

儿童受教育权. 性质、内容与路径

出版人 所广一 责任编辑 李 芳 版式设计 孙欢欢 黄任校对 曲凤玲

图书在版编目 (CIP) 数据

儿童受教育权:性质、内容与路径/尹力著.一北京:教育科学出版社,2011.5

(教育博士文库)

ISBN 978 -7 -5041 -5609 -9

I. ①儿··· Ⅱ. ①尹··· Ⅲ. ①儿童教育 - 公民权 - 研究 - 中国 Ⅳ. ①D921. 04

中国版本图书馆 CIP 数据核字 (2011) 第 004818 号

教育博士文库

儿童受教育权:性质、内容与路径

ERTONG SHOUJIAOYUQUAN: XINGZHI, NEIRONG YU LUJING

出版发行 教育种学出版社 社 址 北京·朝阳区安慧北里安园甲9号 市场部电话 010-64989009 编辑部电话 010-64989235 邮 编 100101 真 010-64891796 X 址 http://www.esph.com.cn 传 经 销 各地新华书店 制 作 国民灰色图文中心 印 刷 保定市中画美凯印刷有限公司 版 次 2011年5月第1版 次 2011年5月第1次印刷 开 本 169 毫米×239 毫米 16 开 印 张 19.5 印 数 1-3000 册 印 字 数 290 千 定 价 40.00元

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摘 要

受教育权利作为一项基本人权既是国际社会公认的准则,也是当前我 国学术界的共识。自然人接受教育不需要任何先验的理由和条件,只因为 是人,源于人的尊严就应该享有。我国1982年《宪法》明确规定中华人 民共和国公民有受教育的权利和义务,2004年3月,又首次将"国家尊 重和保障人权"正式写入了宪法修正案的第二十四条. 列为第三十三条 第三款, 使尊重和保障人权成为国家的理念和价值, 为公民受教育权利作 为人权得到保障提供了宪法依据。2006 年新修订的《义务教育法》,在立 法宗旨方面实现了重大转变,标志着义务教育立法已由工具本位上升为权 利本位,由重视国家利益转变为强调公民权利,这是宪法规定的公民受教 育权利在义务教育领域的具体体现,更彰显了教育的人权特性。特别是在 构建学习型社会的今天,受教育权和学习权作为学习型社会中每一个公民 的基本权利,如何保障这一基本权利,是摆在国家、政府、学校、家庭和 社会面前的一项重要任务。义务教育作为国家的一项公益性、基础性、全 民性和全局性的事业,其普及程度和质量水平决定着国家和民族的未来。 而儿童作为义务教育的主体,也是受教育权利主体中最为庞大的、最为弱 势的和最需要保障的群体、保障义务教育阶段儿童的受教育权无疑又是 "重中之重"。

基于"受教育权利是人权"和"一切以儿童的最大利益为首要考虑"的理念,本书试图回答以下几个问题: (1) 儿童受教育权利的性质、内容及其独特性何在? (2) 义务教育是谁的义务? 国家、学校、家庭和社

会在儿童受教育权利实现中各自享有什么权利?承担何种义务? (3)义务教育的基本价值取向是什么? (4)学习型社会中公民的受教育权和学习权应如何保障? (5)当儿童受教育权利受到侵害时,如何获得补偿和救济?本书从儿童与国家、学校、家庭和社会等权利相对方构成的法律关系出发,综合教育学、法学和社会学等多学科视角,对上述问题进行了深入分析和探讨。全书共分七章,其中的基本观点如下。

- (1) 受教育权利是人权谱系中的一项基本权利,兼具积极权利和消极权利双重特性。受教育权利内涵有一个发展变化的过程,主要形成了公民权说、生存权说、发展权说和学习权说四种学说。"学习权说"是学习型社会中公民受教育权的应有之义,保障公民学习权应该成为学习型社会教育法律与政策建构的价值基础。义务教育阶段儿童的受教育权利主要包括请求权、福利权和自由权三方面的内容。
- (2) 从平等、效率和公平的基本含义出发,结合义务教育的独特性,确立义务教育的基本价值取向为教育公平,并遵循教育机会均等、可选择性和弱势补偿等原则。在当前,义务教育均衡发展成为教育公平的现实诉求。
- (3) 国家在义务教育发展中负有首要责任。特别是在构建学习型社会的今天,基于学习权之生存权、福利权和发展权的不同特性,政府的职能应从直接的管理型政府向间接的服务型政府转变,即采用立法、行政等多种方式,普遍设立学校及其他教育机构,并向一切人开放,保证教育机会均等。同时要加大对弱势群体教育和培训的扶持,努力向他们提供免费的教育。还要大力发展社区教育,真正实现任何人在任何时间和任何地点,只要想学习就能够学习。
- (4)由于学校和教师的教育权来自于国家的授权和父母与社会的委托,学校、教师对儿童的发展负有直接教育责任。因而,学校必须改革现存的弊端,确立学生的权利主体地位,建立尊重学生权益的学校制度,并逐渐建立开放的学校体系,扩大学生、父母和社会各界对学校教育的参与,共同创设合理合法的适合学生身心发展的学校环境。具体到教育教学的微观领域,通过确立以每"个"儿童为本的教育教学观,使学生受到公平的、尊重的、安全的和适合其身心发展阶段的教育。
 - (5) 父母对未成年子女不仅有教育的义务, 更具有"优先选择之

权",孟母堂事件和个别学童"在家上学"现象正是这种自由选择权的现实表征。基于父母教育权的自然权和基本权特性,有必要建立父母教师联合会,明确父母对学校教育享有充分的知情权、提案发言权和共同决定权,以消除"儿童人质论"对父母教育权行使的抑制。

- (6) 社会教育权作为先于国家的最原初的权利,在"市民社会—政治国家"的二元框架下,随着我国市民社会的不断生成,社区的不断健全和发展,社会组织和个人必将在儿童受教育权利实现中起着越来越重要的作用。2006 年夏发生在北京市海淀区的取缔"未经批准流动人员自办学校"事件,在中国市民社会进程中具有标本性意义,体现了社会公众和媒体对儿童受教育权利保障有着不可低估的作用。
- (7) 实体法所规定的儿童所具有的受教育权利,并不必然转化为现实。如何在宣示权利的同时,配置救济的各种途径,使儿童受损的权利及时得到补偿和救济是保障儿童受教育权最为关键的一环。面对当前诸多受教育权被侵害案例所揭示的学生申诉制度不完善、司法诉讼不畅等现状,有必要通过修改《行政诉讼法》,将公民受教育权利纳入到行政诉讼受案范围,或者由最高人民法院出台专门审理教育行政诉讼的规定,并建立教育公益诉讼制度,以使教育公共利益免受公权和私权的各方侵害。另外,还应充分发挥公共知识分子和学术共同体在促进受教育权保障中的积极作用,通过公民教育、扩大民众对教育诉讼过程的参与等途径,提高儿童及其相关主体的权利意识,以构建全方位的保障儿童受教育权利之立法、司法和社会监督体系。

关键词 儿童 义务教育 人权 受教育权利 学习权

Children's Right to Education: Nature, Content and Route

Abstract

The right to education, as a fundamental human right, is not only a principle widely recognized by the world community, but also a common sense among Chinese academia. It is only because of the indignity of human being that a natural person should receive education without any transcendental reasons or conditions. "Constitution of the People's Republic of China" (1982) explicitly stipulates that citizens of the PRC are subject to the rights and obligations of receiving education. In March 2004, it is the first time that the principle of "the state respects and safeguards human rights" was officially written into the Constitution Amendment as the Article 24 and then into the Constitution as the paragraph 3 of Article 33. It turns the respect and protection of human rights into concepts and values highly promoted by the state and it also provides a constitutional basis in safeguarding citizens' right to education, as a basic human right. The revised "Compulsory Education Law," (2006) has made a major shift in its legislative mission, marking the transformation of the legislation from

the tool-based to the right-based, from the emphasis of state interests to the stress of civil rights. Therefore, it has not only reflected the civil right to education regulated in the Constitution regarding compulsory education, but also has demonstrated the characteristics of human rights embodied in education. Currently, we are constructing a learning society. It is an essential duty for the state, government, schools, families, and also the whole society to guarantee the fundamental right to both education and learning for every citizen. Compulsory education, as the welfare of the public interest, is a fundamental, universal, and global business, whose pervasiveness and implemental standards will decide the future of the state and the nation. Consequently, it is essential to guarantee children's rights to compulsory education, because children, the major receiving agent of compulsory education, are the most massive and the most vulnerable group who are in great need of the best protection.

Based on the ideas of "the right to education is a fundamental human right" and "the maximization of children's interest is the priority", the following questions will be answered in this book: (1) What are the property, content and characteristic of children's right to education? (2) Who should undertake the obligation of providing compulsory education? What are the rights and duties for the state, schools, families and the society in realizing children's right to education? (3) What is the fundamental value of compulsory education? (4) How should citizens' right to education and learning be safeguarded in a learning society? (5) How can children get compensation and relief when their right to education is violated? This book will analyze and explore in depth the above issues regarding the legal relationships between children and other parties schools, families, including the state, and the society, multidisciplinary perspectives of education science, jurisprudence and sociology This book consists of seven chapters in total and the major themes are as the following.

(1) The right to education is a fundamental human right, with the characteristic of both negative and positive rights. The connotation of the right to education has been developed in the form of four theories; civil right theory,

survival right theory, developmental right theory, and learning right theory. Learning right is the proper meaning of citizens' right to education in a learning society. Therefore, the protection of citizens' right to education should be the value basis of educational laws and policies in a learning society. Children's right to compulsory education mainly includes the petition right, the welfare right and the liberty right.

- (2) Based on the basic meaning of equality, efficiency and equity as well as the characteristic of compulsory education, the principle of education equity is established as the basic value orientation of compulsory education, which implies the equality of educational opportunities, the right to choose and the compensation to the disadvantaged. Currently the balanced development of compulsory education is a requisite in realizing education equity.
- (3) The state should take the primary responsibility for the development of compulsory education. The role of the government should be shifted from a directly managerial government into an indirectly managerial government which provides service. It is only through the widespread establishment of schools and other educational organizations open to all, with the adoption of legislative, administrative and other means, that the fairness of educational opportunities can be ensured. At the same time, it is necessary to increase the supportive efforts of education and training to vulnerable groups, such as by providing them with free education. Furthermore, it is essential to develop community education in order to realize learning in any place to anyone at any time. One can learn whenever they want.
- (4) Because the right to education of schools and teachers derives from the state's authority and commissions of the parents and society, schools and teachers have direct educational responsibilities for children's development. Therefore, the existing shortcomings of the schools must be reformed. It is necessary to establish schools' principles of respecting rights of students, as main body in education. At the same time, it is important to establish an open school system gradually, and to expand the participation of the students, parents, and the communities in school education, and thus to create a reasonable and

legitimate school environment for both physical and mental development of students. At a micro level of teaching practices, it is essential for students to go through a fair, respectful and safe development, appropriate to their physical and mental development through a child-centered concept stressing each child's development.

- (5) The obligation of parents to minors is not only to have the children receive education, but also have a "right of first choice". Phenomena such as Meng Mu Tang incident and "home schooling" are reflections of the right of choice in reality. Based on the natural and fundamental characteristics of parents' education right, it is necessary to establish an association between parents and teachers, and to clarify that the rights of parents to school education include sufficient right to learn the truth, the right to inquire, and the right to make a collective decisions. This is helpful for eliminating the restraints of parents' rights to education by the theory of "Treating Children as Hostage".
- (6) The society's right of education is an original right prior to the state's original rights. Under the dual framework of "civil society-political state", with the continuous growth of civil society in China and constant improvement and development of local communities, social organizations and individuals will undoubtedly play an increasingly important role in realizing children's right to education. In the summer 2006, the incident of banning the "unauthorized private schools established by migrants" in Haidian District Beijing is a milestone in the process of the development of civil society in China. It indicates that the role of the general public and mass media in protecting children's right to education should not to be underestimated.
- (7) The right to education of Children prescribed in substantive laws has not been fully realized in practice. How to provide various means of relief for children to get their infringed rights compensated and relieved in time is one of the most important questions in the course of guaranteeing children's right to education. Due to the drawbacks in the current student appeal system and judicial proceeding systems, as implied in the cases where the right to education has been infringed, it is essential that we revise the "Administrative Litigation"

Law" and the Supreme People's Court make regulations specially for the administrative litigation in relations to education so as to bring such cases into the scope of administrative litigation. The system of public interest litigation concerning education should be set up to protect the public interest in education from both public power and civil rights. In addition, a comprehensive system of legislation, judicature and social supervision to safeguard children's right to education should be established, in which the public intellectuals and the academic community should play a positive role in promoting the right to education and in enhancing the awareness of children and other stakeholders by means of civil education and the expansion of citizen's participation in the educational litigation process.

Key Words: children, compulsory education, human rights, the right to education, the right to learning

序

尹力博士的专著《儿童受教育权:性质、内容与路径》即将出版, 很为她高兴。她多年来一直研究有关儿童的受教育权利问题,这本书可以 看作对自己所做工作的一个总结。义务教育是国家统一实施的所有适龄儿 **童必须接受的教育,是国家必须予以保障的公益性事业。义务教育是全民** 性质的教育, 是对全体儿童和青少年所实施的免费教育。如果把连续的教 育比作一场接力赛的话。那么、义务教育就是第一棒、义务教育的平等与 否、决定着第二棒、第三棒的平等与否。因此、义务教育要从质和量两个 方面去保证受教育的平权性。国家、学校、社会和家庭如何履行在义务教 育方面的职责,切实而全面地提高义务教育的质和量,保障义务教育阶段 儿童受教育权的实现问题既是整个受教育权利问题的核心,也是21世纪 我国教育改革和发展的重中之重。本书基于"受教育权利是人权"和 "一切以儿童的最大利益为首要考虑"的理念,从儿童与国家、学校、家 庭和社会构成的法律关系出发、综合教育学、法学和社会学等多学科视 角,对儿童受教育权利问题进行了全面的探讨。从内容上看,既有对重大 理论问题的探讨, 也有对现实问题的回应和剖析, 这些研究为义务教育立 法和公共教育政策制定提供了理论依据。

概览全书,感觉作者对儿童的受教育权利问题的研究已经相当深刻, 全书既有对有关受教育权利基本理论问题的探讨,也有对现实的儿童受教 育问题的分析,理论与实践融为一体,历史与逻辑统一于问题,使人感觉

作者的这项研究成果绝非朝夕之功,而是多年悉心积累的结果。全书首先 对受教育权利的基本含义、性质、内容以及受教育权与教育权和学习权之 间的关系等问题作了深刻的阐述、分析了受教育权利在人权谱系中的地 位、义务教育阶段儿童受教育权利的内容、学习型社会中的公民学习权等 问题。然后本书以较大篇幅探讨了与儿童受教育权利相关的国家、学校 (教师)、父母和社会等方面在保障义务教育阶段儿童受教育权利中享有 的权利和义务。作者的一些观点非常鲜明,已成一家之言,如书中提出, 国家在义务教育发展中负有首要责任。特别是在构建学习型社会的今天、 基于学习权之生存权、福利权和发展权的不同特性,政府的职能应从直接 的管理型政府向间接的服务型政府转变,即采用立法、行政等多种方式, 普遍设立学校及其他教育机构,并向一切人开放,保证教育机会均等。同 时要加大对弱势群体教育、培训的扶持、努力向他们提供免费的教育。还 要大力发展社区教育、真正实现任何人在任何时间和任何地点、只要想学 习就能够学习。书中强调、由于学校和教师的教育权来自于国家的授权和 父母与社会的委托,学校、教师对儿童的发展负有直接教育责任。因而, 学校必须改革现存的弊端,确立学生的权利主体地位,建立尊重学生权益 的学校制度,并逐渐建立开放的学校体系,扩大学生、父母和社会各界对 学校教育的参与,共同创设合理合法的适合学生身心发展的学校环境。具 体到教育教学的微观领域,通过确立以儿童为本的教育教学观,使学生受 到公平的、有尊严的、安全的和适合其个性的教育。书中还对现实中的一 些事例作了分析,强调父母对未成年子女不仅有教育的义务,更具有 "优先选择之权",孟母堂事件和个别学童"在家上学"现象正是这种自 由选择权的现实表征。基于父母教育权的自然权和基本权特性,有必要建 立父母教师联合会,明确父母对学校教育享有的权利,以消除"儿童人 质论"对父母教育权的抑制。在书的最后,作者基于儿童受教育权法律 救济的现状与问题,尝试提出了完善受教育权利保障体系的构想,并对教 育公益诉讼制度进行初步探讨。作者认为面对当前诸多受教育权被侵害案 例所揭示的学生申诉制度不完善、司法诉讼不畅等现状,有必要通过修改 《行政诉讼法》,将公民受教育权利纳入到行政诉讼受案范围,或者由最 高人民法院出台专门审理教育行政诉讼的规定,并建立教育公益诉讼制度,以使教育公共利益免受公权和私权的各方侵害。

尹力博士1996 年考入北京师范大学,随我攻读博士学位,从那时起就一直没有放弃对受教育权利问题的研究。她为此付出的精力是值得的,因为教育是一件涉及所有民众的社会公器,如何分配教育机会,如何保障每一个人的受教育权利是我们不能不关注的一个重要问题。

劳凯声于 2010 年末

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