

A Study on the Improvement of Local Education Autonomy System

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[Abstract]

Article 117, Paragraph 1 of the 「Constitution」 states that “Local governments may enact provisions relating to local autonomy, within the limit of Acts and subordinate statutes”. It restricts the enactment of effective self-government laws. The fundamental problem-solving is securing the right to self-governing legislation through constitutional amendment. Therefore, it must be revised to “Local governments can make regulations on self-government to the extent that they handle resident welfare affairs in accordance with the subsidiarity and do not violate the law.” In the long-term perspective, the current education council problem, which is contrary to the constitution, has to be revived as a constitutional independent education committee system, and the voting agency and the executive agency must go together and education councilors must have about 10 years of experience in education and education administration. The current superintendent's election system is of great significance in establishing democratic legitimacy by ensuring residents' right to vote and securing a superintendent's representation of residents. It hasn't been long since the system was implemented, but there are some side effects and it is argued that the election system should be replaced by the appointment by the head of the local government, the running mate system or the joint registration system. However it is thought that it is necessary to minimize and supplement the side effects rather than fixing the system as it violates the Constitution of the local education autonomy system.

▶ **Key words:** Local Education Autonomy System, the constitutional basis, Board of Education System, Superintendent Election System, Vice-superintendent System

[요 약]

「헌법」 제117조 제1항에서 “지방자치단체는 법령의 범위 안에서 자치에 관한 규정을 제정할 수 있다”고 밝히고 있다는 문제로 실효성 있는 자치법규를 제정하는 데 한계가 있어, 근본적인 문제 해결은 헌법 개정을 통한 자치입법권을 확보하는 것이다. 따라서 “지방자치단체는 보충성의 원칙에 따라 주민 복리에 관한 사무 등을 처리하며 법률에 저촉되지 아니하는 범위 안에서 자치에 관한 규정을 제정할 수 있다”로 개정을 해야 하는 것이다. 헌법에 위배되는 현행의 교육의원 문제는 장기적인 관점에서는 합헌인 독립적인 교육위원회 제도로 부활하여 의결기관과 집행기관이 짝으로 이루어져야 하고, 자격요건은 10년의 교육행정 경력이 있어야 한다. 현행 교육감직선제는 민주적 정당성 확립의 의미가 있지만, 제도 시행이 짧은 상황에서 나타나는 부작용이 커서 교육감직선제에 대한 폐지 주장에서 나오는 지방자치단체장의 임명제, 러닝메이트제, 공동등록제 등은 헌법에 위배되어 또 다시 제도개선을 하기 보다는 부작용을 보완하는 방안이 필요하다고 생각된다.

▶ **주제어:** 지방교육자치제도, 헌법적근거, 교육위원회제도, 교육감선출제도, 부교육감제도

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I. Introduction

Local education autonomy system is an institution and system, designed to reflect local specialties in education along with independence, professionalism and neutrality specified in the Constitution and ultimately aimed at developing local education. Local governments has organized and operated separate institutions in charge of education and arts-related affairs.

This study investigates the constitutional basis and improvement on the regulation of the current local education autonomy system and the improvement of a superintendent of education's election system, the Board of Education system and a vice-superintendent system.

II. Constitutional Basis and Improvement on the Regulation of Local Education Autonomy System

1. Current Status and Problems

Among the laws related to education, the Constitution is the first legal basis for local education autonomy system. Under the premise that the autonomy principles of local autonomy and local education autonomy are the same, the legal basis for local education autonomy system can be found in the provisions of the local autonomy system specified in Article 117, Paragraph 1 of the Constitution.

The Constitutional Court explains that Korea had a local autonomy system before the legislation was enacted. In other words, before the enactment of 「Local Education Autonomy Act」, the local education autonomy system existed under the legislation.[1]

In addition, the Constitutional Court judged education autonomy and local autonomy as institutional security as follows. “Article 31, Paragraph 4 of the 「Constitution」 states that independence, professionalism and political impartiality of education and the autonomy of institutions of higher learning shall be guaranteed

under the conditions as prescribed by Act. Article 117, Paragraph 1 of the 「Constitution」 stipulates that local governments shall deal with administrative matters pertaining to the welfare of local residents, manage properties, and may enact provisions relating to local autonomy, within the limit of Acts and subordinate statutes.”[2] Another judgment states that “Local education autonomy has a property of local autonomy as it is guaranteed as a part of local autonomy and also has an attribute of cultural autonomy against political power because it is intended to realize independence, professionalism and political impartiality of education guaranteed by Article 31, Paragraph 4 of the Constitution.”[3]

2. Improvement

The theory of integration with local governments or abolition of education autonomy should be avoided in consideration of the efficiency of local administration. In 2013, the government enacted the 「Special Act on Local Autonomy and Decentralization, and Restructuring of Local Administrative Systems 」 (Abbreviation: Local Decentralization Act) and Article 12 (Reorganization of Special Local Administrative Agencies, etc), Paragraph 2 of the Act, which stipulates that “The State shall endeavor to consolidate systems for autonomy in education and local government,” denies independence, expertise, and political impartiality of education under Article 31, Paragraph 4 of the Constitution, which is the basis for education autonomy. As it is evaluated as being unconstitutional, it must be deleted through the submission of a constitutional petition and it is necessary to clarify the constitutional basis of the local education autonomy system in order to faithfully implement the local education autonomy system. For this, the ‘local education autonomy system’ must be additionally specified in Article 31, Paragraph 4 of the Constitution. It is necessary to ensure that the local education autonomy system is stipulated in the Constitution with the phrase of

“Education independence, professionalism, political impartiality and local education autonomy system are guaranteed by law”.

Article 117, Paragraph (1) of the 「Constitution」 states that “Local governments may enact provisions relating to local autonomy, within the limit of Acts and subordinate statutes.” For this reason, there are limits to enacting effective self-government laws. The fundamental problem solving is securing the right to self-governing legislation through constitutional amendment. Therefore, the provisions should be revised to “Local governments can make regulations on self-government to the extent that they handle resident welfare affairs in accordance with the subsidiarity and do not violate the law.” In addition, the current 「Local Autonomy Act」 states that “Local governments may establish municipal ordinances concerning their affairs within the scope of statutes: Provided, That in order for such local governments to prescribe matters concerning the restriction on rights of residents, the imposition of obligations on residents, or penalties, they shall have the authority delegated by Acts.” The ‘Revised bill of Local Autonomy Act’ recently submitted to the National Assembly also completely blocked the effective self-government legislation. Therefore, Article 22 of the 「Local Autonomy Act」 should be amended to ‘Local governments may enact regulations on self-government within the scope of not violating the law’. This is because it is necessary to clarify the revision scope of the legislation of self-government.

III. Board of Education System

1. Current Status and Problems

In accordance with the Constitution, local education autonomy has a property of local autonomy as it is guaranteed as a part of local autonomy and also has an attribute of cultural autonomy against political power because it is intended to realize independence, professionalism

and political impartiality of education guaranteed by Article 31, Paragraph 4 of the Constitution. Due to this ‘twofold autonomy’, it is inevitable for democratic legitimacy of local education autonomy to be requested to some extent. Local education autonomy must satisfy the three constitutional values of ‘democracy, local autonomy, and educational independence’. There was a judgment stating that, “In accordance with the Constitution, the educational committee or a superintendent, non-political institution, should not be elected in the same way with the election in the political institution (member of the National Assembly, the President) or by the head of local government or a local assembly or by the education or culture industry by putting too much focus on the demand of democracy or local autonomy or education autonomy”.[4]

Therefore, the problem with the current ‘Education-related General Standing Committee’ system belonging to city/province councils excluding Jeju Island is: First, as the Board of Education is integrated into the Standing Committee of the local council, members of the city and provincial local councils, which are party members, constitute the members of the Board of Education in proportion to the number of seats in the party. Since it is made up of lawmakers, it is inevitable to be politically oriented to either party, which violates the constitution, which is the principle of political impartiality in education. Second, the current Board of Education system does not require certain standards for qualifications such as education and educational administration experience, so if it is not possible to secure a lawmaker with professional knowledge or experience in education, it is difficult to actually check or support a superintendent, which violates the constitution, which is the principle of professionalism in education. In other words, if a party with the same political orientation as a superintendent occupies a majority of the seats of the city/provincial council, it is difficult to operate the check system, because it cannot perform the function of checking the policy of a superintendent

and the process of deliberation on educational budgets by city and provincial councils has also been transformed into a political process and does not function as a professional check.

2. Improvement

In order to ensure independence, professionalism, and political impartiality of the education of constitutional spirits, the Board of Education must be revived in any form. In the process of separating the Board of Education, which is a consensus-based enforcement agency, into the Board of Education as a voting agency and a superintendent as an executive agency, a superintendent was changed to an independent enforcement agency. As a result of the abolition of the Board of Education as a voting body, a superintendent is only responsible for the education issues that must be entrusted to the consensus-based institution for professional deliberation. Therefore, there is no mechanism to check a superintendent's arbitrary local education operation, and education expertise is not being utilized. For the development of local education through checks and balances, the restoration of the Board of Education together with a superintendent of education is very urgent, and the qualifications of the education councilors must require about 10 years of educational and educational administration experience. The 'Revised bill of Local Autonomy Act' recently submitted to the National Assembly and the 'Comprehensive Plan for Autonomous Decentralization' of the Presidential Committee on Autonomy only presented the task of promoting linkage and cooperation between educational and local autonomy and did not mention the issue of the unconstitutional education committee, the biggest obstacle to local education autonomy.

If politically it is difficult to revive the City/Province Board of Education, from a short-term perspective, first, the Election and Local Council Division of the Ministry of the Interior and Safety should provide academy (budget technique, financial control strategy for local council, audit technique for the Board of Audit and

Inspection, etc.) at a training institute or cyber education for local councilors and make the training mandatory for local councilors and the staff of the local council office so that they can acquire the knowledge and the expertise necessary to fulfill the role of a councilor of education. Second, the 'Education Policy Deliberation Committee (tentative name)' should be established and consisted of some city/provincial council members and educational finance experts, and should be in charge of preliminary deliberation on the preliminary and settlement bills and ordinances, which were the functions of the former city/provincial education committees.

IV. Superintendent Election System

1. Current Status and Problems

The system for electing a superintendent of education (referred to as "superintendent") is the most important basic system of the local education autonomy system and should be an election system that conforms to the essence, ideology and values of the local education autonomy system. First, the opinion of the Constitutional Court on what the essential value of the local education autonomy system proposed by the Constitution is explained in the above problems and improvement of [Board of Education System].

Therefore, the current system ensures that a superintendent exists as an independent executive agency for education and academic affairs of local governments, and operates separately from the general administration of the central and local governments, thereby guaranteeing the principle of independence in education. In addition, a superintendent is elected by residents through the resident direct election system, thereby enhancing the representation of residents and realizing the principle of resident participation.

However, despite the above positive aspects, the following problems have been criticized. First, the

manpower and cost required for the election for a superintendent are enormous, and there is a difficulty in preparing the cost for the election. In other words, the 2018 election cost limit was 4.17 billion won in Gyeonggi-do and 3,494 billion won in Seoul and in 2014, the total election expenses spent by candidates for superintendents were 72.9 billion won and this is an astronomical amount that far exceeds the election cost of 45.6 billion won by the city/provincial candidates meaning candidates must have money of around 4 billion won to qualify for a superintendent's election in areas with a large number of voters such as Seoul and Gyeonggi-do. Second, the lack of publicity and indifference of residents to the candidates for a superintendent are leading to low turnout. Third, conflict arises when the head of a local government and a superintendent differ in their views on educational policy or ideology.

As an alternative to solving such problems, some members of the National Assembly proposed the 'Partial Revised Bill of Local Education Autonomy Act', which abolishes the current residents' direct election system and adopts a new method of electing and appointing superintendents of education. Specifically, Rep. Hak-Yong Kim suggested that the election method be changed from the resident direct election system to the appointment by mayor/governor, but a superintendent must go through a personnel hearing of the local council before appointment[5], and Rep. Eun-jae Lee suggested that a superintendent be elected or appointed in accordance with the method prescribed by ordinance of each city/province, and the matters concerning the procedure for a superintendent's appointment be specified in the ordinance of city/province and a vice-superintendent be elected by a superintendent not by the President[6], and Rep. Kim Dongcheol suggested that the mayor/governor and a superintendent should adopt a running mate election method.[7]

In addition, in August 2014, 2,451 of high school students, parents, educational experts and teachers argued that Article 43 of the 'Local Education Autonomy Act', which stipulates that a superintendent shall be elected by a universal, equal, direct and secret vote of residents, violates the high school students' right to education, parents' right of children to education and equal right and the right of teachers and educational experts to take public office and teachers' and faculty's right of education and freedom to carry out their occupation and filed for a constitutional appeal but in November 2015, the Constitution Court rejected all of them.[8] In other words, it is against independence, professionalism and political impartiality of education under Article 31, Paragraph 4 of the Constitution and infringes high school students' right to education, parents' right of children to education and teachers' and faculty's right of education and freedom to carry out their occupation because the resident direct election system leads to education being subject to politics and a superintendent's political tendencies or values may cause education policies to be frequently changed and it also violates the right of teachers and educational experts who want to be a superintendent to take public office because it is difficult for them to run for a superintendent without help from specific political parties and huge capital.

The contents dismissed by the Constitutional Court on November 26, 2015 are as follows: ①it merely regulates the direct participation of residents in the election of a superintendent in order to ensure the local education autonomy system and it is difficult to say that this regulation in itself imposes obligations on the claimants or deprives the claimants of their rights or legal status, resulting in disadvantages so that it is hard to judge that the right to education of high school students, parents' right of children to education and the teachers' and faculty's freedom to carry out their occupation or basic human rights is

infringed, ②there is no possibility that the participation of the residents who are not parents infringes equal rights of the claimants who are parents, considering the principle of resident participation in the context of the status of a superintendent and the local education autonomy, ③it protects the right to hold a public office by guaranteeing a wide range of opportunities to take office rather than limiting the right to serve public service of those who wish to be elected as superintendents and ④it is difficult to say that there is a possibility that the claimants' right to hold a public office or basic rights may be infringed since the claimants, educators and educational experts who wish to be elected as superintendents, are indirectly affected.

2. Improvement

The current election system for a superintendent is of great significance for establishing democratic legitimacy by ensuring residents' right to vote and securing a superintendent's representation. It hasn't been long since the system was implemented, but there are some side effects and it is argued that the election system should be replaced by the appointment by the head of the local government, the running mate system or the joint registration system. However it is thought that it is necessary to minimize and supplement the side effects rather than fixing the system as it violates the Constitution of the local education autonomy system.

First, the biggest problem with the current superintendent's election system is excessive election costs and capital so that the limit on election expenses should be lowered by amending Article 121 of the 「Public Official Election Act」.

Second, the election publicity and cost are all managed by the National Election Commission. In other words, the 「Public Official Election Act」 should be amended to operate a joint election office, ban campaigns and distribution of leaflets by an individual candidate, and provide a public debate through TV/Internet, disclose information of

a candidate and establish and operate a review committee for a superintendent to expand the opportunity for candidates to promote themselves and the right of voters to know. Since the enactment of the direct election system, the electorate has voted without knowing the candidate, and the candidate has been promoting themselves by spending a lot of money and so that election fraud occurred and some superintendents received judicial treatment for committing corruption while in office. Due to this, a superintendent becomes immoral and disappoints students, residents, and even loses trust in education.

Third, in relation to the qualification requirements of a superintendent, political impartiality should be secured by reinforcing the restriction on party career from one to two years and professional qualification should be reinforced by raising the required education and educational administration experience period from three years to five years to satisfy the principle of professionalism in education. Because long-term education and training and high degree of autonomy and social responsibility are required to acquire the literacy and knowledge required for a superintendent's job performance due to the unique nature of education that develops human character and intellectual abilities.

Meanwhile, the 'Presidential Committee on Autonomy and Decentralization' is promoting in cooperation with the National Assembly to revise the 「Public Official Election Act」 through research, collecting opinions from the public and consultation with the relevant authorities to improve a superintendent's election system.[9]

V. Reorganization of Vice-superintendent System

1. Current Status and Problems

A vice-superintendent of education (referred to as a "vice-superintendent") system is negatively evaluated for failing to perform its role as a

coordinator between the central and local and of defusing the conflict and as being used as a control path of the central against the local or as a path for promotion to senior officers in the Ministry of Education. There is also a problem that a vice-superintendent is taking a situation where his self-esteem as a senior officer is undermined as feeling constraint between the Minister and a superintendent.

Another issue that arises with a vice-superintendent system is its appointment method. Currently, a superintendent of city/province nominates a person suitable for a vice-superintendent, and he/she is recommended by the Minister of Education, reviewed by the Prime Minister, and then appointed by the President. This procedure is in fact inconsistent with the value of local autonomy as the Minister of Education exercises authority over a superintendent as a senior officer and is negatively evaluated as the person nominated by the Minister becomes a vice-superintendent and, as a result, a superintendent's right to self-governance is seriously restricted.

Since the Minister cannot recommend a person who is not nominated by a superintendent, it seems that a superintendent's intention is important in the appointment of a vice-superintendent from a legal perspective. However, from the point of view of a superintendent, it would be better to recommend someone who is internally decided through prior arrangement with the Ministry of Education, rather than taking the risk of recommending a person who does not have an acquaintance with senior officers of the Ministry of Education, which is one of the qualifications for a candidate for a vice-superintendent, and who will not be approved by the Minister. In this case, a vice-superintendent is appointed by the Minister not by a superintendent.

2. Improvement

Even from the standpoint that it is nationally important to implement the central government's

education policy in each region, there is no actual benefit of the current vice-superintendent system. Because even if a vice-superintendent agrees with a superintendent, there are many ways to implement the central government's education policies in the local region. This is because, in a conflict relationship, the initiative to resolve the conflict either by force or persuasion is always in the center and not in the local area because the central government can provide differential administrative and financial support through the evaluation of city/provincial offices, and can give orders by exercising various supervisory rights granted to the Minister by law. Therefore, there is no need to try to resolve confrontation or manage conflict through a vice-superintendent who cannot actively step up in case of emergency, since there are various means of pressure to secure effectiveness.

As for the improvement, first, in the qualification criteria of a vice-superintendent, allowing only the scholar to be a vice-superintendent, excluding general public officials belonging to the senior officers, can be considered. Since most of scholars have accumulated educational and educational administration experience in each city/province, it can be assumed that they have more specialized knowledge about the educational environment of that city/province. In addition, it is difficult for general officers to demonstrate continuity and expertise on local administration even if they are appointed as vice-superintendents because of their term of office of 1 or 2 years, however, vice-superintendents who served as scholars in the area can keep their actual term longer. In some cases, a scholar with experience working in the Ministry of Education becomes a vice-superintendent, but, compared to general officials, there are not many scholars with that working experience and there would be no one who wants to use the central scholar as a vice-superintendent unless it is a position in the region where the Ministry of Education is located as a pool of local scholars is used.

Second, changing the method of appointment of a vice-superintendent to block intervention by the

Minister of Education and to strengthen a superintendent's practical rights can be considered. As mentioned above, even though a superintendent has the right to recommend a vice-superintendent under the current law, the Minister has the actual right of appointment and it does not correspond to the virtue of local autonomy. Therefore, in the future, it is desirable to reorganize the current method of appointment of a vice-superintendent, which is criticized for excessive involvement in local personnel management by the central while not reaping much of the effect of policy coordination.

Accordingly, Article 30 (Auxiliary organ), which is a regulation related to a vice-superintendent, should be amended to make a vice-superintendent be appointed by the head of the local government through the vote of the delegation of the residents' representative meeting and the standing committee of the local council according to the ordinance and should be revised in the direction of requiring a vice-superintendent to actively assist a superintendent so that local education administration and affairs can proceed without any problems. The system needs to be reorganized in a manner that a vice-superintendent is recommended by a superintendent and appointed by the President in order to realize the purpose of sub-local autonomy and expand the autonomy of personnel management of a superintendent of city and province.

On the other hand, the National Assembly's Education, Culture, Sports and Tourism Committee review report (September 2017; November 2018) analyzed that "Either of the current law or the amendments to the method of appointment of a vice-superintendent cannot be seen as clearly superior" and suggested "It is necessary to consider increasing the number of a vice-superintendent from 1 (exception of two) to 2 (exception of three) and appointing one of them as a local official and the rest as a central official as it is". Currently, for vice-mayors and vice-governors, the metropolitan city has three and the other has two, and each one is appointed by a

mayor/governor as a local public official. In the case of basic local governments, big cities with a population of more than 1 million (Suwon, Changwon, Goyang, and Yongin) have two vice-mayors and are allowed to appoint them as general, specially appointed, and tenure local government officials. It is insisted that for city/provincial offices of education, with similar budget and size of public officials to basic local governments with a population of over 1 million, it is not unreasonable to increase the number of vice-superintendents to two, and one of them to be appointed as special or tenure local government officials, however, I think it is important to let an education expert who can understand and support the school site become a vice-superintendent rather than to determine who has the authority to appoint a vice-superintendent. Therefore, the proposal to increase the positions of vice-superintendents currently occupied by senior officials and to appoint them as scholars or researchers may be criticized by the public as 'creating an unnecessary position to hire a person.' Rather, an effort to appoint an educational professional to the post of a vice-superintendent should be accompanied. If the right to appoint a vice-superintendent is given to a superintendent with authority over human resources, the authority can be abused during the appointment process. Therefore, it is necessary to revise the 「Local Autonomy Act」 so that local councils can conduct personnel hearing procedures for deputy mayors and vice-superintendents who can be appointed by the head of local governments and details can be determined in accordance with the ordinance of each local government.

VI. Conclusion

Article 12 (Reorganization of Special Local Administrative Agencies, etc.) (Abbreviation: Local Decentralization Act), Paragraph 2 of 「Special Act on Local Autonomy and Decentralization, and

Restructuring of Local Administrative Systems」 which stipulates that “The State shall endeavor to consolidate systems for autonomy in education and local government” must be urgently revised as it violates the education autonomy of the Constitution and, in order to faithfully implement the local education autonomy system, the constitutional basis for the local education autonomy system must be more clarified. For this, ‘local education autonomy system’ should be additionally specified in Article 31, Paragraph 4 of the Constitution.

Article 117, Paragraph 1 of the 「Constitution」 states that “Local governments may enact provisions relating to local autonomy, within the limit of Acts and subordinate statutes”. It restricts the enactment of effective self-government laws. The fundamental problem-solving is securing the right to self-governing legislation through constitutional amendment. Therefore, it must be revised to “Local governments can make regulations on self-government to the extent that they handle resident welfare affairs in accordance with the subsidiarity and do not violate the law.” In addition, Article 22 of 「Local Autonomy Act」 specifies “Local governments may establish municipal ordinances concerning their affairs within the scope of statutes: Provided, That in order for such local governments to prescribe matters concerning the restriction on rights of residents, the imposition of obligations on residents, or penalties, they shall have the authority delegated by Acts.” Therefore, Article 22 of the 「Local Autonomy Act」 should be amended to ‘Local governments may enact regulations on self-government within the scope of not violating the law’. This is because it is necessary to clarify the revision scope of the legislation of self-government.

In the long-term perspective, the current education council problem, which is contrary to the constitution, has to be revived as a constitutional independent education committee system, and the voting agency and the executive agency must go together and education councilors must have about 10 years of experience in education and education administration.

The current superintendent's election system is of great significance in establishing democratic legitimacy by ensuring residents' right to vote and securing a superintendent's representation of residents. It hasn't been long since the system was implemented, but there are some side effects and it is argued that the election system should be replaced by the appointment by the head of the local government, the running mate system or the joint registration system. However it is thought that it is necessary to minimize and supplement the side effects rather than fixing the system as it violates the Constitution of the local education autonomy system.

In the case of vice-superintendents who were former general public officers, many of them served as senior officers in the Ministry of Education, and after the expiration of the term of vice-superintendents, most of them returned to the Ministry of Education. Therefore, it is difficult for a vice-superintendent to actively support the policies, contrary to the orientation of the Ministry of Education, even though a vice-superintendent has a legal responsibility to follow a superintendent's policy for assistance. To solve this problem, limiting the qualification criteria of a vice-superintendent to educational professions, and enacting regulation of the local council's personnel hearing procedure, and changing of appointer from the head of the Ministry of Education to a superintendent need to be considered.

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