

## **Invalidity of Election from Performing Duties of Head of Local Government During his Detention Prior to Final Judgment Case**

[2010Hun-Ma68, SEPTEMBER 29, 2011]

In this case, the Constitutional Court held that the provision at issue, Article 265 of the Public Official Election Act, which invalidates the election of candidate of constituency in the instances where that candidate's spouse is sentenced to a fine exceeding three million one for committing election crimes, neither infringes the complainant's right to hold public offices nor violates the rule against guilt-by-association.

### **Background of the Case**

Article 265 of the Public Official Election Act (hereinafter, the "Instant Provision") is a provision invalidating the election of candidate of constituency in the case where either the candidate including a person intending to become a candidate or his or her spouse commits a crime designated by the Act and thereafter is sentenced to a fine exceeding three million won. Complainant is willing to run for the 19<sup>th</sup> general election for members of the National Assembly in his constituency, Gangdong- Kab election district, and that election is to be held on April 11, 2012. However, his spouse was sentenced to a fine of five million won for making a contribution as a crime. When he found himself placed in a situation where his election would be invalidated in accordance with the Instant Provision even if he wins a seat for that general election mentioned above, the complainant filed this constitutional complaint with the Court on February 2, 2010, contending that the Instant Provision infringes on his basic rights including the right to hold public office.

## **Provision at Issue**

**Public Official Election Act** (revised by the Act No. 9974 on January 25, 2010)

Article 265 (Invalidity of Election due to Election Offense by Election Campaign Manager, etc)

If an election campaign manager, person in charge of accounting.....or candidate or lineal ascendant or descendant and spouse of the candidate, has committed a crime related to a contribution from among Articles 230 through 234, or 257(1), or a crime of illegal giving or receiving of the political funds provided for in Article 45(1)of the Political Funds Act, and is sentenced to imprisonment or a fine exceeding three million won..... , the election of the candidate of the constituency .....shall become invalidated.

## **Summary of Decision**

In a vote of 4 to 4, the Court held that the Instant Provision neither infringes the complainant's right to hold public offices nor violates the rule against guilt-by-association based on the ground below.

### **1. Court Opinion**

A. The term of 'the election of the constituency' of the Instant Provision refers to a specific election for which a person intends to be a candidate at the time of crime commitment of his or her spouse. That election can be reasonably recognized if we consider objective indicators including that candidate's position,

people in contact with him or her, or his or her word and behavior. The recognition of election at issue is to be finally decided by the criminal court in charge of the spouse's illegal contribution which will cause an invalidation of that candidate's election. For the forgoing reasons, it is hard for us to find that the term of 'the election of the constituency' of the Instant Provision is inconsistent with the rule of clarity.

B. Moreover, the Instant Provision neither amounts to a guilt-by-association forbidden by Article 13 Section 3 of the Constitution nor is incompatible with the principle of personal responsibility because it imposes joint and several liabilities on the candidate's spouse based on that spouse's actual position and role as a person sharing the inseparable common destiny with that candidate: the spouse, as a person sharing daily life with the candidate, is bound to frequently discuss the election with the candidate; the spouse carries out various activities to make the candidate win the election by intimately sharing responsibilities with the candidate; and the spouse can, in effect, give directions to a campaign manager or a person in charge of accounting in a campaign office.

C. Considering that the spouse who committed an election crime is to be given a procedural guarantee- a court proceeding- and the adoption of separate process to effectuate an invalidity of election has its merits and faults, we also cannot find that the Instant Provision violates the due process only because the candidate is not granted a separate procedural guarantee, an opportunity to make an excuse or a defense.

D. The public interest sought by the Instant Provision is a clean and fair election, a very important value which forms the core of democracy. On the contrary, the crime subject to control under the Instant Provision is a serious election crime which is at the heart of bribing voters. We also cannot deem a candidate's election as fair if an illegal election campaign influences on that election to a certain extent. Moreover, it is undeniable realities of our election that, in many cases, the family members of candidate secretly and systematically

share the role and commit illegalities and wrongdoings. Therefore, we conclude that the Instant Provision does not violate the rule against excessive restriction and thus, does not infringe on the plaintiff's right to hold public office.

## **2. Dissenting Opinion of Four Justices**

In our view, the Instant Provision is incompatible with the rule against guilt-by-association set forth by Article 13 Section 3 of the Constitution when it invalidates the candidate's election in the cases where his or her spouse has only been sentenced to a fine exceeding three million won for committing an election crime. Under the Instant Provision, there is no possibility that a candidate will be exempted from liability regardless of whether that candidate himself or herself is found to have liability whatsoever it is intentional or vicarious.

If the government is to be deemed as not violating due process prescribed by Article 12 Section 1 of the Constitution, a certain process shall be provided for the very person suffering a disadvantage. The Instant Provision, however, neither gives the candidate any chance to go through a judicial process nor guarantees that candidate's right to take part in the criminal proceedings where his or her spouse is tried. For the reasons stated, the Instant Provision also violates due process.