

25. Prohibition of Distribution of UCC in Prior-Electioneering

[21-2 (A) KCCR 311, 2007Hun-Ma718, July 30. 2009]

In this case, the Constitutional Court held constitutional the part, "the likes", of Article 93 Section 1 of Public Office Election Act ("POEA") that prohibits anyone from distributing or posting etc. certain materials, such as advertisements, photographs, or the likes conveying the import of supporting or opposing candidates in order to influence on election because the challenged provision does not infringe on freedom of election campaign. The unconstitutionality opinion, being the majority, falls behind the quorum of six votes needed for the holding of unconstitutionality.

Background of Case

Complainant filed this constitutional complaint arguing that POEA, Article 93 Section 1

infringes on his freedom of political expression by prohibiting him from creating or distributing UCC(User Created Content) that contain the import of supporting or recommending or opposing a political party or candidates or presenting the name of a political party or candidate. The subject matter of this case is whether the part, "the likes", of Article 93 Section 1 of POEA (hereinafter, "Instant Provision") infringes on complainant's basic right. The text of POEA, Article 93 Section 1 is as follows:

Provision at Issue

Public Official Election Act (revised on Aug. 4. 2005 by Act No. 7681)

Article 93(Prohibition of Unlawful Distribution of Posting, etc. of Documents and Picture)

(1) No one shall distribute, post, scatter, play, or run an advertisement, letter of greeting, poster, photograph, document, drawing, printed matter, recording tape, video tape, or **the likes** (*intentionally emphasized*) which contains the contents supporting,

25. Prohibition of Distribution of UCC in Prior-Electioneering

recommending or opposing a candidate or political party(including the preparatory committee for formation of a political party, and the platform and policy of a political party: hereinafter, the same shall apply in this Article), or showing the name of the political party or candidate, with the intention of influencing the election, not in accordance with the provision of this Act, from 180 days before the election day (in the event of a special election, the time when the cause for holding the election becomes final,) to the election day. *(proviso below intentionally omitted)*

Summary of Opinion

In a 3(constitutional) to 5(unconstitutional) decision (one justice did not participate in this decision), the Constitutional Court held that the Instant provision is not unconstitutional for the reason below.

1. Constitutionality Opinion of Three Justices

A. Whether the Instant Provision violates the rule of clarity.

POEA, Article 93 Section 1 restrains unlawful electioneering in terms of conveyance of ideas or thoughts in a manner appealing to the visual and auditory senses rather than the type of medium. In this regard, it can be sufficiently assumed that "the likes" set forth in the said Section can be found to be media or means that can deliver ideas or thoughts and media similar to the readable or audible materials enumerated in the said Article 93 Section 1 that contain the contents supporting, recommending or opposing a candidate or political party with the intention of influencing the election. Therefore, the Instant Provision does not violate the rule of clarity.

B. Whether the Instant Provision infringes on freedom of electioneering

The purpose of Article 93 Section 1 of POEA is to increase the freedom and fairness of elections by deterring unfair competition in

electioneering or unbalance among candidates caused by a difference of financial capacity and preventing an outcome harming the tranquility and fairness of the election. The legitimacy of this purpose can be acknowledged and the said Section is an appropriate means for this purpose. Denouncing with personal attacks or slandering the opposing candidates by spreading false information can have a fatal influence on the results of an election, and anonymity and openness of the on-line space can decisively destroy the fairness of the election through exposing voters to false information of impersonating candidates or electioneering of foreigners or those under 19 who are not entitled to cast a vote. Accordingly, it is difficult to resolve this problem with a simple post-election regulation and to find clearly that there are other less restrictive means than Article 93 Section 1. Furthermore, since distribution of UCC(User Created Content) is allowed over a considerable range, such as posting UCC of candidates or prospective candidates (Article 59 of POEA) during the period of election campaign (Article 82-4 Section 4 of POEA), restriction caused by the Instant Provision can be considered as the least restrictive means for the abovementioned purpose. In addition, while public interest in the tranquility and fairness of the election achieved by the Instant Provision is very important and great in the democratic country, restrictions of basic rights resulting from the Instant Provision cannot be found so serious such that the balance of interest could be upset. Therefore, the Instant Provision does not infringe on freedom of election campaign in a manner violating the rule against excessive restriction.

2. Concurring Opinion of One Justice

Article 116 Section 1 delegates the legislative body to concretely form the restriction on freedom of election campaign by prescribing that "fair opportunities should be guaranteed in electioneering, under the supervision of a competent election commission" and be done within the limit articulated by the statutes. It is obvious that restriction of electioneering shall comply with the constitutional idea of guaranteeing basic rights and general constitutional principles. However, if legislators see restrictions on electioneering as necessary

25. Prohibition of Distribution of UCC in Prior-Electioneering

for the fairness and tranquility of the election, considering characteristics of previous elections and other general situations, it should be observed unless it is clearly unreasonable or unfair.

3. Unconstitutionality Opinion of Four Justices

A. Whether the Instant Provision violates the rule of clarity

We cannot find that "the likes" include 'all media or means of conveying ideas or thoughts' just because the activities set forth in Article 93 Section 1 are limited in time and place. It is difficult to ascertain which one among various kinds of media, having different types and impact of expression, can fall into the "the likes" only with the examples of the written documents or graphic materials set forth in the said Section. Therefore, the Instant Provision violates the rule of clarity in the Constitution because the scope and limit of electioneering activities cannot be clarified only with the enumerated examples in the said Article 93 Section 1.

B. Whether the Instant Provision infringes on freedom of electioneering

The legislative purpose of Article 93 Section 1 of POEA can be found legitimate. However, prohibition of distribution of UCC cannot be acknowledged as an appropriate means for this purpose because we can hardly find that distribution of UCC destroys the fairness of candidates or the tranquility of the election. The Instant Provision cannot satisfy the rule of the least restrictive means for basic rights because there are less restrictive means for that purpose. Furthermore, the Instant Provision does not strike the balance of interests because while the fairness of election obtained by unconditional prohibition from distribution of UCC cannot be found to be clear or concrete, the disadvantage to candidates caused by restriction of freedom of election campaign cannot be underestimated. Therefore, the Instant Provision infringes on the freedom of electioneering by violating the rule against excessive restriction.

4. Unconstitutionality Opinion of One Justice

Electioneering through written or graphic materials should be guaranteed as a freedom of political expression. Accordingly, prohibiting this is restricting the freedom of electioneering without justifiable reason, so it is contradictory to the Constitution. The same shall be valid for Electioneering through Distribution of UCC.