



# Constitutional Guarantee of Citizens' Right to Education — from the Perspective of the State's Protection Obligation

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**Abstract:** Education is the foundation of a country, and the cultivation of talents decides the future of a country. Therefore, the right to education is not only directly stipulated in the chapter on *The Basic Rights and Obligations of Citizens*. Besides, the *General Outline* made it clear of the national obligations and education was given special protection. The state's protection obligation plays an irreplaceable role in protecting the objective value order, which has become an important means to protect the right to education from illegal infringement. It is a systematic project to realize the obligation of our nation in protection of citizens' right to education, which can be achieved with the cooperation of legislative, administrative and judicial organs to jointly fulfill the obligation of constitutional protection of citizens' right to education. The state's obligation to protect the right to education must follow the lower criterion of "Adequate compensation" and the higher criterion of "Balance of interests".

**Keywords:** right to education, constitutional guarantee, the state's protection obligation

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## 1. Introduction

The results of the 2019 and 2020 demographic surveys show that there are still significant differences in education levels between regions, urban and rural areas, and male and female. Therefore, the comprehensive protection of citizens' right to education cannot be separated from the full realization of the state's protection obligation.

The Constitution is the fundamental law for the protection of citizens' basic rights. Although the Articles of the Constitution of China fails to stipulate the national protection obligation of citizens' right to education in a direct manner, Article 19 is closely related to this obligation and essentially stipulates the obligation of our nation in protection of citizens' right to education. As the constitutional normative basis for the obligation of our nation to protect citizens' right to education, this article is endowed with particularity, which is embodied in the following aspects: (1) From the perspective of constitutional style, the provisions of this article belong to the basic state policy or the third structure in the chapter of the General Outline of the Constitution [1]; (2) In terms of specific content, the article stipulates state obligations at various levels and from various angles, and the state's obligation to protect citizens' right to education is relatively clear; (3) From the perspective of constitutional interpretation, this article not only provides the state's obligation to protect citizens' right to education, but also reflects some contents of citizens' right to education, such as the right to secondary education, the right to vocational education, the right to higher education and the right to enjoy various educational facilities, which has obvious right attributes. (4) From the current research status, the existing research results only involve the explanation of the legitimacy of citizens' right to education, but lack of specific explanation.

As mentioned above, since Article 19 of the Constitution embodies the particularity of many aspects, the interpretation of this article should be placed in a specific theoretical framework, so the construction of the theoretical system of the state obligation in protection of citizens' right to education will be particularly important.

## 2. The basic connotation of the state's protection obligation

From the legislative purpose of national obligation to protect citizens' right to education, this obligation aims to provide maximum protection for the realization of citizens' right to education and fully protect the citizens' right to education that has been violated. Therefore, the most complete connotation of the state's obligation to protect citizens' right to education should be the system guarantee, organization guarantee and procedure guarantee established by the state to realize citizens' right to education, as well as the exclusion of all kinds of illegal acts. The specific connotation of the state's protection obligation should be noted as follows:

The object of the state's protection obligation includes public power infringement and third party infringement. There are two main theoretical views on this issue, and what they have in common is that the state's protection obligation is aimed

at the adverse actions of a third party. The difference is reflected in one view that the harmful acts carried out by the public power of the state should not be excluded from this obligation[2], and the most important purpose of this obligation is to prevent and remedy the violation of basic rights by the public power of the state [3], while others hold that the acts carried out by the public power of the state should be excluded. The author believes that the national obligation in protection of citizens' right to education is aimed at both the behavior of public power that damages citizens' right to education and the behavior of a third party that damages citizens' right to education. According to the common sense of the state obligation theory, the state protection obligation to the third party and the state protection obligation to the public power are both primary obligations. The two are parallel rather than inclusive. And if the infringement of the third party or the infringement of public power is excluded from the national protection obligations, a complete system of national protection obligations will not be formed, and the citizens' right to education will not be fully guaranteed.

(2) The subject of state's protection obligation is the organization with public function. As the name implies, the state's protection obligation can only be undertaken by the the nation. However, the word "country" is an abstract concept. If the subject of citizens' obligation to receive education is directly defined as the country, it will lead to the complexity, ambiguity and uncertainty of the subject of the obligation, which is not conducive to the timely and comprehensive protection of citizens' right to receive education. In the author's opinion, the subject of state's protection obligation is the organization with public function, which either directly exercises state power or indirectly has public function due to delegation and authorization. The former mainly includes state organs such as legislative organs, while the latter includes social public organizations such as trade unions and communist Youth League. The relationship between the two is that, based on the state organs directly exercising state power and supplemented by other organizations with public functions and powers, they jointly undertake the state protection obligation of citizens' right to education and provide comprehensive guarantee for the realization and relief of citizens' right to education.

### **3. The concrete structure of the national obligation to protect the right to education**

For a long time, China has been adhering to the governance mechanism with the state as the center and the protection of the right to education is no exception. Under this mechanism, how to reasonably distribute the power of the subject of obligation is an unavoidable problem for the concrete construction of the national protection obligation of citizens to receive education. As for the power structure, why are the legal provisions detailed and accurate, but there are unreasonable aspects in the norms? How to solve the conflict and contradiction between the stability required by law itself and the lag brought by the change of social conditions? These questions will test the wisdom of rulers and people [4]. Therefore, the specific structure of the national obligation to protect citizens' right to education should be made based on the follow of the principle of decentralization on the one hand, and the hierarchical relationship between powers should be considered on the basis of the distribution of legitimacy on the other hand.

#### **3.1 The first level of obligation: The formulation of laws protecting citizens' right to education**

From the constitutional text, the relevant provisions about citizens' right to education are not specific and detailed, which will lead to difficulties in administrative and judicial application. Therefore, the legislature must make the right to education clearer through legislative activities, which is theoretically called "constitutional entrustment" [5]. In this case, legislators can make choices, including the following aspects: First, legislators can not only protect the right to education through public law, but also remedy the right to education through private law.

Generally speaking, if the legitimate rights and interests are seriously infringed with great damage to the society, the legislature should protect and relieve the right to education by formulating criminal law in time. Second, on the one hand, the legislature can provide protection and relief when the infringed requests protection, and on the other hand, the legislature is authorized to intervene with the infringer. The latter includes both negative behaviors such as setup of restrictions and prohibition of specific behaviors. Besides, positive behaviors such as formulation of guiding norms and preferential measures are covered.

Definitely, the legislative obligation on the right to education varies with the change of objective conditions. When the natural environment, economic and social system and structure, culture, science and technology and other social conditions has greatly changed, The legislature is required to revise and supplement existing laws and regulations related to the right to education based on the new social conditions, and even in special circumstances, such as basic incompatibility with the economy and society, the old laws should be abolished with new laws stipulated. Otherwise, it will go against the state's protection obligation of the right to education. For example, with the severe global pandemic, the legislative bodies should implement the requirements of the CPC Central Committee and The State Council on epidemic prevention. Besides, the normalization of epidemic prevention in the education system should be comprehensively push forward to ensure the safety

and health of teachers and students.

### **3.2 The second level of obligation: The law enforcement in the protection of citizens' right to education**

Law enforcement, also known as the application of law, refers to the activities of national administrative organs and their staff to perform their administrative duties and enforce laws in accordance with statutory functions and powers and legal procedures. When the legislature has fulfilled the first level of law creation obligation, the administrative organ should undertake the second level of law implementation obligation in the legal system related to the protection obligation constructed by the legislature. This does not mean that the state protection obligation of the agency is not important. On the contrary, administrative organs play an important, critical and irreplaceable role in leading, organizing and coordinating the protection of the right to education, and establishing an education system with abundant resources, adequate talents and well-equipped facilities.

### **3.3 The third level of obligation: The legal application in the protection of citizens' right to education**

Generally speaking, judicature is characterized with passiveness, which requires the judicial organ to act only when the party concerned applies, that is to say, the judicial organ fails to be the main entity of the state's protection obligation. For example, Karl Schmidt, a scholar of Federal Germany, only introduced the law amendment system, legislative body and other institutions as the guarantee of fundamental right was concerned [6]. In the constitutions of some countries and regions, it is clearly stipulated that the subject of obligation of fundamental power is limited to the legislature and the executive organ, excluding the judicial organ, for example, Article 7, Item 1 of the Constitution of South Africa. So how does the judicial organ act as the subject of the state's protection obligation? If so, to what extent does it bear the protection obligation?

Article 1, Provision 3 of the German Basic Law directly stipulates that the judicial organ is the subject of the obligation of basic rights. Although there is no similar provision in the Constitution of China, the concept of state used in Article 19 of the Constitution of China fails to make in-depth interpretation of it, nor the the judicial organs as the subjects are directly excluded. Therefore, citizens' right to education is also legally binding on the judiciary. As the subject of obligation to protect citizens' right to education, judicial organs should not only coordinate and cooperate with legislative organs and administrative organs, but also timely supplement and improve the loopholes and limitations of legislative protection and law enforcement protection.

Specifically, it is mainly reflected in the following situations: First of all, If the legal norms for the protection of the right to education are specific and clear in legislation, the judicial organs are merely required to apply the relevant provisions in accordance with the legal provisions. Secondly, there will certainly hysteresis in law to some extent, as a result, the legislative organ will be authorized for any social means whatever can be adopted, In this case, relatively general provisions and uncertain concepts can only be used when formulating legal norms for those occasional and even unpredictable events. At this time, the judicial organs are required to make judicial interpretation of general clauses and uncertain concepts according to the value of citizens' right to education, so as to make up for the deficiency of legislative protection in individual cases. Third, after the administrative organ performs the state's protection obligation, the judicial organ will be required to perform review and supervision to correct the loopholes that may appear in the law enforcement protection.

### **3.4 The fourth level of obligation: Public participation under the protection of citizens' right to education**

The obligations at the above three levels constitute the national organ system with the obligation in protection of citizens' right to education. In addition, public organizations should also fulfill the obligation to protect citizens' right to education. One of the most typical features of modern politics is that national organs entrust some functions with public power attributes to some social organizations or groups. These organizations or groups can well supplement national organs with high efficiency and universality in the performance of obligations. However, the state's protection obligation undertaken by public organizations is not intact, which proves only to be a supplementary obligation. As a result, the obligation is not allowed to go against the legislation, judiciary and law enforcement in protection.

## **4. Standards for the state's protection obligation of citizens' right to education**

Based on the theory of the state's protection obligation of citizens' right to education, all kinds of national organs and other organizations should implement intervention in a proactive manner, However, if the protection is carried out without limit, it is bound to infringe other legal interests, so what standard should be adopted to determine whether the state's

protection behavior exceeds the reasonable limit? When protection measures are not implemented by public authorities at all? or the protection measures adopted are inappropriate or fail to achieve the corresponding protection purpose, it is regarded as deviation from the state's protection obligation[7]. However, "fully inappropriate" and "failure in achieving the purpose of protection" are still vague expressions that need to be clarified.

#### **4.1 The lower limit of the state's protection obligation of the right to education**

Insufficient compensation. The definition of "insufficient prohibition" was initially put forward by Canaris, a German civil jurist, which was regarded as the opposite category of the definition of "excessive prohibition", that is, the state should not excessively restrict people's rights, and the protection degree of people's rights and freedoms should not be lower than the necessary standard[8]. The principle of inadequacy prohibition is, first of all, to draw a bottom line for the state's protection obligation.

Insufficiency prohibition theory as the "lower limit" benchmark of the right to education national protection obligation can be specifically interpreted as: (1) Justification of purpose. When state organs and other organizations carry out active intervention to protect citizens' right to education, the purpose of the action should also be constitutionally reasonable, which is "purpose due review", mainly aiming at the legislature, which must be achieved based on the "constitutional mandate" to establish a more sound law to protect the rights and interests of education. (2) Suitability of means. That is, measures taken by state and other institutions must be able to achieve the overall objective of "protection of the right to education". For example, when the government approves to establish compulsory education facilities, its presetting of basic social value means under "protection in right to education": The right to education, once the administrative measures to deviate from the purpose, not to exercise the power and responsibility of the right to education, the other citizens groups or enterprise as a legal person rights violations, which violates the principle of "insufficient ban". (3) In line with the principle of proportion. The state organs and their organizations shall undertake the protection obligation in a proportional manner, and adopt a method that has little impact on the counterpart on the basis of fully reflecting public and private interests. It shall not exceed the necessary limit, otherwise it violates the principle of insufficient prohibition.

#### **4.2 Upper limit of the state's protection obligation of the right to education**

Balance of interests standard. The balance of interests means that the rights and interests between the parties, between the subjects of rights and obligations, as well as between individuals and society should all be stroked in accordance with the value concept of equality, so that the rights and interests between the parties can reach a relatively optimized and reasonable state on the basis of coexistence and compatibility. In particular, consideration must be given to the need to strike a proper balance between the various interests involved. The restrictions on citizens' right to education can be imposed only on the basis of the tests of necessity and proportionality for limiting fundamental rights, and only under circumstances that the values of the Basic Law are observed and respected.

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