

Legal review of public officials' leave of absence for law school enrollment training

Jong-Ryeol Park*, Sang-Ouk Noe**

*Professor, Dept. of Police & Law, KwangJu Women's University, Gwangju, Korea

**Professor, Dept. of Police & Law, Joongbu University, Chngcheongnamdo, Korea

[Abstract]

It is not seen as discrimination based on reasonable grounds for the National Public Officials Act to discriminate between public officials entering general graduate schools and public officials entering law schools. The degree of discrimination cannot be said to be appropriate. Therefore, it is judged that it violates the principle of equality under Article 11 of the Constitution for the relevant laws and regulations to treat them differently by excluding those public officials who went to law schools from the application of the State Public Officials Act because the criteria for discrimination cannot be said to have a substantial relationship to realize its purpose. The degree of discrimination is not appropriate, so related laws and regulations are arbitrary legislation that discriminates against public officials entering law schools without reasonable reasons. Articles 71(2)3 and 72(6) of the National Public Officials Act and Article 90 of the Rules on the Appointment of Public Officials stipulate that public officials who want to go to "research institutions or educational institutions designated by the head of the central personnel agency" can use the training leave system. However, it is reasonable to assume that there is no reasonable basis for discrimination because it does not allow such benefits to public officials who wish to enter law schools. I think it is desirable to utilize a special admission system that allows students to enter night law school or to enter while working for a living.

▶ **Key words:** Law school, Public officials who wish to enter law schools, State Public Officials Act, Rules for appointing public officials, Principle of equality

[요 약]

국가공무원법이 일반대학원 진학 공무원들과 법학전문대학원 진학 공무원들을 차별하는 것은 합리적 근거에 의한 차별이라 보여지지 않고, 관련 법령 및 규칙은 헌법 제11조의 평등원칙에 위배되는 것으로 생각한다. 국가공무원법 제71조 제2항 제3호 및 제72조 제6호와 공무원임용규칙 제90조는 '중앙인사관장기관의 장이 지정하는 연구기관이나 교육기관'에 진학하려는 공무원에게는 연수휴직 제도를 이용할 수 있도록 규정하고 있으나, 법학전문대학원에 진학하고자 하는 공무원들에게는 이를 허용하지 않음으로 인하여 차별 취급하고 있는 것을 개선해야 한다. 따라서 야간 로스쿨 또는 생업에 종사하다가 입학할 수 있는 특별전형 제도를 활용하는 것이 바람직하다고 생각한다.

▶ **주제어:** 로스쿨, 로스쿨진학 공무원, 국가공무원법, 공무원임용규칙, 평등원칙

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- First Author: Jong-Ryeol Park, Corresponding Author: Sang-Ouk Noe
 - *Jong-Ryeol Park (park3822@kwu.ac.kr), Dept. of Police & Law, KwangJu Women's University
 - **Sang-Ouk Noe (nosang2424@daum.net), Dept. of Police & Law, Joongbu University
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I. Introduction

The law school system aims to cultivate legal professionals with the knowledge and ability to professionally and efficiently resolve complex legal disputes with sound professional ethics to provide high-quality legal services that meet various expectations and requests of the people based on abundant culture, deep affection and understanding for humans and society, and values aimed at defining freedom and equality, unlike the existing legal professional selection system through judicial tests. In 2009, it produced its first students. Applicants with various backgrounds and experiences have graduated from law school, obtained lawyer certificates, and have been actively active in various parts of society since then.

However, there was a case in which a public official passed the law school and applied for training leave, but was rejected. In addition, issues of equity have been raised, such as the dispatch of education and training by specific institutions. Therefore, I will examine the problems of law school education in the law school era, and also examine whether Article 71(2)(3) and 72(6) of the Public Officials Act and Article 90 of the Public Officials Appointment Rules (hereinafter referred to as relevant laws and rules) violate A's right to equality.

II. Cases related to training leave

1) Public official A is a level 5 examiner who works for the Korean Intellectual Property Office. To have the expertise, he applied for training leave based on Article 71(2)(3) of the National Public Officials Act, which stipulates that he can take leave of absence when he passes law school and conducts training at research institutes or educational institutions. However, it was rejected due to Article 90 of the Rules for Appointment of Public Officials (Ministry of Public Administration

and Security) stipulating Article 71 (2)(3) of the National Public Officials Act, which argues that the scope of "research institutions or educational institutions designated by the Central Personnel Management Agency" does not include law school, and Article 72 Subparagraph 6 of the State Public Officials Act sets the training leave for two years.

2) The Supreme Prosecutors' Office has established a system to send entrusted education to domestic law schools to improve vocational expertise and boost fraud. Since the Supreme Prosecutors' Officers are also public officials, they are impossible to enter law schools, but the Supreme Prosecutors' Office made it possible by sending education and training through coordination with the Ministry of Public Administration and Security.

3) In the case where a police officer went to graduate school through training leave but was disciplined in parallel with law school during the course, the Seoul Administrative Court judged as follows: The court first cited the legal principle of "Considering the contents and purpose of the relevant laws and regulations on the training leave system and the use of leave of absence for public officials, whether a public official on training leave falls under the above 'use outside of the purpose of leave' shall be objectively judged by comprehensively considering the purpose of applying for training leave by specifying the purpose of the public official's reason for training leave and its faithful performance, the possibility of acceptance, intention, and duration of use. "According to the above legal principles, the court judged that" the National Public Officials Act restricts educational institutions subject to training leave to graduate schools established under the Higher Education Act. The training leave period is within two years. On the other hand, law schools are selected to foster excellent legal professionals following the Establishment and Operation of Law Schools Act. Unlike public graduate schools, the duration of classes is more than three years.

Considering such restrictions and policy judgments that allowing them could hinder public officials' discipline or undermine the nature of public affairs, "training at law schools" is not permitted for reasons of training leave. In addition, attending a law school during the training leave is an act other than training purposes." Subsequently, the court acknowledged the following facts and regarded the case as "the Plaintiff intentionally received training at the law school in this case during the training leave and used a significant portion of the period for that purpose.": When Plaintiff applied for training leave, only the matters to be trained at the graduate school, in this case, were stated for a reason, and only documents related to this were submitted; Most of the weekdays were used to take several classes and carry out related studies while living in Dohwa-dong, Mapo-gu, Seoul, close to the law school in this case; The Plaintiff reported to the Defendant on the status of service during the training leave and did not notify them that they were attending the law school in addition to the graduate school in this case; For most of the training leave, the Plaintiff participated in the law school in this case (from the moment immediately after applying for training leave until receiving an order to reinstate the case). Therefore, they judged that even if the Plaintiff faithfully conducted training at a graduate school as the reason for training leave, the Act of entering a law school during that period falls under "use outside of the purpose of leave" prescribed in Article 57-5 [1] of the Public Officials Appointment Decree. Considering the above precedent, a public official entered a graduate school and applied for training leave. Still, if they trained at the same time as a law school during the same period, it constitutes "use outside of training purposes."

4) As many law school students were confirmed to be from the police college, it was argued that it was necessary to verify whether the incumbent police officer had illegally entered the law school in violation of related laws.

On the 29th, the judicial exam preparation group submitted an audit application to the National Police Agency, asking for disciplinary action against the police who entered the law school as an incumbent.

They claimed that as a result of requesting the disclosure of information on the university and age of 25 law schools nationwide this year, 56 students were from police colleges in 24 universities, excluding Chung-Ang University, the most significant number ever.

The Judicial Examination Preparatory Group said there were past cases in which salary cuts were imposed on police students who entered law schools as incumbent police officers and requested an audit because it was presumed that incumbent police were included among law school students.

They mentioned that it is impossible in principle for incumbent police officers to take a leave of absence or go to law school in parallel with their work and argued that according to Article 71 of the National Public Officials Act, public officials could only take training leave within two years for designated institutions, but three-year law schools are not eligible.

They expressed the purpose of the audit claim, saying that it is not in line with the public sentiment that police officers from the National Police University who trained at state expense go to law schools in violation of regulations and that law schools can be seen as cases of expedient admission.

In this regard, an official from the National Police Agency explained that it is not illegal to go to law school because there is currently no regulation restricting public officials from attending law schools outside of working hours. However, he noted that according to the Ministry of Personnel Management policy, leave of absence to attend law school (not allowed for training leave), so disciplinary action might be taken for use outside of the purpose. [2]

III. Problems with the law school system

In 1995, under the administration of President Kim Young-sam, a new law began to be sought to replace the judicial examination. Since then, 25 law schools nationwide have opened since 2009 with related laws in July 2007.

The reason why Korea abolished the judicial system, which is attracting attention for fairness and objectivity and is called the hope or ladder of the ordinary people, etc. and switched to law schools is that in the 21st century, characterized by diversity, expertise, and internationalization, a consensus was formed that it was difficult to cultivate professional assistants required by our society through the judicial examination system. Therefore, they decided to change the paradigm from selecting legal personnel through tests to training professional legal professionals through education amid the consensus. However, when examining the reasons for enacting the Act on the Establishment and Operation of Law School, Due to the lack of linkage between legal education and the judicial system in the current legal profession training system, it is challenging to provide faithful legal education in universities and specializes in complex legal disputes. Furthermore, it was pointed out that it was insufficient to cultivate legal professionals to prevent and solve efficiently.

Therefore, the government aims to provide legal services to meet the diverse expectations and requests of the people by introducing a law school system that provides professional legal theory and practice education to people from various academic backgrounds. In other words, it can be summarized that the direction of improvement arising from the change of system in which legal professionals who were trained and produced from a single state-run educational institution called the Judicial Training Institute are made through education provided by several different professional educational institutions is diversity, expertise, and international competitiveness [3].

The law school system, launched after such a national decision, assumes that various undergraduate majors should acquire legal knowledge as legal professionals and then return to various majors to work as legal experts.

However, suppose we re-check whether law schools are introduced, and the production of legal professionals through bar examinations is being carried out according to the original purpose of fostering professional legal professionals through education. In that case, such arguments cannot be readily agreed upon.

With the start of the law school system, one of the most pointed out problems by established legal professionals is that the skills of legal professionals graduating from law school are insufficient compared to those who passed the bar exam, resulting in a decline in the overall quality of legal professionals. The second is that in the recently saturated legal market, the number of new licensees through law schools increases by more than 1,500 a year, resulting in oversupply. Not only are the state's high-quality human resources wasted, but excessive competition due to oversupply and a decline in the level of judicial services are occurring. Simply summarizing these problems can be expressed in terms of deterioration of ability and market saturation.

However, the two are closely related to each other. Law education in law schools that train legal professionals is bound to have a close relationship with what areas the educated people will enter and do, what abilities they need, and the size and conditions of the area. Conversely, there is no choice in the legal market but to pay keen attention to issues such as what prospective legal professionals need to learn, whether their curriculum and teaching methods meet the standards required by the market and whether the number of legal professionals discharged from law schools is appropriate. This is because the mayor will further try to influence the contents of the legal education that meets the skills of the

prospective legal professionals they need and the number. Therefore, in the new launch of the Graduate School of Law Education, deep discussions should have been conducted in connection with the content and method of law education, along with the size of the legal market and the improvement of similar legal areas.

Unfortunately, we cannot deny that the law school system was suddenly introduced according to political interests without deep discussion and preparation for the content. On July 3, 2007, the bill on the establishment and operation of law schools was passed collectively in the form of a barter along with the revision of the private school law, which was the 17th National Assembly's most significant issue. [4] At the passage of the above Act, the relevant research data [5] were inferior. Since the law school era was reached without sufficient preparation, there should have been discussions on law education and the legal market even after that. Although research data on law education have been released since the opening of the law school [6], it cannot be considered sufficient compared to the necessity and importance of new law education that meets the new system. In addition, no in-depth research or report has been conducted so far on utilizing new legal personnel discharged from law schools or how to expand and overhaul the legal market. [7]

IV. Judgment on the relevant statutes and unconstitutionality

1. Related laws and regulations

1.1 State Public Officials Act

Article 71 (Leave of Absence)

② Where a public official wishes to take a leave of absence for any of the following reasons, the appointment authority may order him/her to do so: Provided, That in cases falling under subparagraph 4, leave of absence shall be ordered, except in

extenuating circumstances prescribed by Presidential Decree: <Amended by Act No. 8996, Mar. 28, 2008; Act No. 10699, May 23, 2011; Act No. 11992, Aug. 6, 2013; Act No. 13288, May 18, 2015; Act No. 13618, Dec. 24, 2015>

3. Where he/she is to receive training at a research or educational institute, etc. designated by the head of the central personnel management agency;

The period of leave of absence shall be as follows:

6. The period of leave of absence prescribed in Article 71 (2) 3 shall not exceed two years:

1.2 Rules for appointing public officials

The scope of "research institutions or educational institutions designated by the head of the Central Personnel Management Agency" in Article 90, Article 71(2)3 of the Act on Leave of absence for training at research institutes or educational institutions is as follows:

1. College of Education, University of Education (including graduate school), and affiliated research institutes established under the Higher Education Act.

2. Korea Advanced Institute of Science and Technology.

3. Gwangju Institute of Science and Technology.

4. Daegu Gyeongbuk Institute of Science and Technology (newly established on January 26, 2012)

5. Judicial Training Institute.

6. Korea International Cooperation Foundation (limited to cases where selected as an overseas volunteer group pursuant to the Act of the Korea International Cooperation Foundation; newly established on April 1, 2009)

7. Other institutions determined individually by the Minister of Public Administration and Security (if private enterprises and organizations recognize that it is necessary to take a leave of absence for training, the relevant minister shall designate a training purpose and institution to consult with the Minister of Public Administration and Security).

2. Judgment of unconstitutionality

2.1 The purpose of the State Public Officials Act

The purpose of the State Public Officials Act is to establish fundamental standards for personnel administration to be applied to all state officials working at various levels of institutions, to establish fairness in performing duties, and to ensure democratic and efficient operation of administration as a volunteer to the entire people. Articles 71 and 72 of the National Public Officials Act stipulate training leave for the improvement of public officials' capabilities and administrative development. Under the provisions of this Act, state officials may apply for leave of absence for obtaining degrees from universities and universities at home and abroad in order to improve their expertise and work ability to work.

2.2 Do Articles 71 and 72 of the State Public Officials Act infringe on the right to equality?

2.2.1 The significance of the principle of equality

Article 11, Paragraph 1 of the Constitution states, "All citizens are equal before the law. No one is discriminated against in all areas of political, economic, social, or cultural life by gender, religion, or social status," it declares the principle of equality. The principle of equality is the supreme principle of the Korean Constitution on the basic guarantee of the people and is the standard that the state should follow in legislating or interpreting and enforcing laws. At the same time, it is a citizen's right not to treat the state unequally for no reasonable reason, and is a basic right among the basic rights of the people. [8] The principle of equality under Article 11 (1) of the Constitution does not mean absolute equality that denies any discriminatory treatment, but means relative equality that no reasonable groundless discrimination should be made in the application of legislation and law. Therefore, discrimination or inequality with reasonable grounds is not contrary to the principle of equality. In addition, whether or not discrimination with reasonable grounds should

be judged based on whether the discrimination is necessary and appropriate to achieve a legitimate legislative purpose without contrary to the constitutional principle of respecting human dignity.[9]

2.2.2 The standard and effect of discrimination

The "research institution or educational institution designated by the head of the Central Personnel Management Agency" stipulated in Article 71 (2) 3 of the National Public Officials Act is stipulated as an institution individually determined by junior colleges, education colleges, universities (including graduate schools) and research institutes, Korea Institute of Science and Technology, Gwangju Institute of Science and Technology, Judicial Training Institute, Korea International Cooperation Foundation, and other institutions determined individually by the Minister of Public Administration and Security.

According to Article 29-2 (3) of the Higher Education Act, law schools are not graduate schools established under the Higher Education Act, but junior graduate schools established under the Act on the Establishment and Operation of law schools. Therefore, public officials who want to go to law school (hereinafter referred to as "legal graduate school officials") will not be able to enjoy the benefits of training leave that public officials who want to go to research institutes or educational institutions designated by the head of the Central Personnel Management Agency (hereinafter referred to as "general graduate school officials") and to enter a law school, one is only in a situation of resigning from public office.

The benefits of training leave that public officials at general graduate schools can receive are designed to improve the capabilities of public officials and develop administrative development. Due to the benefits, it is possible to develop one's abilities and improve work expertise in national universities and graduate schools while maintaining the status of public officials. In addition, in the

case of a leave of absence applied by a public official who intends to study abroad, the necessity and job relevance of training, validity of the training institution, purpose of study, and training time are comprehensively considered. However, unlike other leave of absence, it provides special benefits to public officials, such as paying 50% of the remuneration even during the leave of absence and recognizing 50% of the experience. Therefore, public officials who wanted to go to law schools, such as A, excluded from the benefits granted by the State Public Officials Act under the legislative classification of relevant laws and regulations were discriminated against for equal rights.

2.2.3 Infringement of equal rights

The principle of equality prohibits legislators from arbitrarily treating essentially the same thing differently and essentially the same thing differently. Therefore, even though the two facts make up the comparison, if the two facts are treated differently, the legislator violates the right to equality. However, if the facts that can be compared with each other are not the same from all perspectives, but are only the same for certain elements in order to determine whether the two comparable facts are legally viewed as the same or different, the question is which factor becomes the decisive criterion. Judgment on whether the two facts are essentially the same generally depends on the meaning and purpose of the relevant legal provisions. [10]

As discussed earlier, related laws and regulations benefit public officials entering general graduate schools to develop their abilities and improve their expertise while maintaining a public office, and exclude public officials entering law schools from these benefits. However, the difference between public officials going to general graduate schools and public officials going to law schools is whether the institution they want to enter falls under Article 29-2 (3) of the Higher Education Act. The reason that Article 29-2 (3) of the Higher Education Act

does not include the contents of law schools, and for enacting a law on the establishment and operation of law schools separately is because, unlike general graduate schools or vocational graduate schools, law schools are institutions to establish a system to train legal professionals by education, replacing the existing legal professional selection system, and the number of graduates is regulated by the state. Therefore, these differences are not essential to undermine the idea that public officials entering general graduate schools and law schools should be treated legally the same. In other words, whether to go to a general graduate school or a law graduate school cannot be a decisive criterion for treating them differently in the subject of training leave stipulated in Articles 71 and 72 of the National Public Officials Act.

Legislation that discriminates is bound to discriminate against the purpose to be achieved by that discrimination and to achieve that purpose. In order to claim discrimination based on reasonable grounds in discrimination against the basic rights of the people, the purpose of discrimination must first be a legitimate purpose consistent with the Constitution. Next, the standard of discrimination must have a practical relationship for realizing the purpose, and the degree of discrimination must also be appropriate. [11]

Articles 71 and 72 of the National Public Officials Act stipulate that public officials can apply for leave of absence to improve their expertise and work skills in educational institutions and related institutions and use them in practice. However, while the training leave system is allowed for public officials who go to general graduate schools, public officials who go to law schools cannot apply because they are excluded from the application, so they must resign from public office to apply. Regarding the fact that the National Public Officials Act excludes public officials who have entered law schools from the application, most of them can be considered to prevent them from retiring from public office and working in legal services, and

their purpose of training is personal. However, considering that Article 82 of the Rules on the Appointment of Public Officials falls under the "Judicial Training Institute," it is not reasonable to say that the provisions of Articles 71 and 71 of the National Public Officials Act that is to prevent people from working in legal organizations without returning to work after taking a training leave are the reasons for excluding law schools.

Considering that all state actions must be exercised on a legal basis and that many civil and criminal problems arise due to the increase in private economic activity, the state requires many legal professionals in various occupations and employs legal professionals as public officials in various fields. Therefore, if a public official who works in a public office and has expertise returns to work with legal expertise through entering a graduate school specializing in law, the state can reduce the inconvenience of hiring new legal professionals as public officials. In addition, it is judged that they will be able to improve their work and achieve administrative development by utilizing their expertise and legal knowledge of their work.

The difference from the case in which the Supreme Prosecutors' Office sent its employees to domestic law schools to enhance vocational expertise and boost fraud in consideration of professionalism in business characteristics is also recognized. The prosecution investigator, an employee of the Supreme Prosecutors' Office, is also a state official, and it is prohibited to use training left to complete a three-year law school course as a public official. However, the Supreme Prosecutors' Office achieved it through coordination with the Ministry of Public Administration and Security by dispatching education and training.

Many public officials have entered law schools and are studying math. They go to a law school and study by using general leave and parental leave or registering for other general graduate schools after parental leave. (You can register multiple law graduate schools and general graduate

schools) The abuse of the system through this expedient is already a widely known public secret, and the frequency of use is also increasing as more public officials want to enter law schools. Therefore, to prevent such harmful effects, it is necessary to allow public officials entering law schools to take training leave.

Suppose the problem of refusing to return to work is more serious than expected. In that case, the problem of refusing to return to work will also be solved by introducing a mandatory service period system that requires public officials to serve for a certain period after graduation, so the legal knowledge accumulated in law schools can be used for public affairs to solve the problem.

Therefore, it is not seen as discrimination based on reasonable grounds for the National Public Officials Act to discriminate between public officials entering general graduate schools and public officials entering law schools. The degree of discrimination cannot be said to be appropriate.

2.2.4 Judgment

Therefore, it is judged that it violates the principle of equality under Article 11 of the Constitution for the relevant laws and regulations to treat them differently by excluding those public officials who went to law schools from the application of the State Public Officials Act because the criteria for discrimination cannot be said to have a substantial relationship to realize its purpose. The degree of discrimination is not appropriate, so related laws and regulations are arbitrary legislation that discriminates against public officials entering law schools without reasonable reasons.

V. Conclusion

Articles 71(2)3 and 72(6) of the National Public Officials Act and Article 90 of the Rules on the Appointment of Public Officials stipulate that public

officials who want to go to "research institutions or educational institutions designated by the head of the central personnel agency" can use the training leave system. However, it is reasonable to assume that there is no reasonable basis for discrimination because it does not allow such benefits to public officials who wish to enter law schools.

I think it is desirable to utilize a special admission system that allows students to enter night law school or to enter while working for a living.

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Authors



Jong-Ryeol Park received the Ph.D. degree in Laws and Civil Law from Chosun University, Korea, in 2001, 2006 respectively. Dr. Park joined National Communication Ombudsman District

Prosecutors' Office in Gwangju in 2009 and was a member of Metropolitan Police Agency Administrative Disposition of a Driver's Licence Review Committee in Gwangju in 2010. Also he was Policy Advisers in Gwangju, Jeonnam Regional Military Manpower Administration. He is currently a professor in the Dept. of Police & Law at Kwangju Women's University. He is interested in Civil Special Act and Registration of Real Estate Act.



Sang-Ouk Noe received the Ph.D. degree in Laws Studies from Dongguk University, Korea. Voluntarily resigned from human resources department of Posco in 2008 and worked as professor for industry-academy

cooperation in Gangneung Wonju National University and Cheonnam National University, trying to promote employment and field practices. Since 2015, I have been working as an assistant professor in Police Law Department of Joongbu University. Furthermore, I was designated as a professional member of Korea Industry Commercialization Association in 2014.