

Resident Recall against the Head of Local Government Case

[2007 Hun-Ma 843, March 26, 2009]

The Resident Recall Act states that the signatures of 15 or more percentages of voters, regardless of the reason of resident recall against the head of local government, shall suffice the request of the resident recall vote against the head of local government; the authority of the recalled head of local government shall have been suspended from the request of a resident recall vote until the confirmation of the resident recall; and the resident recall shall be confirmed by more than a majority out of one third of voters. In regard of this Act, the Constitutional Court decided the instant Act does not violate the right to hold public office and equality of the complainant under the principle against excessive restriction.

Background of the Case

The complainant was elected as the Mayor of Hanam City in the election of the head of local government on May 31, 2006. In accordance with the campaign promises to establish a large-scale crematorium under the sponsorship of Gyeonggi Province to promote the local economy, the complainant submitted a proposal of such crematorium to the Governor of Gyeonggi Province on Aug. 25, 2006; sought the agreement of the council of Hanam City on Oct. 16, 2006; and planned a presentation meeting and public hearing for local residents. However, the proposal could not have been accomplished because of a series of demonstrations against such equipment by local residents.

32,848 citizens of Hanam City, which amount to 31.2 percentages of voters, requested the resident recall vote to the Hanam City Election Commission on Jul. 23, 2007 for the arbitrary decision regarding such equipment without reflecting the public opinion sufficiently.

On Jul. 25, 2007, the complainant filed a constitutional complaint, alleging the Resident Recall Act (hereinafter, the “Act”) infringed his right to hold public office due to the failure of specification on reasons of resident recall. The complainant also brought a revocation lawsuit against the Hanam City Election Commission because of its acceptance of the request of the resident recall vote. However, while the appellate review of the lawsuit was pending, the resident recall vote proceeded according to the second request of the resident recall for the same reason. Accordingly, the complainant amended the constitutional complaint to include the provision which suspends the power of the head of local government from when the resident recall vote is notified until when the result of the vote is announced, without limiting the repeated request of resident recall for the identical reason.

Summary of Decision

The Constitutional Court unanimously dismissed the complaint, confirming the constitutionality of the provisions of the Act, except the dissenting opinion of four Justices regarding Article 21 Section 1 of the Act which suspends the authority of a recalled officer from the notification of the resident recall vote to the announcement of the result.

1. Majority Opinion

A. No Limitation on the Grounds for Resident Recall

Article 7 Section 1 Item b of the Act, which does not limit the grounds of resident recall, has a purpose to make resident recall a political system to pursue responsible politics or administration by unseating a public officer who has committed illegal conducts as well as who is incompetent or corruptible in carrying out a policy. Legislators have a broad discretion in forming a resident recall system. According to its nature, which takes an issue of confidence as re-election, it is appropriate not to specify grounds for resident recall: It does not have to limit the grounds of recall because of the necessity of a broad regulation over undemocratic and arbitrary drive of policy; it is not easy to specify the grounds of resident recall from the perspective of the broadness of business and legislative techniques; and limiting grounds of resident recall would be accompanied with a judicial review, which would be inappropriate and retard the process. Therefore, not only it is justifiable that the grounds of resident recall are not limited, but also such legislative decision, unlimiting the grounds of resident recall, is not inappropriate within their discretion. Also, it appreciates the balance of equity when the public interests of residents' controlling against public officers and participating into politics are compared with the risk of an abusive resident recall against public officers because the reasons of resident recall are not limited. Therefore, the instant provision does not violate the right to hold public office under the principle against excessive

restriction.

B. Requirement for Resident Recall Request

The part of Article 7 Section 1 Item b of the Act states the signatures of fifteen percentages of residents eligible to resident recall vote suffice the request for resident recall. In setting such requirements of resident recall vote, the broad discretion is granted to the legislature. Besides, the requirements of resident recall votes are not relaxed so that recall could be abused; and the provision of resident recall intends to reflect the public opinion of residents at most, preventing the biased and unjust request. Therefore, the part of resident recall request neither violates the principle against excessive restriction nor infringes on the right to hold public office.

C. Limitation on the Request Period for Resident Recall Vote

There are three legislative purposes to limit the request period of resident recall vote: First, it intends to provide opportunities for elected public officers to promote policies according to his or her conviction at the beginning of his or her term of office; second, it considers the lack of efficacy of the resident recall when the expiration of his or her term of office is approaching; and third, it purposes to prevent the abuse of repeated resident recalls despite the rejection against the resident recall vote. Therefore, the repeated resident recall would be allowed for the second or third times and there are no reasons to be limited, unless residents repeatedly request the recall vote within a certain period despite the rejection against the vote.

Therefore, Article 8 of the Act, setting the request period for a resident recall vote, does not infringe on the right to hold public office although it does not have the provision to prevent the second request of resident recall vote for the same reason.

D. Solicitation Activity for Signatures of Resident Recall Request

Residents are allowed to solicit for the signatures of the resident recall vote; while, the recalled head of local governments is not allowed to solicit not to sign for the resident recall. Because the request of resident recall vote requires a certain number of residents' signatures, the activities of solicitation for signatures should be protected. However, it does not mean that the solicitation for signatures is included into the resident recall vote campaign or such solicitation virtually accomplishes to satisfy the requirements of resident recall vote and to realize the request of resident recall vote. Accordingly, there are few necessities to ensure the public officer, subject to a recall request, the opportunity to protect himself or herself from the recall even before the request of resident recall: otherwise, the administrative vacuum would be unreasonably extended. Besides, from the perspective of the entire procedure, the Act provides fair opportunities against the recall for a public officer: the competent election commission allows the recalled officer to vindicate himself or herself, following the request of resident recall (Article 14 of the Act); and the recalled officer can mount a campaign against the recall, after the proposal of the resident recall vote (Article 17, 18 of the Act). Considering these elements collectively, Article 9 of the Act, ensuring residents can solicit for the signatures of a

resident recall vote but forbidding the recalled officer to mount a campaign against the resident recall, would not violate the complainant's right to hold public office under the principle against excessive restriction.

E. Suspension of authority

Article 21 Section 1 of the Act suspends the authority of the public officer subject to the resident recall vote against him or her from the notification of the resident recall vote to the announcement of the result. Such suspension of the authority of the recalled public officer is an appropriate means to accomplish the purpose of the above provision that strives for the public interests of the regular administration service and fair supervision on the vote. Because the temporary suspension during the above period would not infringe the fundamental substance of the right to hold public office and the period of suspension of authority may be short as 20 or 30 days, the public interests aimed by the instant provision and the right to hold public office subject to a resident recall vote, restricted by the public interest, would not be disproportionate. Therefore, the instant provision would not infringe on the right to hold public office and would not be against the principle against excessive restriction.

The requirements of the suspension of the authority of the public officer subject to the resident recall are relaxed compared to the requirements of the suspension of the authority of the public officer, for example, President, who is accused impeachment. However, the two requirements are incomparable in considering the infringement of equality because of the different natures and levels

between the two requirements. Therefore, the alleged infringement of equity of the complainant, comparing with the public officer subject to impeachment, should be rejected.

F. Confirmation Requirements of the Result of a Resident Recall Vote

Article 22 Section 1 of the Act states the resident recall is confirmed by more than a majority out of one third of voters. This requirement, from the objective perspective, would not cause the abuse of resident recall because it would be not easily attainable; rather, its requirement, more than a majority out of one third of voters, is more restrictive than the one of elections in general. The difficulty of the above requirement would be supported by the low turnout of voters in recent local elections and the high possibility of solitary resident recall vote in weekdays, unconnected to other elections. Further, such requirement is within the scope of legislative discretion in nature. Accordingly, the instant provision violates neither the principle against excessive restriction nor the complainant's right to hold public office.

The complainant also alleged the violation of equality, based on the provision that the concurrent vote of two thirds or more of the total members of the National Assembly shall be required for the expulsion of any member (Article 64 Section 3 of the Constitution). However, because a member of the National Assembly subject to expulsion is not comparable to the head of local governments subject to resident recall, the allegation should be rejected.

2. Partial Dissenting Opinion of Four Justices (Unconstitutional)

Article 21 Section 1 of the Act infringes the right to hold public office of a head of local governments by election and violates the principle of a representative system and the principle against excessive restriction because the instant provision suspends automatically the authority of the public officer subject to a resident recall vote if a resident recall vote were proposed.

The grounds to propose resident recall are not limited and the requirements to propose resident recall are not restricted: it implies the great possibility of abusive resident recall for the political purpose if the notice of resident recall vote proposal automatically suspends the authority of the public officer subject to a resident recall vote.

The requirements, compared to the public officer subject to impeachment as stated in the Constitution, would be excessively relaxed, being against the principle of equality of the elected public officer of local governments.

The period of authority suspension, which may be not so long, does not justify the suspension of authority: First, the degree of infringement on the fundamental rights is not insignificant because the suspension of authority could last 90 days at most; and second, the suspension of authority would lack legitimacy if the resident recall is rejected.

An alternative system could prevent the harmful effects of the exercise of authority if it were allowed. Besides, the instant provision does not balance the public and private interests well: the suspension of power is the most rigorous infringement means

against the right to hold public office when the resident recall is proposed; and it is more coincident with the spirit of the constitution and infringes less on complainant's fundamental rights when the recalled public officer continued his service during the recall process than when the power is suspended but the proposal of resident recall is rejected later.

It would violate the substance of the representative system by ignoring the result of a confirmed election as well as the definite term if the signature of fifteen or more percentages of residents, the requirements of recall proposal, could suspend the power even before the confirmation of resident recall.