# ISSUES ON THE RIGHT TO EDUCATION IN JAPAN*

## —REFERENCE TO THE COMPARATIVE STUDY—

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### はしがき

わたくしは1981年8月から1年間，American Council of Learned Societies（ACLS，アメリカ学術評議会）のスカラシップを得て Indiana University School of Law（Bloomington）に客員研究員として滞在しました。そこでは Law School の授業，演習と合わせて教育学部の教育法担当者であるマッカーシー教授(現学部長補佐)の演習にも参加させていただきました。また，教授には関係学会，大会の案内をいただいたり，調査インタビューのために教育委員会関係者などへの紹介もいていただき，いろいろとお世話になりました。ある時，教授から教育法の日米比較についての論文を留学の成果として是非書くようにと勧められました。当初，よもや論文などを書くことになろうとは思っていなかったので日本からほとんど資料らしきものは持参しませんでしたので躊躇していました。しかし，何度か教授と質問を兼ねて討論を繰り返すなかで，教育法の日米比較はどのような視点から行うことが可能か，を考えさせられ，若干その糸口のようなものが見えてきたところで，教授への説明にも有益と思い論文の執筆をすることにしました。そして，結局，わたくしの論文を土台としてマッカーシー教授との共同執筆という形で NOLPE（National Organization on Legal Problems of Education，教育法問題研究全国協議会）の機関紙である NOLPE SCHOOL LAW JOURNAL（掲載号未定）に発表することになりました。したがって，このわたくしの論文と共同執筆論文とではかなりの重複箇所があります。わたくしとしては，共同執筆論文は枚数制限や共同執筆ということでわたくしの視点を仰えたりしました。

このような経過からして，問題視角を率直に表わしているこの論文を印刷し残す意義があると考えた次第です。

ここで，マッカーシー教授への感謝とともに，Indiana University School of Law で研究条件を整えて下さった教授，職員の方々にも感謝したい。また，わたくしの留学を可能にして下さった ACLS および ACLS への財政的援助を日本から行っている日本証券奨学財団へもあわせて感謝したい。

1982年11月　　青木記

## Contents



The public education shall be performed under law in most western countries. In the course of the modern development of public education, the most basic arrangement of legalized public education is the establishment of compulsory education law. Even after building the legal

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This article was written while the author was a visiting scholar of the American Council of Learned Societies at Indiana University School of Law (Bloomington) during 1981—82. I cannot use the method of citation of Japanese materials according to the legal citation form due to the lack of official materials.

The article could not be completed without the help of Professor Martha M. McCarthy (Indiana University School of Education). I would express thanks for Professor Bryant Garth, who gave me some ideas and advice in early drafting.

foundation of public education, we have ceaselessly confronted with many serious problems pertaining to the governance of public education. The public school system has been swayed among the interests or powers of state, parents and children.

In the United States some controversial issues have been discussed, which include religious teaching, sex education, racial discrimination, students' rights in public schools and the role of court decisions on the school governance. In contrast with focusing on the function of court decisions in America, the governmental control over the public school through the administration is the most critical issue in Japan, which is simplified to be called the conflict between the state power and people's right to education. It is said that the best interest of children has gradually been taking root in social and legal settings, although conflicts on controversy continue to be happening. In this sense, the legalization[1] of public education should be employed to promote and protect children's right to education as the fundamental human right. In other words, the primary purpose of "legalization" in public education should be the guarantee of the right to education. System or means for realizing the right to education may be varied from country to country due to the historical, cultural and political circumstances. Some states need court intervention into the school governance, and others limit of government control. Models of legalization of public education can be varied with it.

These comments will be written for the preparation of comparative study of "legalization of education law." But now I cannot delineate the systems of legalized public education totally. This is the brief introduction of Education Law in Japan for reference to the comparative study. I will conclude to write some points of comparative study of education law.

## I. Constitutional Bases of The Right to Education

### 1. *The "Right to Education" in the Constitution of Japan*

As the result of the defeat of the "agressive" War, the new Constitution of Japan came into effect on May 3, 1947, during the allied occupation, which laid down three fundamental principles — popular sovereignty, protection of fundamental human rights and renunciation of war. The change of the Constitution appeared to be revolutionary for the Japanese society with the old constitutional system of an absolutism feature.

The right to education along with other fundamental human rights such as freedom of speech (article 21), academic freedom (Article 23) and so on is taken a base. The Article 26 of the Constitution of Japan pertaining to the right to education reads as follows:

> [Article 26] 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.

Relating to the provision of the right to education, the drafters, led by Professor Kōtarō Tanaka, thought that the precise rules was unappropriate for the Constitution style. The Constitution was involved with the political domain but education of people should be free from the political dominance. So, the fundamental principles of public education would be embodied in another Act like a "declaration", which was named the Fundamental Law of Education. It includes very principles of fundamental human rights or civil rights in public education such as religious

education [Article 9], equal opportunity of education [Article 3], equality of sex [Article 5] and so on. As the legislative process shows above, the constitutional principles are embodied in the Fundamental Law of Education. We need to understand the constitutional right to education in the Constitution and the Fundamental Law of Education, and after *Sugimoto* decision in Ienaga Textbook Certification Case[2] made these principle incorporated into the right to education and most of the subsequent cases were held as the incorporated constitutional right to education.

Until ten years ago the arguments related with the public school governance have particularly been focused on the Article 10 of the Fundamental Law of Education. There are three critical points about what educational administration controls over the school are, or to what extent the administration including the central gdvernment office may control and exercise the forcible influence to the school.

The Article 10 of the Fundamental law of Education provides that;

> [School Administration] Education shall not be subject to (a) *improper control*, but it shall be (b) *directly reresponsible to the whole people*. School administration shall, on the basis of this realization, aim at (c) *the adjustment and establishment of the various conditions* required for the pursuit of the aim of education.

a. The first issue is whether the legislature or administration may be excluded from the prohibited power or not. According to the construction of Government and School Administration side this phrase means that political party, religious group or labor unions may not be allowed to exercize influence in force, so the legislature and the administration

with the delegated power can control public schools. But it is clear in the legislative intent that it would prohibit the influence or control of the legislature and central or local administration over public school, especially over the curriculum, which reflected on the excessive control of public school during the pre-war period. Even now the situations of public education are exposed to the abusive power of the political government and administration. It should be emphasized that the main purpose of this phrase should be constructed with including the governmental control as the illegal force, as we know the situations in which the centralization of the Government since the 1950's, and the bureaucratic control, as below stated, have been strengthened.

b. The second issue is what the "direct responsibility to the whole people" means. This phrase was provided, at the outset, aiming at the popular control of public education and the decentralization of school administration. The school board's system, which originally had the popular election system of board members, was established on the base of this phrase. The initial system was shifted to the appointed system by the Law Concerning Local Organization and Functions of Education (1954). The prefectural boards of education, which consist of five members, are appointed by the Governor with the consent of the prefectural assembly, and the prefectural superintendent of education is appointed by the board with the approval of the Ministry of Education, Science and Culture (hereinafter referred to the Ministry of Education). The appointment of municipal board members need the consent of the municipal assembly, and also the municipal superintendents and the approval of prefectural boards of education for the appointment by the Mayor. This change would lose the "direct" participation of residents into the policy making process of public education. It is criti-

cized that the members of school boards with the approval and appointed by the political elected persons is not sufficient for the particular meaning of word "direct".

c. The third construction problem is whether the underlined phrase includes the content of education or curriculum or not. If so, school administrations may intervene the curriculum as one adjustment of "condition of education." Another interpretation states that under this phrase the school administration may not control the curriculum beyond the broad strandarrds of education. In this Article 10 education and school administration are explicitly distinguished. Therefore, the school administration should be limited to promote the *externa*—conditions of education excluding the content of education.

These issues have been argued in many cases in Japan.[3] Through the arguments it is said that the principles provided in the Fundamental Law of Education can take the base as the constitutional rights.[4] In other words, the right to education in the Constitution should be construed with including comprehensive constitutional rights shown in the Fundamental Law of Education.

## 2. *Constitutional Problems of The Right to Education*

Until the late 1960's from the enforcement of the Constitution of 1947, the state of the right to education has been criticized and commented from the view of physical or economical conditions of public education, which includes problems about parents payment for meterials, new addition for buildings, equipments in the school. Since the 1950's under the change of educational policy to the conservative, the more the government would involve or intervene with the public school in school curriculum,

teacher evaluation system, and others, the more many teachers (Unions) and parents fight not only for the freedom of education but also for promoting the educational physical conditions. Most and typical textbooks of the Constitution till the early 1970's make comments on right to education in the light of economical conditions of education, as included the equal opportunity of education. They don't take into consideration the freedom of education, more frankly speaking, I would say that their views are lack of reality of the freedom of education in elementary and secondary schools.

To understand the causes of negative construction of freedom of education for educational freedom, it is necessary to know the constitutional style and cultural backgrounds in Japan.

The first problem is that the right to education was positioned among the the social rights category, unlike the freedom category. The Constitution of Japan in 1947 was made under the influence of American Constitution theory, although, the Japanese constitutional style was heavily oriented by the German conceptual system. It is uneasy to change the tradition of legal theory oriented by the German system since the Meiji period. According to their theory fundamental human rights could be classified principally to two categories, *freedom*, including liberty, and *social rights*. For realizing the social rights, the state may and shall take an important function to accommodate and control social services including public education.

In addition to the position of right to education in the Constritution, social rights could be guaranteed through the state control, which is presumed to be democratized in the twentieth century. In the welfare state theory the state takes, for better or worse, the function of accommodating social service as well as controling them.

The second problem of the construction pertaining to education in the Constitutional rights is that it is acknowledged to be different from the academic freedom and other freedoms such as freedom of speech, association. The right to education is not like something different from freedom from the state. This thought on education has been accelerated by the constitutional tradition which distinctively differed education from the academic affairs. Education is the state business of inculcation of people, but the academic business of university is the task of search for truth. So, the state may control or should keep the standard of education, but may not intervene in the university academic affairs. Such two dimensions policy of education and academic affairs relationship has been established in the Meiji government. The new Constitution, which proclaim the guarantee of freedoms radically, would have diminished or transformed the two dimension policy.

## II. Political and Social Settings of Legalized Public School.

It is a truism that the good knowledge of comparative study of law should be taken non-legal elements into account. Particulary stressed on the function of legal control over public school, it is necessary to understand some outer legal circumstances. This part explains the legal feature or climate of governance of public education in Japan.

### 1. *Bureaucratic Control of Public School.*

It is difficult to understand the legal control of the Japanese public education without knowing the bureaucratic and centralized administration of public school. Glancing over the legal system of Japanese school administration, there are boards of education at two local levels--prefectural

and municipal, which are similar to the system of American School administration. The initial system of Boards of Education was established under the Board of Education Law in 1947 during the post War Reform in order to change the legal structure and climate (attitude) of educational administration which had been extremely centralized and bureaucratic before the War to the decentralized and democratic ones. But this endeavor didn't last a long time. In 1954, the new law was passed under the political circumstances changing towards the conservative (reacting to the post War Reform which had been more democratic than it had been) and the conservative trends were strengthening the political majority control over public education and the power of centralized administration.

The great difference between Japan and the United States concerning the school administration, is the existence of the powerful central administration. In addition to this system people's attitude to the centralized state power is explicitly not shown dangerous to education. In other words, most Americans do think the centralized administration shall contradict to the democracy in education, but many Japanese do not think so.

In the course of the legalization of public education there should be a basic discontinuity between the post War education and the pre-war period. But they have survived in the administration system and people's attitude or educational climate. We need to look back to the historical features of public education in Japan since the Meiji period.

Until the post war reform the public education had been governed by the Emperor Order (choku-rei) without the control of legislature, which on the idea that education of people (which was called "subject" then) is so important or spiritual that the Emperor (Tennou) should keep the direct control of "Education". To receive education is not the right to develop the capacity of individuals, but the tools of Emperor and sources

of the state, which aimed to be "rich country and strong army." Under the legal system children and parents should be subordinated to the Emperor or representatives of the Emperor (public officers including teachers). The education of a child is one of three great obligations--payment of tax and compulsory obligation to military service. The old educational system could be developed to indoctrinate the authoritative values[5] into children.

After World War II the new Constitution declared the realization of democracy and the guarantee of fundamental human rights. The new society should be based on the idea of individualism, which is shown in the Constitution and the Fundamental Law of Education.

> [The Constitution] Article 13. All of the people shall be respected individuals. Their right to life, liberty, and the pursuit of happiness shall be the supreme consideration in legislation and in other governmental affairs.
>
> [Fundamental Law of Education] Preamble. We shall esteem individual dignity and endeavor to bring up the people who love truth and peace, while education which aims at the creation of culture general and rich in individuality shall be spread far and wide.
>
> Article 1. Aim of Education
>
> Education shall aim at the full development of personality, striving for the rearing of the people, sound in mind and body, who shall love truth and justice, esteem individual value, respect labour and have a deep sense of responsibility, and be imbued with the independent spirit, as builders of the peaceful state and society.

The bureaucratic relationship in the educational administration has

survived even after the change of public education. In the post War reform the power of central educational administration was required to be weakened and decentralized. It should confine the business as the "service" department, and should not control and order to the local boards unlike the other general administrations. But the Ministry of Education has increased the influence and power over the local boards or local educational administrations through many channels such as the visiting officer to the local educational positions, sending circulars, budget cut pressure and others. In this sense we seldom find the board of education would make decisions on a lot of areas of educational policy independently.

In addition to the centralized educational administration current leading political party has pressed to centralize the educational administration and hostile to the individualistic democracy and education. The conservative party repeated to criticize the post War reform and intend to change the centralized administration since it is easy to control public education and mainly inculcate their own political values to children through the bureaucratic control.

2. *Innovating and Solving Process of Educational Affairs.*

The decision making process in educational policy is characterized as the strong bureaucucrats and the inactive courts in Japan in the contrast to American scene. There are a lot of reasons which raise the divergence between two countries. This part explains some historical and social conditions of these features.

First of all, I will take the question why courts have not functioned or assumed the role for solving the educational conflicts. During the past decade there is a changing attitude toward litigation against the board of education or teachers, but a little bit. Many cases has been still

brought in the criminal case. As mentioned above, it is usual that members of Japan Teachers Union (J.T.U.) defefending or protesting the educational policy might be prosecuted by the government on the ground of the disturbance or violence to the public officer, or strike. Until the ealy 1970's there has not been such court decisions as to affect or have influence on the educational policy. In this sense, courts has not played the functional role in the educational policy. We can point out some social and legal barriers for people to bring legal suits for solving educational conflicts.

Firstly, most Japanese would not bring suit for solving conflicts. The small numbers of legal cases does not show that there are less conflicts in Japanese society, but many conflicts could be solved out of courts with helping through the administrative initiative. Such attitude toward litigation is accelerated against the administration. Generally speaking, it is said that the Japanese people have common attitudes of "the respect of the officials and downgrade the people.", and that since the Meiji period the law has been used as the tools of rule by the Government. These notion of traditional attitude reflects the legal system or right-consciousness of Japanese. Education has also been the obligation of subjects (people) for a long period. Such educational tratition is magnified by the legal attitude, and then private persons of individual parent could not work for solving the conflicts or raising critiscism on public education. Most parents would publicly not criticize the school or school administration, but leave their education of the child wholly to the school decision.

Secondly, we have had the difficulty to pass over the hurdle of administrative dogma for bringing the suit concerning the student-school relationship. Courts repeated to reject the cases on the ground of the

*Besonderes Gewaltverhältnis* (Special Governmental relation). According to this theory, once students get an agreement with the school they shall be subject to the school officers or teachers. Applying such theory to the educational cases, courts could not intervene or decide the issues on student-school relationships. If I understand the situation in good direction, courts respect the gratitude or professional discretion to the school. But under the circumstance of Japanese school, it is not exaggerated that courts allowed the school administration to control or subordinate the students and parents.

Thirdly, there are lack of arrangements and forces for people to bring the suit against the excessive or the abuse of power of school administrations. In the United States the growing involvement of the federal courts in education has been increased in the litigations supported or represented by the civil rights groups such as the National Association for the Advancement of Colored People (NAACP) and American Civil Liberties Union (ACLU) and legal services funded by Office of Economic Opporturity (OEO) for filling the suit alleging the discrimination violation of the Civil Rights Act 1964 and Legal Service Corporation Act (LSCA) in 1974. And in addition to these legal aids the government may represent the minority discrimination against local administration and others[6]. There has been no developments of arrangement and forces facilitating the legal suits against the school administration.

The Ministry of Education advocated the state control of public education in the courts and government publications. One of the reasons for justifying the power of central educational administration is usually supported by the need of centralized administration for the modernization of the Japanese society[7]. So, school administrations and schools in the whole country do look like having the same face or features.

Under the centralized circumstances educational issues or conflicts might be solved by the governmental agency through the standardized rules (shown on the circular of the letters of the Ministry of Education). I think that one significant fact in Japanese administration is that central administration publishes a lot of circulars or letters to local agencies, most of which the public don't know them. And these are applied not only to individual cases, but also to the subsequent cases in the whole country unless the statute does provide the precise and strict regulations.

I will take the example to show the close tie relationship between the Ministry of Education and the local departments of education. In the case of student discipline the principal of the school would consult the local school administration for deciding the solution policy. If this case was criticized by the public or did not have the precedent, the local school administration would immediately ask for the Ministry of Educatiion by telephone or letter. And then it might answer or direct to do it. These questions and answers can be accumulated into the *Handbook for the School Administration*, and that they have the strong force on the school administration and managements.

Another case of such relationship is shown in the personnel or officials of local educational administration. High ranked officers of the Ministry of Education can visit and take the position of local educational administration. If he had done the good job, sometimes to control the Unions or to execute the pilot policy well and so forth, he would come back to the higher position in the central administration.

There are many pressure and tools for the Ministry of Education to control the local educational administration. And most boards of education would be subject to the administration or superintendents. As the result, in Japan, the Boards of Education have less influence or initiative for

the educational policy. It is not exaggerated to say that basic policy making can be controlled by the Ministry of Education, which is the bureaucratic organization, but not the democratic body for education[8].

## III. Key Steps to Consciousness of Educational Rights

### 1. *Historical Overview Till the* 1960's

Few cases were sued by individual parents or students against the school administration. In Japan, as mentioned above, most people feel hesitation or consider it a bad thing to call for the legal suit for solving conflicts or contradictions. Until the 1960's most cases were happened to be related with the Japan Teacher's Union (JTU), and that were criminal cases. The Union protested the Government policy on Education, and some leaders would be prosecuted. That is the typical pattern of legal cases pertaining to educational protests.

There was another barrier of legal theory for litigation. The legal relationship between school and students might be considered as the *Besonderes Gewaltverhältinis* (Special Governmental Power), in which students or parents could not call for the judicial remedies. They should be subject to the school officials at the school. This dogma, which had the origin of German Administrative law, has survived to the 1960's. It takes a long time for the judicial courts to go into the school gate.

Now, two decisions of the Supreme Court of Japan can be picked up for understanding the consciousness of education rights at the Court. One is called Popolo Player's Case and another Free Textbook Claim case.

The first case happened on Febrary 20, 1952 at the University of Tokyo campus. A student's group of theatrical players at the University

of Tokyo put on a political play for the University community, with the permission of the university officials. During the performance students discovered four plainclothes policemen in the audience, and found the police inquiries not concerning activities of certain faculty members. Students assaulted and forced the policemen to write a letter of apology. The accused students was arrested for a crime of violence, but he was acquitted by both the Tokyo District Court[9] and the Tokyo high Court[10].

The main part of opinion for remand at the Supreme Court was stated as follows:

> The academic freedom of that Article [Art. 23] includes freedom for academic research and the freedom to announce the results of that study. The guarantee of academic freedom under that Article intends that such freedom should be broadly guaranteed to all the people, but especially to the university in the light of its essential nature as a center of arts and science where truth is intensively pursued. *The freedom of education and teaching are closely related to academic freedom, but not necessarily included therein.*[11] [emphasis added].

Unlike the application of academic freedom to elementary and secondary school, the Supreme Court held that the construction of academic freedom [Art. 23] of the Constitution protects only the freedom of research and teaching at the university level, which heavily oriented by German construction of academic freedom. Its opinion might retard the development of freedom of education in elementary and secondary school.

The underlying thought in the interpretation was the dichotomy of research and teaching (or education), which took deeply root under the Meiji government policy. The policy sustains the research and teaching

only relating the research results free from the outer powers, but teaching in elementary and secondary schools might be restricted by the governmental power within the extent of reason. This is the very high barrier for the freedom of education to keep in the public school.

Secondly, the Supreme Court held the decision related to the right to education clause [Art. 26]. A parent of elementary school pupils claimed for reimbursement of the required textbook fee used in the compulsory school. Both lower courts rejected this claim[12], the Supreme Court held to the appeal of parent as follows:

> This claim is not proper with reasoning that the provided free compulsory education means that "All the people are obligated to have all boys and girls under their their protection receive the minimum, ordinary education. Some monetary compensation includes only "tuition"[13].

The opinion was held in the light of literatural interpretation of Article 26, which should the coverage of educational conditions under the Constitution.

Both opinions could not reveal the structure and significance of right to education.

### 2. *Critical Points for Developing the Educational Freedom—to compare two decisions.*

The landsmarking decision in the development of Education Law in Japan was held at the Tokyo District Court on July 17, 1970, which has had a great influence not only on the legal theory of education law and constitutional law, but also on the product of educational rights consciousness in the Japanese society.

The old-fashioned construction of the constitutional literature has inclined to consider the educational rights in the light of monetary and physical conditions, in which it is confined to the concept of equal opportunity of education.

The *Sugimoto* decision prevailed the freedom of education as another essential fact of the constitutional right to education. This elemental idea of educational rights has conventionally been neglected or made light of in the Japanese school. The *Sugimoto* decision, even though it was held at the lower court, was appraised to proceed with the constitutional right to education profoundly. Many literature of the Japanese Constitution would be forced to reconsider the nature of educational rights as the fundamental human rights, and since then many legal scholars have made comments with touching heavily on the freedom of education.

In 1960, the Ministry of Education disapproved the Textbook of Japanese history for use in the senior high school; titled *Shin Nihon-Shi* (New Japanese History). The Author Ienaga, then Professor of History at Tokyo University of Education sued against this certification system of school textbooks. He brought two suits against the Japanese government on the grounds that the certification of textbooks (Kyoka-sho Kentei) violates the freedom of speech, right to education in the Constitution of Japan and the Fundamental Law of Education (Article 10 — abuse of educational administration power). One is the order for annulment of disapproval of his textbook, and the other is the claim for the damages of making no use of textbook drafts and other interests. The *Sugimoto* decision was held for the first suit, which stated that the certification of textbooks did not violate the Constitution only in use of checking typographical errors, misprints and very clear errors of "historical facts". The Court construct the education right as the freedom consolidated

academic freedom (Art. 23), freedom of Speech (Art. 21); right to education (Art. 26) and the Fundamental Law of Education.

The main part of the decision, which just takes a long sentence, reads as follows:

> This [Article 26] is to be interpreted as meaning that in a democratic society which respects individual dignity, every citizen has the duty, not only towards his own children, but towards the whole of the next generation, to help them to develop their own personalities, to transmit to them the cultural heritage and to develop them as individuals capable of sustaining a healthy society and a healthy world.
>
> This fundamental notion may be called, in contrast to the concept of the state's right (it should be change "power" — the referer) to education, the concept of the people's (or of the nation's) freedom to educate.[14]

Following the basic idea of right to education, the decision prescribed the function of the state; first, the primary function of the state is to assist the people to perform their duties to educate their children. Secondly, the power of Government do not require involvement in the content of education ("*interna*" of education), but only the provision of the necessary facilities ("*externa*" of education).

Touching on Ienaga's academic freedom in writing the textbook for senior high school students, the decision indicated the application of academic freedom in elementary and secondary school. The construction of the academic freedom is stated as follows; academic freedom (Art. 23) contains:

> The right of scholarly freely to publish the results of their academic work, including their theories and opinions as scholars, and the publication of textbooks is naturally included as one form of such publication. ...it is one of the purposes of school education to foster an eagerness for the pursuit of truth which is also the function of university research."[15]

In addition to the constitutional construction of educational rights, the holding indicated the essential nature of education as the underlying idea of the Fundamental Law of Education (Article 10.) Education is to be performed :

> in the personal contact between teacher and pupil : teachers, through their own study and efforts at self-improvement, should seek to embody the rational "will to educate" of the people as a whole and, owning a direct responsibility to the people as a whole, to fulfill the task which the people have entrusted to them."[16]

In this way the *Sugimoto* decision made the limitation of the governmental control of education, and then geared the control of education to the autonomy of teachers and the people including children for the development and management of school education. This surprised the Government and people of conventional idea who have leaned to the state controlled education.

After the *Sugimoto* decision in 1970, courts, which faced with educational legal issues, could not pass over this opinion. Until then many cases concerning educational controveries has been held with limiting to the argument of the Fundamental Law of Education (mainly Article 10). As lower courts came to decide based on the constitutional right to education, the Supreme Court of Japan might be forced to show the new

interpretation about the right to education and academic freedom. The Supreme Court delivered the unanimous judgment pertaining to the right to education in May 21, 1976[17]. The case happened in 1961. During the late 1950's to the early 1960's the Ministry of Education executed a nation wide testing program at the junior high school, which confronted with the opposition of the Japan Teacher's Union including parents and university prepfessors. This called "National Unified Junior High School Achievement Examination" was planned and forcibly scheduled by the Ministry of Education, and the responsibility of managing the test was assumed by the prefectural boards of education, the municipal boards of education and school principals. The Union had conducted the militant resistance against the enforcement of the test. The test is characterized as an illegal intervention into the ordinarily classroom management, which was violated the Article 10 of Fundamental Law of Education. In Hokkaido on the date of the test, one Union leader and three sympathized habitants was prosecuted for disturbing the test and violence against the principals (public officers).

Both the Asahikawa District Court and the Hokkaido High Court judged that the national achievement test administrered by the Ministry of Education was the excessive power of educational administration in the light of the Article 10 of Fundamental Law of Education and other statutory interpretations, not referred to the consitutional rights to education.

The Supreme Court Opinion of this case showed the basic idea of the constitutional right to education against the state controlled education. The opinion is read as follows:

> The primary issue concerns who has the right to educate the child. Fundamentally, education is entrusted to the parent.

> This statement [Article 26] implies that every person has the right to develop his or her personality both as a citizen and an individual. Thus, education must be carried out in the interest of the child..... The Court recognizes that education is vulnerable to political influence even under a parliamentary form of Government. Therefore government involvement in determining the content of education must not be excessive.[18]

Following these statements, the opinion allowed the governmental intrvention to the content of education with limiting the governmental control, because;

> It is natural that conflicting opinions arise concerning just what is in the best interest of the child. Unfortunately, the Constitution does not provide an answer. [Beyond the teaching at home and the choice of either private or public school for the child], the Government must determine the will of the people and accordingly educational policies for the benefit and progress of society and for the development and growth of the child. ...In order to establish minimum national standards of education and to assure equal educational opportunities, the government with the sanction of the people must establish necessary and rational general policies for the public schools.[19]

The evaluation of the Supreme Court decision was divided even among professors who took the position against the Governmental intervention. One group of professors took the decision as the allowance of governmental intervention into the content of public school. The other group understood that his opinion could not provide the plain standards or justification of

governmental control of public education, so the clear rule shall be resorted the future cases in the current situation the basic idea of the opinion would put the limitation on the governmental control, although it is not necessarily restrictive on the governmental power.

The new standards reached the new stage of construction of constitutional rights to education, but it does not provide the clear standards and left the following case to establish the concrete rules for deciding the educational rights policy.

## IV. Some Suggestions for the Comparative Study of Education Law —like the conclusion.

Intending to compare the education law in the United States and Japan, I have drawn the introduction of education law in Japan. It is emphasized that the question is how the education law is enforced and functions in a certain circumstances of Japanese society. We find little analysis of functions os courts decisions and education laws, but almost legal study is likely to construct the conceptual system or interpretation.

Some significances might be raised from these analysis, which has the very contrast with the education law structure in the United States. The legal structure of education in Japan can be allowed the state government to intervene the public school, although many civic groups and teacher's union might have little influence on and criticize the educational policy. These situations are as if the state controlled school. As the result most conflicts have been canalized to the state controlled results which cannot often give actual solution. In this way, we could not find the autonomous character of education law, such as the local autonomous decision and teacher's autonomy.

During the past decade the courts decisions fill the important role in making the educational policy in education in the United States. There are extending areas of public school concerning the courts intervention into it, beginning with *Brown v. Board of Education* in desegregation case. Since the late 1960's there have been a lot of courts decisions affecting the school policy and managements. Some of them resulted in promoting the school reform among certain aspects of school administration and finance. We found as merely a few examples, such as *Tinker v. Des Moines Independent Community School District*[20] in the students' freedom of expression, *Goss v. Lopez*[21] in procedural due process of school discipline, *Pennsylvania Association for Retarded Children v. Commonwealth of Pennsylvania*[2222] and *Mills v. Board of Education*[2323] in handicapped children's right, and many other cases in school finance and teachers' rights. Conflicts have dared dispute court decisions.

In the notion of democracy in education, education of children is vested to be involved with local residents, on the other hand, the aim of education is of the universal value which means that it purports for developing the capacity of individual person. And also education of children can be beyond the value of current society or adults. So, the legalization of public education should help promote the universal value and that should not confine that children only within the current society or adult values.

Children in the Japanese schools should be exposed to the wide range of conflicting values. Realizing the educational right as the fundamental human rights, we need more democratic process of public education. Nobody cannot be democrat or healthy civics just only they are taught the rule or principles of democracy and fundamental human rights. Children have to experience democratic process and human rights in public schools.

## FOOTNOTES

1. The word "legalization" is used in this context as the notion of government regulation permeating through the boundaries of education. The theme of the legalization of public education is focused on how and why the public education has been and is involved with the government by law. Another meaning of the word "legalization" is found in the example in the "legalization of abortion." This is the making process of legal or permissible that which was previously prohibited.
2. I regret not using the recommended usage of cases and statutes citing in this article as I don't get most materials and books in official form. In Japanese legal literature we don't have such uniform citation system.
3. Most cases concerning the "National Unified Achievement Test" contained in this issue and went up to over 15 cases until now.
4. In Hokkaido case (Keishu 30 No. 5, p. 615) the Supreme Court ruled as follows:

> The Fundamental Law of Education was provided for aiming at proclamation of fundamental ideas and principles of our whole education and educational system, instead of providing precise education article in the Constitution ... and is the central role among many other statutes with aiming at the radical change of the post War Japanese education. ... Therefore, it is taken the provision, purposes and intentions into account as possible in construing the other educational provisions.

5. Legal source of this value is Imperial Rescription Education (1890), which contains moral values, loyalty and filial piety mainly based on the Confucian doctrine.
6. Developments of American civil rights litigation impress me with the crucial interaction between the federal government and courts. Such person to bring suit against the government would be forced to be isolated and lack of spiritual and financial support except for some recent cases showing *Inaga* Textbook Supporting Association.
7. See, OECD, Reviews of National Policies for Education—Japan, 1971, part II Autonomy and Flexibility in Education.
8. Although the Ministry of Education claims that the government is entrusted by the elected members of Diet under the representative government form, in not enough democratic for the educational process.

9. This case was ruled on May 11, 1954, at Tokyo District Court.
10. This was ruled on May 8, 1956, at Tokyo High Court.
11. Supreme Court, Grand Bench, 22 May, 1963, 17 Saiko Saibansho Keiji Hanreishu (A collection of Criminal Supreme Court Cases) [hereinafter cited as Keishū] 370, translated into English in Itoh and Beer, The Constitutional Cases Law of Japan—Selected Supreme Court Decisions, 1961—70, at 226 (1978) [hereinafter cited as Itoh and Beer].
12. Tokyo District Court held the decision on November 22, 1961, and Tokyo High Court held on December 19, 1962.
13. 18 Minshū 2 at p. 343, Supreme Court, Grand Bench, 26 Febrary 1964, Itoh and Beer, Supra note 11 at 147.
14. The passage was translated into English in Dore's Article ; *Notes and Comment —Textbook Censorship in Japan : the Ienaga Case*, 43 Pacific Affairs 4, p. 548 (1970) at 552.
15. *Ibid*, at 552.
16. *Ibid*, at 552.
17. 30 Keishu 5, p. 615. See, Duke, *The Japanese Supreme Court and the Governance of Education*, 53 Pacific Affairs 1, p. 69 (1980).
18. This passage was translated into English in Duke's Artical at 75.
19. *Ibid* at 76.
20. 393 U. S. 503 (1969).
21. 419 U. S. 565 (1975).
22. 334 F. Supp. 1257 (E. D. Pa. 1971).
23. 348 F. Supp. 866 (D. D. C. 1972).
24. See San Antonio Independent School District v. Rodrigez, 411 U.S. 1 (1973), Robinson v. Cahill, 62 N. J. 473, 303 A. ad. 273, cert. denied, 414 U.S. 976 (1973), Serrano v. Priest(II), 18 Cal. 3d. 728, 135 Cal. Rept. 345, cert. denied, 432 U.S. 907 (1977).
25. See Pickering v. Board of Education, 391 U.S. 563 (1968), Mt. Healthy City School Board of Education v. Doyle, 429 U.S. 274(1977).

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(Books and Articles in English are limited on this area. Beer's article contains a lot of references of Japanese education).