

**Deprivation of Parliamentary Membership  
due to Imposition of a Fine of Three Million Won  
on Accountant in Charge of Election Campaign Case**

<2009Hun-Ma170, March 25, 2010>

In this case, the Constitutional Court denied the constitutional complaint on the grounds that the part of “accountant in charge of an election campaign office” in the main sentence of Article 265 of the former Public Officials Election Act neither violates Article 13 Section 3 of the Constitution which prohibits unfavorable treatment on account of an act not of his own doing but committed by a relative nor goes against the principle of self responsibility, the principle of due process and the rule against excessive restriction under the Constitution.

**【Background of the Case】**

Complainant, recommended by the Grand National Party as a party candidate, was elected to a member of the 18<sup>th</sup> National Assembly member at Yangsan City, Kyongnam on April 9, 2008. But, the complainant’s accountant Kim XX, who was in charge of his election campaign office, was indicted for offering illegal compensation to election campaigners who made phone calls to voters asking for support of the complainant in violation of Article 230 Section 1 Item 4 and Article 135 Section 3, and on November 4, 2009 the Ulsan District Court sentenced him one year imprisonment and suspension of the sentence for two year and

also ordered 160 hours community service (2008KoHap264). Upon this decision, Kim XX appealed but the Busan High Court denied the appeal (2008No856). Consequently, this case was brought to the Supreme Court on February 11, 2009, but the appeal was also denied on June 23, 2009. As a result, the complainant was stripped of his parliamentary membership.

The complainant filed this constitutional complaint on March 20, 2009, arguing that the part of “accountant in charge of an election campaign office” in the main sentence of Article 265 of the former Public Officials Election Act(hereinafter, the “Instant Provision”) infringes his right to hold public office and right to trial as it violates the principle of due process under Article 12 Section 1 of the Constitution, the principle against guilt by association and the principle of self responsibility under Article 13 Section 3 of the Constitution and the rule against excessive restriction under Article 37 Section 2 of the Constitution. The subject matter of this constitutional complaint is constitutionality of the part of “accountant in charge of an election campaign office” in the main sentence of Article 265 of the former Public Officials Election Act(Amended by Act No. 7681, August 4, 2005 but before amended by Act No. 9974, January 25, 2010).

### **【Provisions at Issue】**

Public Officials Election Act (Amended by Act No. 7681, August 4, 2005 but before amended by Act No. 9974, January 25, 2010)

Article 265 (Invalidation of Election due to Election Offense by Election Campaign Manager)

If an election campaign manager, accountant in charge of an

election campaign office (including a person who has not been appointed nor reported as an accountant in charge of an election campaign office, and the amount paid by him in collusion with a candidate for election expenses of the latter is equivalent to 1/3 or more of the restricted amount of election expenses) or the candidate (including a person intending to become a candidate), or lineal ascendant or descendant and spouse of the candidate, has committed a crime related to a contribution act from among Article 230 through Article 234, or 257(1), or a crime of illegal giving or receiving of the political funds provided for in the provisions of Article 45(1) of the Political Fund Act, and is sentenced to imprisonment or a fine exceeding three million won (with regard to an election campaign manager and an accountant in charge of an election campaign office, including the case due to the acts before an appointment or report), the election of the candidate concerned (excluding the candidate for the presidency, the proportional representative National Assembly member and the proportional representative local council member) shall become invalidate: *Provided*, That where the crime is committed with the intention of making the election of the candidate invalidated by an inducement or provocation of another person, this shall not apply.

### **【Summary of the Decision】**

In an opinion of 5(constitutional):4(unconstitutional), the Constitutional Court rendered a decision of denial on the grounds that the part of “accountant in charge of an election campaign office” in the main sentence of Article 265 of the former Public

Officials Election Act which invalidates a candidate's election when his/her accountant in charge of election campaign is sentenced to a fine exceeding three million won neither violates Article 13 Section 3 of the Constitution which prohibits unfavorable treatment on account of an act not of his own doing but committed by a relative nor goes against the principle of self responsibility, the principle of due process and the rule against excessive restriction under the Constitution. The summary of the decision is as follows:

1. Court Opinion of Five Justices

A. Whether Article 13 Section 3 of the Constitution is violated

As Article 13 Section 3 of the Constitution simply applies to the case where a person suffers unfavorable treatment only due to "the reason that he/she is a relative of the one who commits wrongdoing," unless the accountant in charge of an election campaign office is, in principle, a relative to the candidate, the Instant Provision is not against the actual norm of Article 13 Section 3 of the Constitution.

B. Whether the principle of self responsibility under the Constitution is violated

The Instant Provision does not make a candidate jointly responsible for the criminal wrongdoing committed by an accountant in charge of his/her election campaign office but simply corrects the result of election based on the objective fact detrimental to fairness of election (the crime committed by the accountant). Also, a candidate, who has a duty to ensure fair competition observing the Public Officials Election Act, should be responsible for not only his/her own crime but also directing and supervising his/her personnel, at least including accountants, etc., in order to prevent

them from committing an election crime. The Instant Provision, however, simply imposes responsibility on the ‘act done by the candidate himself/herself,’ and therefore, does not violate the principle of self responsibility stipulated in the Constitution.

#### C. Whether due process is violated

Considering the legal structure of the candidate’s responsibility under the Instant Provision; the procedural guarantee of trial available to an accountant in charge of an election campaign office; the fact that it is basically a matter of legislative policy as to whether a separate procedure such as an administrative litigation should be provided for candidates; and the fact that if so provided, concerns can be raised that it is hard to determine matters related to election in an earlier stage and this possibly redundant and inefficient procedure overlapping that for accountants would be abused by a candidate, the simple unavailability of a separate procedure that gives candidates another chance to provide excuse or defense does not amount to violation of the principle of due process or infringement of the right to trial.

#### D. Whether the rule against excessive restriction is violated

The legislative decision that treats the act done by an accountant in charge of election campaign office as done by the candidate, viewing the accountant and candidate as one entity that cannot be separated, thereby preventing corruption in election, cannot be considered as being distinctively wrong or unreasonable. Therefore, the system that imposes a joint responsibility on the candidate without recognizing any cause of exemption from the responsibility, which is execution of the duty of care under supervision, cannot be regarded as infringing on the candidate’s right to hold public

office by imposing excessive restriction and harsh responsibility on the candidate.

#### E. Conclusion

The Instant Provision does not violate the Constitution, and therefore, the constitutional complaint should be denied for lack of cause.

#### 2. Dissenting Opinion of Four Justices

The Instant Provision stipulates strict liability even regarding criminal sanction depriving a candidate's right to hold public office, which is totally different from civil sanction that simply imposes financial compensation, and the candidate's right to hold public office, who is a mere third party, is deprived based on the sentence in which the subjective sentencing conditions for the defendant, or the accountant in charge of election campaign office, are also reflected, without exception.

The criminal trial of an accountant in charge of a candidate's election campaign office is not to decide as to whether the candidate's parliamentary membership should be deprived, but simply to make a judgment on the accountant's criminal act. Moreover, in the case where an accountant and a candidate do not share common interests, such as when the accountant betrayed the candidate and committed an election offense as stipulated in the Instant Provision, practically, no chance can be provided for the candidate to provide excuse or defense himself/herself.

The Instant Provision, which conclusively deprives a candidate of his/her parliamentary membership without allowing him/her to be possibly exempt from the responsibility by proving that he/she is not responsible for managing or supervising, rules afoul of the

Constitution, as it infringes on the candidate's right to hold public office, violating the rule of self responsibility.

### 3. Supplementary Opinion to the Dissenting Opinion by Justice Cho, Dae-Hyen and Justice Kim, Jong-Dae

Conclusive deprivation of parliamentary membership through a statutory provision after election against the one elected as a representative by direct vote of the people with strong democratic legitimacy, requires very high level of constitutional justification surpassing the aforementioned democratic legitimacy, and therefore, strict standard of review is required for reviewing as to whether the Instant Provision violates the principle of self responsibility under the Constitution.

If a candidate was ignorant of the criminal activity done by the accountant in charge of his/her election campaign and no supervisory responsibility can be recognized for such ignorance, depriving a candidate of his/her parliamentary membership not based on the result of trial on the fairness of election itself, but based on the criminal sentence rendered against the accountant in charge of election campaign office would result in severe distortion of voters' intent, thereby going against the ideology of representative system.

The Instant Provision sets three million won of fine, among the punishments of a fine, as the standard of sanction, neither based on guiltiness or innocence nor types of punishments, and this cannot be a reasonable and objective standard for restricting fundamental rights.

Moreover, the Instant Provision, by associating the conditions that cause a candidate to lose the right to hold public office, or

deprivation of parliamentary membership, with judge's discretion in sentencing against a third person who committed an election offense other than the candidate, fails to provide a person who is subject to the statutory provision with legal predictability, and this failure may also bring about a more serious problem.