

Local Government Officers' Elected Term Limit Case

[18-1(A) KCCR 320, 2005Hun-Ma403, February 23, 2006]

In this case, the Constitutional Court ruled that the three time elected term limit on local government officials set forth in Article 87 Paragraph 1 (hereinafter referred to as the "Instant Provisions") of the Local Autonomy Act(hereinafter referred to as the "the Act").

Background of the Case

Petitioners are local government officials who are serving their third elected term. They filed this constitutional complaint, arguing that the Instant Provisions, firstly, restrict their right to serve public offices without reasonable cause by limiting the number of elected terms regardless of their competence to hold the offices, and secondly, violate their right to equality by imposing the term limit only on local government officials while not imposing such limit on other elected officials such as the members of local councils.

Summary of the Decision

The Constitutional Court dismissed the Petitioners' claims in 6 : 3 decision for the following reasons:

1. Majority Opinion of Six Justices

A. The legislative purpose of the Instant Provisions is to protect regional growth from disruptive influences of prolonged incumbency and to broaden opportunities for talented persons to run for local government offices. The Instant Provisions also have incidental effects of encouraging the officers elected for the third time to conduct their local administrative functions fairly and reasonably without the distractions of reelection and partisan politics. We acknowledge the legitimacy of the purpose of the Instant Provisions.

Once a person of influence is elected into a local government office,

it is likely that the officer will attempt at prolonged incumbency by taking control of and organizing the civic servants in office and other local supporters. When the officer abuses its power in personnel, financial, and other areas, it is practically difficult to detect such instances of abuse. Even when it is detected, the Act has not adopted the retirement age for or the citizens' recall vote for local government officers, and therefore it is difficult to restrain such abusive officer during the officer's term. Therefore, the Instant Provisions constitute the means of last resort to correct the above-mentioned disruptions in local government administration and therefore have the appropriateness of means.

The Instant Provisions restrict election beyond the third term. They do not restrict the local government officials' right to hold public offices from the beginning. If they are not elected for consecutive terms, there is no term limit. Even if consecutively elected, they can serve three time terms (12 years). Then, by not seeking candidacy for one term, they can seek candidacy for additional three time consecutive terms. If so, the restriction on the right to hold public officers is relatively abated and the Instant Provisions satisfy the requirement of the minimal restriction.

The extent of restriction on the right to hold public offices by the Instant Provisions is relatively meager while the legislative purpose of the Instant Provisions is important public interest that should be attained to promote the nascent local governance system. Therefore, under the current Act lacking the means of potent restraint against the incumbent local government officials, the Instant Provisions are meaningful as an effective means to attain the public interest, and when weighed against the restriction on the local government officials' basic rights, do not depart from the principle of balance of competing interests.

B. The members of local councils have the right to be elected to be the chairperson or the vice chairperson of the local councils, and the rights to initiate a bill, make statements, vote, and participate in the local council to make resolutions. However, fundamentally, a councilperson is merely a member of the local council, a confessional body, and therefore cannot influence local government administration merely with the powers of one person. In contrast, the local government offices are unitarily operated administrative bodies. The local government heads are the chief executive officers of the local governments and have the powers to oversee their operation, promulgate rules, submit issues to residents' vote, and hire or supervise the employees, and influence greatly the local self-governance. Therefore, the likelihood and magnitude of side-effects due to re-election are much greater for local government heads than for local councilpersons. Therefore, discriminatory treatment between local government heads and local councilpersons has a reasonable basis.

The members of the National Assembly are the representatives of people and represent the interests of the entire people of the country (Article 46 Paragraph 2 of the Constitution). Due to their unique role, they are granted the privilege against arrest and the immunity (Articles 44 and 45 of the Constitution). Therefore, it is inappropriate to place them on the same or similar status as those of the head of the local government in charge of local administration and take them into account as the comparison group for right to equality.

2. Dissenting Opinion of Three Justices

A decision on what is best for the interest and welfare of local residents lies with the local residents themselves. A decision on who is an appropriate person for local development also lies with the residents themselves, whose decision is therefore legitimate in itself and who take responsibility for the consequences of such decision. Not acknowledging their autonomy and responsibility and setting involuntary and

external conditions and limits on the same is not consonant with the nature of local autonomy. The Instant Provisions contradict the basic principles of democracy and local autonomy and restrict the right to hold public offices through inappropriate and excessive means, and therefore are unconstitutional.

Party

Petitioners

Kwon ○ Yong and thirty four others
(The names of all Petitioners are listed in the attachment)
Counsel: Yi Seok Yeon and one other

Holding

The claims of this case are rejected.

Reasoning

1. Petitioners' Arguments and Subject Matters of Decision

A. Petitioners' Arguments

(1) Petitioners are the heads of the following districts, the mayors of the following cities or the heads of the following counties, who are serving or have served their third consecutive elected term: Kwon ○ Yong, Gangnam, Seoul(resigned on February 16, 2006); Cho ○ Ho, Seocho, Seoul; Chung ○ Sup, Gwangjin, Seoul; Ko ○ Deuk, Seongdong, Seoul; Park ○ Suk, Yeongdong, Busan; Park ○ Young, Saha, Busan; Park ○ Hae, Yeonje, Busan; Hwang ○ Hyun, Dalseo, Daegu; Kim ○ Taek, Suseong, Daegu; Cho ○ Ho, Jung(as in "Jung-gu"), Incheon; Yoo ○ Woo, Ichon, Gyunggi; Shim ○ Sup, Gangrung, Gangwon; Hong ○ Il, Taebaek, Gangwon; Kim ○ Dong, Samcheok, Gangwon; Cho ○ Jin, Hoengseong, Gangwon, Kim ○ Chang, Jungsun, Kwangwon; Yoo ○ Yeol, Okchun, Chungcheong; Kwak ○ Hee, Gimje, Jeonbuk; Im ○ Jin, Jinahn, Jeonbuk; Kim ○ Sik, Jangseong, Jeonnam; Park ○ Yong, Gimchun, Gyeongbuk; Kim ○ Soo, Sangju, Gyeongbuk; Chung ○ Gul, Uisung, Gyeongbuk; Kim ○ Ro, Jinhae, Gyeongnam; Song ○ Bok, Gimhae, Gyeongnam; Yi ○ Cho, Milyang, Gyeongnam; and Shin ○ Joo, Bukjeju, Jeju (hereinafter referred to as the "Petitioner Officials")

The following Petitioners are voters residing in the following districts: Yi ○ Geun and Keum ○ Whan, Gangnam, Seoul; Chang ○ Hyun, Seongdong, Seoul; Shin ○ Gun and Yi ○ Bung, Gwangjin, Seoul; Oh ○ Soo, Bukjeju, Jeju; Kim ○ Sun, Milyang, Gyeongnam; and Cho ○ Mok, Gangrung, Gangwon(hereinafter referred to as the "Petitioner Residents")

(2) Petitioners argued that Article 87 Paragraph 1 of the Local Autonomy Act limiting the consecutive elected terms of local government heads to three time violates the Petitioners' constitutional right to hold public offices, right to vote in elections, right to equality, and etc., and filed this constitutional complaint.

B. Subject Matter of Decision

The subject matter of this case is Article 87 Paragraph 1 of the Local Autonomy Act(revised on December 20, 1994 by Act No. 4789) which states that the consecutive elected terms of the head of the local government shall be limited to three time(hereinafter referred to as the “the Instant Provisions”), which reads as follows:

Article 87 of the Local Autonomy Act(Tenure of the Local Government Heads)

(1) The term of service for the head of the local government shall be four years, and the consecutive terms of service shall be limited to three time.

2. Petitioners’ and the Ministry of Government Administration and Home Affairs’ Arguments

A. Petitioners’ Arguments

Petitioner Officers argue that the Instant Provisions (1) infringe on the right to hold public offices by barring one from candidacy solely for reason of the number of prior incumbencies without reasonable cause and regardless of his or her competence to be elected; (2) violate the right to equality by imposing the three time term limit only on the local government heads while the members of the National Assembly and local councils, and the other elected officials are not subject to the term limit; and (3) infringe on the right to pursue happiness of the local government heads who would like to run to exceed the three time term limit.

Petitioner residents argue that the Instant Provisions infringe upon the local residents’ right, which has been constitutionally guaranteed under the local governance system, to elect the most appropriate person to accomplish local welfare(the right to vote in elections), and general freedom of action.

B. Arguments of the Ministry of Government Administration and Home Affairs

The contents of the right to hold public offices, the right to vote in elections, and the local governance system are determined by statute, and therefore in absence of infringement on their essences, fall under legislative discretion. Local government heads are the heads of administrative bodies and therefore are not comparable to the members of the National Assembly or local councils. The essential content of local governance system consists of the guarantee of local self-governing bodies, self-governing functions, self-governed administration, and local councils. The Instant Provisions guarantee representative local autonomy. The three time term limit prevents irregularities in local administration due to corruption of local government heads, facilitates life cycles of local political personnel, and enhances the welfare of local residents. The private interest infringed thereby does not outweigh the public interest achieved and therefore the term limit abides by the principle of proportionality in restricting basic rights.

3. Statutory Requirements

A. Legal Relevance

Petitioners are the head of the local government in their third consecutive terms who cannot run again for the local government head elections due to the Instant

Provisions, or those who cannot vote for these local government heads in the next elections. Therefore, the Instant Provisions restrict directly, without intermediaries, the basic rights of the Petitioners and therefore abide by the requisite directness. It is their own basic rights being restricted. Therefore, the requisite self-relatedness is also satisfied. Also, the restriction on basic rights is clearly anticipated, and therefore the requisite presentness is deemed satisfied.

B. Timing of Petition

The Minister of Government Administration and Home Affairs argues that, since the Instant Provisions have been effective since December 20, 1994, and the petitions hereunder have exceeded the time limit for filing and are therefore illegitimate.

However, the Instant Provisions do not restrict on the basic rights of the Petitioners immediately upon becoming effective. The infringement on basic rights takes the concrete presence only when the Petitioner local government heads are about to serve in the offices in more than three time consecutive terms, and therefore cannot be said to exceed the time limit for filing.

4. Review on the Merits

A. Legislative Backgrounds of the Instant Provisions and the Present State of Consecutive Incumbency of Local Government Heads

(1) Article 87 Paragraph 1 of the former the Local Autonomy Act (prior to the revision through Act No. 4789, December 20, 1994) provides “The term of office of the head of the local government shall be four years” and did not have limitation on consecutive services. In 1995, when the local governance system was truly implemented, the Instant Provision limiting the consecutive terms of the head of the local government to three time was enacted.

The Instant Provisions were adopted for the purpose of enhancing competitiveness of local self-governing bodies. The concrete legislative purpose was to prevent local government heads from using their personnel decisions as means to prolong their incumbency through consecutive terms, protect local development from complications with local luminaries, suppress corruptions, and broaden opportunities for competent people to participate in politics.

(2) As of March 2005, the greater-area local government heads in their third consecutive terms account for 12.5%(2) of all greater-area local government heads. Among basic local government heads, the percentage is 14.6%(29).

B. Whether the Right to Hold Public Offices has been Infringed

(1) Article 25 of the Constitution states “All citizens shall have the right to hold public office under the conditions as prescribed by the Act” and guarantees the right to hold public offices as a basic right. The right to hold public offices means the right to perform the work duties as the members of local self-governing entities and other state or public entities. To perform work duties here does not mean that all people can actually perform those duties but that people are guaranteed equal opportunities to do so in a rational manner. The protected scope of the right to hold public offices covers not only irrational exclusion from the opportunity to hold public offices but also the unjust deprivation of the status as a civic servant (9-1 KCCR 325, 332, 96Hun-Ba86, March 27, 1997 ; 14-2 KCCR 219, 223, 2001Hun-Ma788 et al., August 29, 2002). The right to hold public offices is a right to hold public offices in

all state entities and therefore includes the right to be a candidate and be elected in various elections.

On the other hand, people are granted the right to hold public offices “as determined by statutes” and therefore the legislature is given wide legislative-formative discretion in determining the contents of that right. However, such discretion should not exceed the limit on restriction on basic rights set forth in Article 37 Paragraph 2 of the Constitution(14-2 KCCR 219, 225, 2001Hun-Ma788 et al., August 29, 2002)

(2) Legitimacy of the Purpose

The legislative purposes of the Instant Provisions are to protect local development from adverse effects of prolonged incumbency and to broaden the opportunities for competent prospects to serve as local government heads. The Instant Provisions have the incident effects of freeing local government heads elected the third time from the temptation to seek continued incumbency and thereby ensuring fair and reasonable administration of local government matters independent of partisan politics. Therefore, the Instant Provisions have the requisite legitimacy of purpose.

(3) Appropriateness of Means

Local government heads represent the relevant local self-governing bodies, and oversee, control and execute the affairs thereof(the Local Autonomy Act, Articles 92 and 94), direct and supervise personnel under the heads' control and administer matters concerning appointment, dismissal, training, service, disciplinary sanction, and etc.,(Article 96), have the power to appoint the heads of subordinate administrative entities(Article 109) and propose for residents' referendum the important matters of the local governing bodies(Article 13-2).

Therefore, once an influential person from the locality is elected into a position of a local government head, it is highly likely that the elected will attempt at prolonged incumbency by organizing the employees of the relevant government bodies and other supporters in that locality. Especially, the incumbents have a clear advantage over other candidates vis-a'-vis their authority over personnel decisions. The incumbents can also obtain support from influential local people more easily by collusion with powerful and wealthy local families. Because the voting rate in elections for local government heads and local legislatures is not very high, the support formed on the basis of private gains will increase the probability of prolonged incumbency during which privately driven factionalism arising thereof may paralyze the very functioning of local self-governance.

Given the reality of our local politics, we fear that the head positions of a substantial number of basic local self-governing bodies may be monopolized by people from certain families or schools. The monopoly will lead to spoils systems, bringing down the morale of civic servants or giving rise to corruption and irregularity and wasteful local administration. Under certain circumstances, it may even lower the creativity and will power of long-entrenched local government heads themselves and set up an obstacle to local development.

A violation of law by a local government head is subject to regulation by criminal law. Residents can petition for an audit or file a residents' suit on the matters within the jurisdiction of the relevant local government bodies and their heads(the Local Autonomy Act, Articles 13-4 and 13-5). When local government heads exercise their overreaching powers illegitimately in the areas of personnel and finance, it is practically difficult to detect such exercise. Even if such overreaching is revealed, when there is no retirement age or residents' recall vote under the current Local Autonomy Act, a check on local government heads mid-term is practically difficult. Even at the end of the term, due to the special features of local

elections described above, it is likely that an incumbent will be re-elected.

Therefore, the Instant Provisions have the requisite appropriateness as the last means to correct the aforesaid disturbances in local self-governed administration under the present the Local Autonomy Act.

(4) Minimality of Restriction

The Instant Provisions concern consecutive re-election beyond three time terms. Therefore, the Provisions do not restrict the Petitioner local government heads' right to hold public offices from the beginning. As long as not re-elected consecutively, they can be candidates without any limitation. If re-elected consecutively, they can hold the offices for twelve years(provided that, the first three time terms under the Instant Provisions are eleven years.) If they do not become candidates in any one election after that, they can again be in incumbency for another consecutive set of three time terms.

Then, the extent of restriction imposed by the Instant Provisions on the right to hold public offices is relatively abated, and the requirement of the Minimality of Restriction is satisfied.

(5) Balance of Interests

The Instant Provisions restrict the right to hold public offices but do not deprive one of the right from the beginning. When three time consecutive terms are allowed, the restriction on the basic right is relatively meager. On the other hand, the public interests aimed to be accomplished by the Instant Provisions such as protection of local development and broadening of opportunities for competent aspirants are important and necessary for the advancement of meaningful local governance system, which has barely taken roots. The Instant Provisions, though enacted previously, have not actually taken effects until 2006. In comparison to when they were enacted, the level of participation by local residents and the maturity of political awareness, and the availability of access to the information on local administration have been improved. However, the possible evils that the legislature tried to provide against in enacting the Instant Provisions cannot be said to have completely disappeared.

Therefore, under the current Local Autonomy Act not equipped with strong checks on local government heads, the Instant Provisions constitute meaningful and effective means to accomplish public interest and, even in consideration of the basic rights of the Petitioner local government heads being restricted, do not violate the principle of balance between legal interests.

(6) Petitioners, in addition to arguing that their right to hold public offices are being infringed by the Instant Provisions, argue that their right to pursue happiness is infringed.

When one regulation restricts more than one basic rights, our analysis of the limit on the restriction should center the basic right which is deemed most closely related to the controversy and deemed most severely restricted in light of the Petitioners' intent and the objective motive of the legislature behind such restriction(10-1 KCCR 327, 337, 95Hun-Kal6, April 30, 1998). In consideration of the Petitioners' arguments and the legislature's intent, the regulation arising out of the Instant Provisions is mostly closely related to the right to hold public offices, and the basic right most severely restricted is also the right to hold public offices. A response to the Petitioners' arguments vis-a'-vis the right to pursuit of happiness suffices with our decision on infringement of the former.

C. Whether the Right to Equality is Infringed

(1) Whether an equality violation shall be reviewed under a strict standard of

review or a relaxed one depends on the scope of legislative-formative power granted to the legislature. First of all, if the Constitution specifically requires equality, the strict standard may be applied. If the Constitution itself states the criteria upon which discrimination shall not be based or the areas within which discrimination shall be particularly banned, discrimination based upon such criterion or discrimination within such area shall be justly subject to strict review. Furthermore, if discrimination causes grave restrictions on relevant basic rights, the legislative-formative power shall be limited and be subjected to strict scrutiny (11-2 KCCR 770, 787, 98Hun-Ma363, December 23, 1997).

The Instant Provisions restrict the right to hold public offices but do not discriminate within an area constitutionally banned or cause grave restrictions on the relevant basic rights. The right to hold public offices is unique in that the work performed in such offices accomplishes public interest. Therefore, a restriction on the right to hold public offices shall be presumed to have relatively strong constitutionality as long as the restriction does not infringe on the essence of the work performed and does not cause infringement on other basic rights. Therefore, compliance with the principle of equality or a reasonable relationship between means and ends shall be the main subject matter of review, and a balance between legal interests shall be also reviewed under a relatively relaxed standard (14-2 KCCR 541, 550, 2001Hun-Ma557, October 31, 2002).

Therefore, the equality review of the Instant Provisions shall suffice with a rationality review.

(2) A possible group to be compared to in the equality review of the Instant Provisions are elected officials and more concretely the members of local councils.

The members of local councils are elected officials who have run and prevailed in elections in certain regions. They represented the interests of the relevant localities and constitute a local council, a branch of the relevant local self-governing body. Local councils represent local residents, make the decisions of the relevant local self-governing body within the scope set by the relevant laws and regulations and the decisions concerning local administration, promulgate ordinances, and monitor and supervise the work of the executive branch as the representatives of the local residents. Therefore, local councilpersons can be deemed elected officials in a situation similar to that of local government heads in light of the purposes of the Local Autonomy Act such as democracy and efficiency in local self-governing administration, balanced local development, and the promotion of national democracy.

Local councilpersons have the rights to be elected to be chairpersons and vice chairpersons of the local councils, and the right to initiate proposals, make statements, and vote on the proposals, and can participate in local council meetings and resolutions thereof. However, they are merely the members of a local council, a conferral body. A local councilperson cannot exercise great influences on local administration with his or her individual power. In considering deliberate and equitable decision-making process unique to a conferral body, fair mediation among various interests, and democratic decision-making processes, the wills of individual local councilpersons materialize after conference with other local councilpersons in form of the decisions of the local councils and thereby the resulting decisions are procedurally justified. Contrarily, the head of the local government are unitary administrative entities, who as chief executive officers of local self-governing bodies are empowered to oversee and execute the operation of the local self-governing bodies, promulgate rules, initiate proposals on residents' referendum, and hire and supervise the employees, and thereby exercise great influences on local administration. Therefore, the two are equally elected by residents but the probability and magnitude of adverse effects due to repeated incumbencies is much greater for local government heads. Therefore, differential treatment of local

government heads and local councilpersons has a rational basis.

(3) Petitioners argue that the members of the National Assembly shall also be the comparison groups in conducting equality review.

The members of the National Assembly are similar to local government heads in that they are elected civic servants elected by residents of certain areas. However, the members of the National Assembly are functioning as the representatives of people who represent the interests of the people of the entire country (Article 46 Paragraph 2 of the Constitution). Due to their unique role, they are granted the privilege against arrest and the immunity (Articles 44 and 45 of the Constitution). It is inappropriate to place them on the same or similar status as those of the local government heads conducting local administration and take them into account as the comparison group for equality purposes. Even if deemed a comparison group, almost all justifications for differential treatment of local councilpersons will equally apply.

(4) Therefore, the Instant Provisions regulate only the prolonged incumbencies of local government heads because of the relatively high risk of interfering with democracy and efficiency in local autonomy and balanced local development, and thus has a rational basis.

D. Whether the Right to Vote in Election has been Infringed

(1) Petitioner residents argue that the Instant Provisions ban local government heads in their third terms from candidacy and thereby infringe on the residents' right to vote for the persons with the proven capabilities and integrity.

(2) Article 24 of the Constitution states "All citizens shall have the right to vote under the conditions as prescribed by the Act." The right to vote here means the right of the people to elect civil servants. In our country where indirect democracy has been adopted, the right to elect civil servants is the most important of people's rights to participate in politics. Civil servants are most broadly defined here to include not just ordinary civil servants but also the President, the National Assemblypersons, local government heads, local councilpersons, judges, and all other persons constituting national and local government entities (14-1 KCCR 211, 223, 2000Hun-Ma83 et al., March 28, 2002). Therefore, the Petitioner residents have the right to elect local government heads as set forth by statute.

However, in exercising their right to elect local government heads, if a person to be voted for does not voluntarily, or cannot due to legal restrictions, obtain candidacy, the voters will suffer indirect and factual restrictions on their choices of candidates but cannot be said to suffer infringement on their election rights. At most, the person unable to obtain candidacy suffers a restriction on the right to hold public offices.

E. Infringement on Rights to the Local Governance System

(1) Petitioners argue that the Instant Provisions excessively infringe on residents' right to self-determination and thereby exceed the limit on legislative-formative power.

(2) The essential content of local autonomy is guarantee of local self-governing body, local self-governing functions, and local self-governed administration (6-2 KCCR 510, 522, 94Hun-Ma201, December 29, 1994). The constitutional guarantee of local self-governing bodies includes the autonomy of those bodies as well as the autonomy of the residents.

The local government system is one of the institutional guarantees of the

Constitution (6-1 KCCR 317, 339, 91Hun-Ba15 et al., April 28, 1994 ; 10-1 KCCR 380, 384, 96Hun-Ba62, April 30, 1998). "An institutional guarantee arises out of placing provisions in the Constitution specifying a certain objective institution and thereby maintaining the integrity of such institution. When the framers of the Constitution find a certain national institution especially important and worthy of constitutional protection, the framers specify such institution in the Constitution and thereby regulate the future development, directions and scope of relevant laws. In other words, institutional guarantees are different from basic rights in that they are not subjective rights but objective norms. However, once such institution is guaranteed in the Constitution, the legislator has a duty to form and maintain such institution, and due to the presence of a specific mandate, cannot abolish by legislation or infringe on its essential content in restricting on the content. However, while guarantee of basic rights omitted is subject to the requirement of 'maximum guarantee', institutional guarantees permit broadly the legislator's power to determine the substance and form of the institutions and are therefore subject only to the requirement of 'minimum guarantee'(9-1 KCCR 435, 444-445, 95Hun-Ba48, April 24, 1997)."

(3) Residents' right to self-government are institutional guarantees and therefore are not rights granted to individual residents. Even if we understand Petitioners' arguments as those concerning the residents' right to participate in the decision-making or vote on the local matters, these rights cannot be said to be basic rights to participate in governance guaranteed by the Constitution (13-1 KCCR 1431, 1439-1440, 2000Hun-Ma735, June 28, 2001). In other words, the constitutional scope of local self-government is determined by law and can be restricted by law outside its essential area.

The Instant Provisions' restricting of incumbent local government heads from repeating terms beyond the third does not gravely undermine residents' right to self-government. Furthermore, the newly elected heads will also have been elected with the hands of the residents themselves to oversee local self-government administration. Therefore, there is no infringement on the essential function of local self-government. The Instant Provisions do not excessively restrict local governance system and cannot be said to exceed the limit of legislative formation.

5. Conclusion

Therefore, this constitutional complaint is rejected as set forth above. This decision is a unanimous one except Justices Kwon Seong, Song In-jun, and Choo Sun-hoe who wrote a dissenting opinion set forth below.

6. Dissenting Opinion of Justices Kwon Seong, Song In-jun and Choo Sun-hoe

We dissent from the majority opinion for the following reasons:

A. The Republic of Korea is a democratic republic. The essence of democracy is that the basis of state power and its exercise are based on the consent of the people. Where a modern state performing a variety of functions over a vast territory, representative democracy is not simply useful in but necessary for setting up a governance system, and has now become one of the fundamental principles of the Constitution (10-2 KCCR 600, 606, 96Hun-Ma186, October 29, 1998). The local governance system allows the local residents of a defined area to take responsibility for and carry out the work concerned their welfare, properties and other legally defined matters(Article 117 Paragraph 1 of the Constitution) through the entities

elected by themselves, thereby enhance democracy and efficiency in local self-government and promote balanced local growth and the development of national democracy. The Local governance system is a local manifestation of representative democracy. Therefore, the directions of local development and the broadening of political opportunities to new prospects should be left up to the residents themselves as long as residents' opinions are democratically and rationally congregated and converged and the local self-governing entities are elected from the converged opinions to perform the work concerning the residents' welfare.

Article 25 of the Constitution states, "All citizens shall have the right to hold public office under the conditions as prescribed by the Act." and grants the legislature broad legislative-formative discretion in determining the contents of the right to hold public offices (14-2 KCCR 219, 225, 2001Hun-Ma788 et al., August 29, 2002). However, the public offices are the means through which local self-governing entities execute political decisions on behalf of local residents and thereby materialize representative democracy. Restriction on the right to hold public offices shall not interfere with the functioning of the local governance system under the principle of representative democracy and the legitimacy of the election through which local self-governing bodies are elected upon the residents' consent.

B. The majority opinion identifies as the legislative purposes of the Instant Provisions prevention of spoils systems, protection of local development, and broadening of political opportunities to new prospects. These may be the legislative purposes to be achieved at the expense of restricting the right to hold public offices. However, the Instant Provisions are not appropriate means to achieve those purposes and do not qualify as the minimum necessary restriction of basic rights.

Prolonged incumbency of local government heads itself cannot be an obstacle to local development. Local development does not depend on lengths of offices but the heads' capabilities and integrity. If a local government head is in his or her third term, we should assume that it is because he or she has developed the relevant local governing entities and strengthened the competitiveness thereof during his or her terms, barring special circumstances.

Corruption and irregularities can take place regardless of prolonged incumbency. In recognition of this, the Local Autonomy Act has instituted residents' request for audit(Article 13-4), residents' suits(Article 13-5), local councils' authority to audit and investigate administrative affairs(Article 36), the Central Government's authority to supervise local government affairs(Article 156-2), correction of unlawful or unreasonable orders and disposition(Article 157), the Ministerial orders to local government heads to perform duties(Article 157-2), and the Ministry of Government Administration and Home Affairs' authority to audit(Article 158), and thereby provided the means for monitoring and supervising local government heads. Even if the aforesaid monitoring or supervisory devices cannot control incompetence, corruption, and irregularities of local government heads and the Instant Provisions are being considered as the last recourse, retirement age or the age limit on candidacy are the less restrictive means to achieve the aforesaid legislative purposes.

Also, intra-party competitions and evaluations conducted during party endorsements of candidates, and critical monitoring and checking by the media also appropriately limit prolonged incumbencies of corrupt or incompetent local government heads.

The number of local government heads in their third consecutive terms is only 12.4% among basic local self-governing bodies and 12.5% among greater-area local self-governing bodies. The number of newly elected local government heads is 63.2% among basic local self-governing bodies while 75% among greater-area local government heads. Contrary to the belief at the time of enacting the Instant

Provisions, the rate of consecutive incumbencies through three time terms is low. The Instant Provisions are not contributing to broadening the political opportunities for new competent prospects, and the repeated incumbencies of local government heads are not interfering with the advancement of new competent prospects.

C. Most importantly, the Instant Provisions do not comport with the fundamental principles of democracy and local autonomy. Under the local governance system, local residents themselves determine what is the best for their interests and welfare. Local residents themselves decide who is the most appropriate for local development. Such decisions are immediately considered legitimate while local residents themselves take responsibility for the consequences of such decisions. Not recognizing such autonomy and responsibility by imposing involuntary and external conditions and limits does not harmonize with the nature of 'autonomy.' How to evaluate local government heads in their third consecutive terms, whether such repeat of terms have interfered with or contributed to local development, or whether local development calls for continuation of experienced incumbents or challenges of new prospects shall be left up to the residents themselves. The Instant Provisions deprive local residents of the right of self-determination on the basis of untested and abstract legislative purposes, no matter how capable and morally competent the local government head is and no matter how much they want him or her to repeat his or her term. The fundamental reason that the Instant Provisions cannot be deemed legitimate is the non-democratic and non-autonomous nature of the initiatives and directions behind them.

D. The Instant Provisions infringe on local government heads' right to hold public offices through inappropriate and excessive means in contradiction to the fundamental principles of democracy and local autonomy, and thereby violate the Constitution, and therefore we hereby announce our opinion of unconstitutionality in contradiction to the majority opinion.

Justices Yun Young-chul(Presiding Justice), Kwon Seong, Kim Hyo-jong, Kim Kyung-il(Assigned Justice), Song In-jun, Choo Sun-hoe, Jeon Hyo-sook, Lee Kong-hyun, Cho Dae-hyen

[Attached] Petitioners' List : omitted