

The Provision Restricting Contribution in Public Official Election Act

[21-1(B) KCCR 108, 2007Hun-Ba29 · 86 (consolidated), April 30, 2009]

In this case, Constitutional Court held constitutional the provision at issue of Public Office Election Act ("POEA") that the candidates shall not make a contribution to those within a constituency and those having connection with the electorate even if they reside out of a constituency because the provision does not violate the rule of clarity in nulla poena sine lege. Further, Constitutional Court upheld the provision prohibiting contribution at all times without setting a time period of prohibition is not unconstitutional because it does not infringe the basic rights such as the right to the pursuit of happiness in violation of the rule of proportionality.

Background of Case

1. 2007Hun-Ba 29

Petitioner Lee ○○ ("LEE") was elected as the council member of Gyung-sangnam-Do at the 2nd Electoral District of Kosung in the nationwide local government election held on May 31, 2006. The article 113(1) of POEA stipulates that a candidate shall not make a contribution to those having connections with voters even if the recipients reside out of a constituency. Yet, LEE was indicted for making the prohibited contribution when Lee gave 2,000,000 won to Hahn ○○ ("HAHN"), Secretary of General of Kosung-Gun Athlete Association under the pretense of HAHN's living expenses. At the Pusan High Court, Petitioner, LEE was fined 15,000,00 won which could invalidate LEE's election. Petitioner appealed to the Supreme Court and, subsequently, filed a motion to request for a constitutional review of the provision at issue. After the Supreme Court denied the appeal and the motion, Petitioner filed the instant constitutional complaint.

2. 2007Hun-Ba 86

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Petitioner Kim ○○ is the spouse of Kim △△ who was elected as President of Changheung-Gun in the nationwide local government election held on May 31, 2006. Yet, Petitioner was indicted for violation of POEA, Article 113(1) based on the allegation that Petitioner made a prohibited contribution of a 100,000,000 Won check to the pastor of the Changheung Central Church under the pretense of a tithe in January 2006. Petitioner was sentenced to six months in jail with a stay of execution for two years at the Kwangju High Court. Petitioner appealed to the Supreme Court and filed a motion to request for a constitutional review of the provision at issue. After the Supreme Court denied the appeal and the motion, petitioner filed the instant constitutional complaint.

Provisions at Issue

Public Office Election Act(revised by Act No. 7189, March 12, 2004)

Article 113(Restriction on Contribution by Candidates, etc.)

(1) A National Assembly member, a local council member, the head of a local government, the representative of a political party, a candidate (including a person intending to become a candidate), and their spouse shall not be allowed to make a contribution (including officiating at a wedding) to those within the relevant constituency, or institutions, organizations or facilities, or to those having connections with the electorate even if they are outside of the relevant constituency, or institutions, organizations or facilities.

Article 257 (Violation of Prohibition and Restriction on Contribution)

Any person who falls under any of following items shall be punished by imprisonment for not more than five years or by a fine not exceeding ten million won

1. A person who violates Article 113, 114 (1) or 115; and

Summary of Opinion

The Constitutional Court held that the provision at issue is not unconstitutional in a 5 to 4 vote.

1. Court Opinion

A. Whether the language, "those having connection with," violates the rule of clarity.

It is necessary to block out the influence if contribution to those having connection with electorate creates the influences on the decisions of the electorate even if the recipients of the contribution are not electorate. The provision at issue describes this certain relatedness as "having connection with." Although the terminology, "having connection with" is an abstract expression, people with common sense can easily understand the legislative intent of the provision at issue by considering the legislative purpose of prohibiting contribution, the relationship with other provisions, and the technical limitation in legislating.

Also, during the process of the application of the provision at issue, the risk of inconsistent interpretation is deemed little owing to the subsidiary interpretation by judge. For this reason, the provision at issue does not fall into the case of the arbitrary interpretation and enforcement of Authority, and, therefore, it does not violate the rule of clarity in *nulla poena sine lege*.

B. Whether the language, "a person intending to become a candidate," - who belongs to those not allowed to make a contribution, - violates the rule of clarity

Whether one belongs to a group subjected to the restriction of making contribution prescribed in Article 113(1) of POEA is determined not only by one's subjective intent but also by objective signs which cast one's intent to become a candidate based on the facts such as one's status, contacted people and behavior.

In determining whether one falls into the people intending to become candidates, it is questioned which election should be the basis of the determination among many different elections including the present one, the future one and concurrent multiple ones. To solve this question, we should determine a candidate's intent with objective

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indicator on the basis of the present election. Therefore, the language, "a person intending to become a candidate" does not violate the rule of clarity.

C. whether restricting contribution at all times infringes the right to personality, right to equality, right to pursuit of happiness and the right to hold public office in violation of the rule against excessive restriction.

The legislative purpose of the contested provision restricting contribution is to guarantee the fairness of election by punishing any campaign work which distorts the free will of the electorate with unjustified financial interest. Thus, the legitimacy of the legislative purpose and the appropriateness of means is acknowledged. Although the provision at issue always restricts contributions, the range of the prohibited contribution is confined by the Article 112. Further, the National Election Commission Rule may additionally prescribe the list of non-prohibited contributions. Furthermore, even though a contribution does not fall into those non-prohibited acts such as the regular activities of a political party, activity ex officio, or customary act as defined in Article 112(2), it can be justified as a kind of customary ex officio action not contradicting social customs and rules if it is one of normal life styles within the boundary of a historically created social order. (the Supreme Court of Korea, 2007. 6. 29. declared 2007do3211). Upon this review, we find the rule of the least restrictiveness is not violated.

Also, if fairness of election is destroyed, people's will on the choice of candidate can be distorted, and, further representative democracy itself can be threatened. Accordingly, in order to safeguard the fairness of election and democracy, the restriction of the basic right within the scope of non- infringement of essential elements can be allowed as it satisfies the balance of different legal interests.

Therefore, the provision at issue does not infringe the right to personality, right to equality, right to pursuit of happiness and the right to hold public office in violation of the rule against excessive restriction.

2. Dissenting Opinion of Four Justices

Since the provision at issue is the regulation on the criminal punishment and the removal of public office, it should be prescribed with clarity. The abstract expression, 'connection with' is not appropriate to be an element for criminal punishment, and is likely interpreted and applied arbitrarily. Also, the language, "intending to become a candidate" violates the rule of clarity in the Constitution because it does not clearly define the based election among many different elections such as the current one and the future ones including the one after the next.

Furthermore, the provision at issue prescribes 'those who are not allowed to make a contribution' broadly enough to include "a person intending to become a candidate." However, it neither questions the relevance between the contribution and the election nor sets a time period of restriction. In result, it prevents people from making a contribution to person or institutions in connection even when a scheduled election is far away and a person has not decided to be a candidate. In this regard, the provision at issue infringes the right to pursuit of happiness in violation of the rule against the excessive restriction.