations under the International Covenant on Economic, Social and Cultural Rights, Peking University Press, 1st edition, 2005, p. 17.

three-part division of state obligations, namely to respect, protect and fulfil to fully realize the right to food.¹ This classification of state obligations has been adopted by the Committee on Economic, Social and Cultural Rights.² In General Comment No. 12 on the right to adequate food, the Committee on Economic, Social and Cultural Rights pointed out that the right to adequate food, like other human rights, stipulates three levels of obligations for States parties, namely, the obligations to respect, protect and fulfill (some works also translate it as fulfillment). The obligation to implement includes both the obligation to facilitate and the obligation to provide.³

In fact, from a linguistic point of view, there is no clear boundary between the terms "respect", "protect" and "implement". There is overlap in meaning, ambiguity and overlap in usage. Therefore, in the process of legal interpretation of the Convention, the interpreter needs to make artificial explanations and definitions for it.⁴

The Committee on Economic, Social and Cultural Rights has made a statement on Article 13 of the International Covenant on Economic, Social and Cultural Rights. The general legal obligations of the States parties are clearly mentioned in the general comment. The Committee believes that the right to education, like other fundamental human rights, also imposes three levels of state obligations on States parties. Specifically on the issue of the right to education, the obligation to respect requires States parties to refrain from taking any measures that hinder or prevent the enjoyment of the right to education; the obligation to protect requires States parties to take measures to prevent third parties from interfering with the enjoyment of the right to education; the obligation to facilitate in implementation requires States parties to take measures to enable individuals and groups to enjoy this right and facilitate their enjoyment of these rights. Finally, States parties have an obligation to provide the right to education. Generally speaking, when individuals or groups are unable to use the available means to implement the relevant rights themselves due to reasons beyond their control, States parties have an obligation to implement (provide) a certain right stipulated in the Covenant. "The Committee on Economic, Social and Cultural Rights specifically pointed out that the wording of the Covenant is different in terms of primary, secondary, higher education and basic education. Therefore, from the specific provisions of the Covenant, States parties bear heavy implementation obligations in terms of the right to education. The scope of the obligation is discussed below, but not limited to the mentioned.

The core obligation of the state to promote and protect the right to education

The so-called core obligations refer to the minimum obligations that each contracting party should assume, which can also be understood as at least maintaining the realization of the right to education at a most basic level.

In its general comment No. 3 on the nature of States Parties in 1990, the Committee on Economic, Social and Cultural Rights pointed out that "the Committee believes that every State Party has a minimum core obligation to ensure that each right reaches a minimum essential level of protection" (para.12). In December 1993, the Committee held its 9th meeting to review the right to health and held a general discussion on the issue of "core (obligation) content." The members of the Committee agreed at the meeting that "each right (in the Covenant) contains a minimum core content, which constitutes the lower limit of the conditions for compliance that States Parties may not reduce."⁵

It can be considered that core obligations are the minimum requirements for a country to fulfill its obligations under the Convention, and violation of core obligations is a flagrant violation of a country's obligations under the Convention. Specifically speaking of Article 13

¹ UN Doc.E/CN.12/1990/SR.4, para.49.

² Ibid.

³ UN Doc.E/CN.4/Sub.2/1999/12, para.15.

⁴ Liu Huawen, On the Asymmetry of States' Obligations under the International Covenant on Economic, Social and Cultural Rights, Peking University Press, 1st edition, 2005, p.19.

⁵ See: General Comment No. 14 of the Committee on Economic, Social and Cultural Affairs on the right to the highest attainable standard of health, para.12.

of the International Covenant on Economic, Social and Cultural Rights, the Committee pointed out that the core obligations of a country should be to guarantee the right to study in public educational institutions on a non-discriminatory basis; to ensure that education is consistent with the purposes set out in Article 13, paragraph (1); to provide primary education to all in accordance with Article 13, paragraph 2 (a); to adopt and implement a national education strategy that includes the provision of secondary, higher education and basic education; and to ensure that educational institutions are freely chosen without interference from the State or third parties, provided that such institutions meet "minimum educational standards" approved or as may be established by the State.¹

The State's specific obligations to promote and protect the right to education

After explaining the content of the right to education of individuals in international human rights law, the specific obligations of the state are not difficult to understand, because the content of the rights enjoyed by individuals and the specific obligations of the state can be said to correspond to each other. The normative content of the right to education in Article 13 of the International Covenant on Economic, Social and Cultural Rights can be regarded as the specific obligations of the state.

When elaborating on the specific legal obligations of States, the Committee on Economic, Social and Cultural Rights specifically mentioned the provisions of Article 2, paragraph 1, of the International Covenant on Economic, Social and Cultural Rights⁸⁴. In the view of the Committee on Economic, Social and Cultural Rights, on the issue of specific legal obligations of States, "States Parties have an obligation to provide international assistance and cooperation for the full implementation of the right to education. In the negotiation and ratification of international agreements, States Parties should take steps to ensure that these instruments do not have an adverse impact on the right to education. In addition, States Parties have an obligation to ensure that the actions they take as members of international organizations, including international financial institutions, fully take into account the right to education."²

4. Implementation of the right to education in China

The relationship between international conventions stipulating the right to education and Chinese domestic law

China has ratified the major international conventions that stipulate the right to education, such as the International Covenant on Economic, Social and Cultural Rights and the Convention on the Rights of the Child³. It should be pointed out that signing and ratifying human rights conventions is not an end in itself, but an important step to respect and promote human rights. Properly treating the signing and ratification of human rights conventions at least expresses a government's recognition of the relevant human rights provisions and its willingness to implement them. The legal implementation of treaties is more difficult and complicated than the recognition of human rights treaties.⁴ This not only involves the issue of "treaties must be observed", but also makes the issue of "the

¹ See Committee on Economic, Social and Cultural Rights, general comment No. 13 on the right to education (21st session, 1999), para.57.

² In China, education still maintains a high degree of administrative control. Although the "Law on Promoting Private Education" and "Implementation Regulations" have been issued, there are not many measures that have truly broken the monopoly of public education.

³ The Convention against Discrimination in Education, which came into force in 1962, is unclear whether it has come into force in China because the Chinese Ministry of Foreign Affairs does not have relevant records. However, China cannot violate the provisions of non-discrimination in the convention, because human rights conventions often become the source of moral responsibility of the international community. For example, on July 24, 2002, the U.S. House of Representatives believed that the Chinese government had violated the International Covenant on Civil and Political Rights, and the Chinese government gave a corresponding defense. Although both countries know that China has not ratified the International Covenant on Civil and Political Rights, using human rights treaties as the basis for moral accusations and defenses has a profound impact.

⁴ Liu Huawen, On the Asymmetry of States' Obligations under the International Covenant on Economic, Social and Cultural Rights, Peking University Press, 1st edition, 2005, p. 141.

relationship between international treaties and Chinese domestic law" particularly prominent.

In China, neither the Constitution, the fundamental law, nor the Legislative Law, the basic law, has any specific provisions on the relationship between international treaties and domestic law and how international treaties are applied domestically. From the perspective of the application of treaties in China, there are generally two ways: direct application and transformation.

Direct application of the treaty. Article 142, paragraph 2 of the General Principles of the Civil Law of the People's Republic of China stipulates: "If an international treaty concluded or participated in by the People's Republic of China has different provisions from the civil laws of the People's Republic of China, the provisions of the international treaty shall apply, except for reservations made by the People's Republic of China." This is a direct application method, but there are great doubts about whether this method has universal significance in China's legal practice. It is difficult for us to draw the conclusion that international treaties can be directly applied in China from the provisions.

Transformation and application. China joined the Vienna Convention on Diplomatic Relations and the Vienna Convention on Consular Relations in 1975 and 1979 respectively, and later formulated the Regulations on Diplomatic Privileges and Immunities and the Regulations on Consular Privileges and Immunities in 1986 and 1990 respectively. This method of transforming international treaties into domestic laws is more conducive to the implementation of treaties in China.

Incorporating or transforming the provisions of the right to education in international treaties into domestic law can be considered as the issue of "localization" of the international standards of the right to education. There is a view that "relative rationalism" should be pursued in the process of "localization". Its theoretical premise is that international standards are universal, and China is currently unable to meet the requirements of international standards due to some relevant objective conditions, and can only adopt "relative rationalism" of "not seeking the best, but seeking better".⁹² On the issue of the right to education, China should use "relative rationalism" to apply the international standards of the right to education to the maximum extent in domestic law, because there are fewer differences in ideology or national policies on the issue of the right to education.

As for the issue of the effectiveness of treaties compared with domestic laws, there are no direct provisions in our Constitution and laws. The provisions of Article 142 of the General Principles of the Civil Law of the People's Republic of China cited above show that the effectiveness of treaties is higher than that of domestic civil laws, because "if there are different provisions between international treaties and the civil laws of the People's Republic of China, the provisions of the international treaties shall apply." However, these provisions are limited to individual laws and cannot be said to be rules that have been fully established in the Chinese legal system. However, many laws have made "similar provisions", which fully demonstrates the obvious tendency of legislative policies, making it possible for treaties to prevail over domestic laws to become a universal rule.

China has already joined the vast majority of universal international conventions that currently stipulate the right to education. Under such circumstances, while attaching importance to the "procedural obligations"¹ of the Convention, it should also pay attention to and resolve as soon as possible the current unclear relationship between international law and domestic law.

Relevant legislation and practice on the right to education in China

¹ At present, the procedural obligations are mainly to submit reports to the State Party. In practice, the Chinese government also pays great attention to procedural obligations and submitted its first report to the Economic, Social and Cultural Committee through the Secretary-General of the United Nations on June 27, 2003. Compliance with international obligations, including procedural obligations, is a matter of national image and national credit. See Liu Hainian: Research on the International Covenant on Economic, Social and Cultural Rights, China Legal Publishing House, 2000, pp. 1-2.

In China, the right to education has been stipulated as a constitutional right. However, there are a large number of people who need to receive compulsory education in China, urban and rural development is unbalanced, educational resources are backward, and compulsory education is regarded as a major issue related to the improvement of national quality and national prosperity, which makes compulsory education a prominent problem. It can be said that the "Compulsory Education Law of the People's Republic of China" is one of the most important laws in China's many laws on the right to education. The newly revised "Compulsory Education Law of the People's Republic of China" came into effect on September 1, 2006, which is a milestone in China's educational legislation practice. From the short 18 articles of the "Compulsory Education Law" in 1986 to the 8 chapters and 63 articles of the newly revised "Compulsory Education Law", it can be said that every process of the revision of the law reflects China's progress in the legal issue of the right to education. The issue of funding guarantee is a focus of this revision. The newly revised Compulsory Education Law finally clarified: "The state will fully include compulsory education in the scope of financial guarantee, and the funds for compulsory education shall be guaranteed by the State Council and local people's governments at all levels in accordance with the provisions of this law", completing the real transformation from "people's education run by the people" to "compulsory education run by the government". The issue of free compulsory education is another hot topic in this revision. Finally, it was clarified that "free tuition and miscellaneous fees will be charged for compulsory education".¹ At the same time, considering the financial situation of the country, the supplementary provisions were added that "the implementation steps for free miscellaneous fees for children and adolescents of school age receiving compulsory education shall be stipulated by the State Council". Other hot and difficult issues in education, such as solving the difficulty of migrant children in school enrollment, the transformation of public schools, the craze for school selection in cities, and the high price of textbooks, were all reflected in this revision of the Compulsory Education Law.

The above laws and administrative regulations are consistent or basically consistent with international standards, reflecting that the right to education has gradually been aligned with the standards of the right to education in international human rights law in China's legislative practice. However, there are still some rights enjoyed by individuals, such as "teachers' freedom of association" and "parents' freedom to choose education for their children", which are still in the stage of debate. The formal formulation of legal safeguards should not be understood as the purpose of human rights protection, but only as a means of human rights protection. At the same time, whether the rights established by law are in line with international standards in implementation is also worthy of further exploration. How to continue to improve the content of the right to education in my country's laws with reference to international standards and better protect the right to education of individuals has also become a hot issue in theory and practice.

Problems China faces and its path to reform

All international conventions that stipulate the right to education have made it clear that the right to education is an individual right.² From the provisions of the Chinese Constitution, Article 46 stipulates: "Citizens of the People's Republic of China have the right and obligation to receive education." Regarding rights, there is no need for more academic explanations; and regarding obligations, some scholars explain: "The so-called obligation

¹ See <http://learning.sohu.com/20060707/n244152228.shtml>.

² From the provisions of international conventions, Article 26 of the Universal Declaration of Human Rights states: "Everyone has the right to education." Article 13 of the International Covenant on Economic, Social and Cultural Rights states: "Everyone has the right to education." Article 5 of the International Convention on the Elimination of All Forms of Racial Discrimination states: "Everyone has the right to education and training." Article 28 of the Convention on the Rights of the Child states: "The child has the right to education." What these documents have in common is that they define the international right of everyone to education without imposing any obligations on individuals.

refers to the obligation of the people to the state to ensure that their children of school age receive national education; at the same time, the state has the obligation to the people to ensure that their people receive national education during their school age. Therefore, under education, the state and the people must share responsibilities and obligations." It is not difficult to see that the academic community has adopted a two-way interpretation of the right to education as "both a right and an obligation", that is, the state has obligations to the people, and the people also have obligations to the state. However, from the perspective of legal norms, if both parties have obligations and responsibilities, the relationship between the obligations of the subjects will lack a clear definition, and it will often evolve into a situation where neither party has obligations or responsibilities.¹ The analysis in the previous chapters has made it clear that in the field of international human rights law, the right holder of the right to education is the individual, and the obligation holder is the state. In this way, the state fulfills its obligations and the individual enjoys his rights. The fulfillment of obligations and the enjoyment of rights are clear at a glance, and naturally there will be no legal confusion.

As for the issue of financial funding for education, the previous analysis has pointed out that the state has the obligation to ensure that citizens enjoy the right to education, and that education cannot be called "compulsory education" in the true sense unless it is "free". Moreover, the government is not only the main bearer of compulsory education funds, but also has the obligation to reasonably allocate educational resources, otherwise it will be difficult to ensure that the quality of education reaches the required level.² In paragraph 228 of its first report on the implementation of the Convention submitted to the Committee on Economic, Social and Cultural Rights, China pointed out that from 1995 to 2001, the proportion of national fiscal education funds (including education appropriations at all levels, urban and rural education surcharges, funds used by enterprises to run primary and secondary schools, and tax exemptions for school-run industries) to GDP increased year by year, accounting for 3.19% of GDP in 2001. Paragraph 229 also points out that "due to the long-term imbalance in development among different regions of China and other difficulties, there are still nearly 110 million people in areas where nine-year compulsory education has not been achieved; the dropout rate of junior high school students in some rural areas is still relatively high." In addition, "8% of the country still has not achieved universal nine-year compulsory education, all of which are concentrated in the central and western regions."³ Under such circumstances, China should increase the central government's financial allocation for education, especially compulsory education. In the view of Katarina Tomasevski, the Special Rapporteur on Education of the United Nations Human Rights Commission, "budget allocations for education should account for at least 6% of GDP as recommended by international standards, that is, double from 3% to 6%."⁴

In addition, due to certain national conditions, the standards of the right to education in China and international human rights law are slightly different in terms of "parents' freedom to choose education for their children". This is related to the fact that in China, the absolute number of parents who want their children to receive corresponding religious education is not large. However, for some ethnic minorities, they should be treated differently. As the Committee on the Elimination of Racial Discrimination pointed out, "a unique religion is

¹ Wen Hui: Research on the Inclusion of the Right to Education in the Constitution, Peking University Press, 1st edition, 2003, p. 60.

² Hong Guanglei: "On the Obligation of 'Compulsory Education'", in Zhong Qiquan, Jin Zhengyang, and Wu Guoping, eds., Interpreting Chinese Education, Educational Science Press, 1st edition, 2000, p. 102.

³ See Ambassador Sha Zukang, head of the Chinese delegation, introductory statement at the UN Committee on Economic, Social and Cultural Rights review of China's first report on the Convention, Geneva, 27 April 2005.

⁴ See Katarina Tomasevski, Special Rapporteur on Education of the United Nations Commission on Human Rights, report on the right to education following her visit to China from 10 to 19 September 2003, para. 16.

very important for the identity of some ethnic minorities"¹. "Of the more than 120 ethnic minority languages spoken in China, 50% are on the verge of extinction", which highlights the importance of preserving the cultural characteristics of ethnic minorities. If education affirms the rights of ethnic minorities, it is bound to require the majority to fully recognize the value of ethnic minority languages and religions in all aspects of life. Otherwise, education is tantamount to assimilationism, which is contrary to China's human rights obligations.²In its concluding observations on the State party report submitted by China, the Committee on Economic, Social and Cultural Rights pointed out that "the State party has not provided sufficient information on the enjoyment of the economic, social and cultural rights provided for in the Covenant by people in ethnic minority areas." It also requested China to "provide detailed information in its next periodic report on the progress made and obstacles encountered in the implementation of the provisions of the Covenant in ethnic minority areas."³On the issue of the right to education, China should fully integrate human rights and ethnic minority rights into its education policies, laws and practices.

Following the principle *pacta sunt servanda*, China has the obligation to implement in good faith the international treaties it has ratified. The above brief description is not comprehensive, but only makes a theoretical discussion of China's current relevant legislation and practice with reference to the provisions of relevant international treaties, hoping to benefit China's legislation and related practices.

Conclusion

The right to education is a basic means for personal development and a prerequisite and means for individuals to enjoy other human rights. As a basic right of citizens, it is protected by both domestic law and international law. Although the right to education has not been protected in international law for a long time, it has achieved fruitful results. The right to education has been recognized in some important global human rights conventions adopted after World War II, thus becoming a basic human right protected by international human rights law.

The right to education is one of the most complex human rights in international human rights law. This article mainly studies the International Covenant on Economic, Social and Cultural Rights, which has the most detailed provisions on the right to education, and roughly summarizes the content of the right to education into the following four aspects, namely: the right to receive education, the freedom to choose education, the freedom to establish private schools and academic freedom. The content of the right to education is also the substantive obligation of the state to promote and protect the right to education. Under the premise that the international community is improving and enriching the content of the right to education, it is particularly important for the state to fulfill its corresponding substantive international obligations. In promoting and protecting the right to education, the state bears general obligations, specific obligations and core obligations. As for general obligations, the state should assume the obligation to respect, protect and implement the right to education ; as for specific obligations, the state should conscientiously fulfill the commitments made in the International Covenant on the Right to Education ; as for core obligations, since these obligations are the minimum obligations of the state to promote and protect the right to education, the state should fulfill them with the utmost sincerity and should not openly violate them. The state's conscientious implementation of its international legal obligations on the right to education can not only protect the right of individuals to education, but also meet and promote the comprehensive development of the country and society.

¹ U.N.Doc.CERD/C/304/Add.15,para.14,27 September 1996.

² See Katarina Tomasevski, Special Rapporteur on Education of the United Nations Commission on Human Rights, report on the right to education following her visit to China from 10 to 19 September 2003, para. 36.

³ See: Concluding observations made by the Committee on Economic, Social and Cultural Affairs at its 34th session in 2005 based on the Convention Implementation Report submitted by China, paragraph 67.

In recent years, the right to education has made great progress in China both in legislation and in practice. However, there is still some gap between legislation and practice of China and the relevant "international standards". More positive and effective measures need to be taken in legislation, judicial system, social progress and educational concepts to promote the universal, comprehensive and full realization of the right to education.

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