

***Case on Prohibition of Succeeding National Assembly Member
Seats Reserved for Proportional Representation in the Event
of Vacancies Occurring Within 180 Days Prior to the Term
Expiration Date***

[21-1(B) KCCR 928, 2008Hun-Ma413, June 25, 2008]

In this case, the Constitutional Court ruled that, the provision of the Public Official Election Act providing that a vacancy in the seat of the National Assembly reserved for proportional representation should, in principle, be succeeded by the next eligible candidate on the roll of proportional representation National Assembly members but that the same will not apply to vacancies occurring within 180 days prior to expiration of terms is against the Constitution, for the reason that the provision infringed on the next eligible candidate's right to hold public office. The Court declared the provision incompatible with the Constitution but ordered its continuous application until legislators revise it by December 31, 2010.

Background of the Case

The complainants are candidates of proportional representation National Assembly members who were registered on the list of the Grand National Party at the time of the 17th National Assembly member elections, and they were in the position to succeed the seat at the National Assembly as the three member-elects quit the GNP and resigned from their office. However, under the new Public Official Election Act("POEA") revised during the 17th term of the National Assembly, which provides that the same will not apply in case "a vacant member accrues within 180 days before the date on which his term of office expires, (proviso in Article 200 Section 2, hereinafter the "Instant Provision")," the complainants became unable to succeed the seats of proportional representation National Assembly members. In response, the complainants filed a constitutional complaint in this case on May 27, 2008, arguing that the Instant Provision violated their rights to hold public office, etc. The full text of the provision at issue

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is as follows:

Provisions at Issue

POEA(revised by Act No. 7681 on August 4, 2005)

Article 200(Special election)

(2) If the office of a proportional representation National Assembly member or a proportional representation local council member becomes vacant, the constituency election commission shall decide the person to succeed to the seat of the vacant member in the order of the roll of candidates for the proportional representation National Assembly members and for the proportional representation local members of the political party to which the vacant member belonged at the time of his election, within 10 days after it receives the notification of such vacancy: Provided, That where his election becomes invalidated as provided in Article 264, the political party to which he belongs is dissolved or a vacant member accrues within 180 days before the date on which his term of office expires, the same shall not apply.

Summary of Decision

In a vote of 4 (unconstitutional) to 3 (incompatible) to 2 (constitutional), the Constitutional Court ruled the Instant Provision incompatible with the Constitution for the following reasons.

1. Opinion of 7 Justices

A. Under the current proportional representation election system, voters' expression of political will directly determines the number of seats of proportional representation members assigned to the entitled political party, instead of which candidate will be elected for the seat. Yet, the Instant Provision does not allow for automatic succession to a vacant seat by the next eligible candidate on the list of the political party to which the seat belonged in case a vacancy in the seat of proportional representation National Assembly members arising within 180 days before a day prior to the expiration of the term,

consequently disregarding and distorting the political will of voters who intended to grant a seat to the political party in question.

It is also not reasonable to judge that the case in which "a vacant member accrues within 180 days before the date on which his term of office expires" should be addressed differently from other general cases, given that vacancies in the seat of proportional representation National Assembly members are, as opposed to vacancies in National Assembly members of local constituencies, in principle briefly filled by eligible candidates according to the order of the list submitted by the political party in question without by-elections or re-elections that are considerably time and money consuming and that it is hardly impossible nor very difficult for the successor as a member to prepare for state affair activities or discharge of duties within 180 days before the predecessor's expiration of term, etc.

Furthermore, if a number of vacancies arise in the seats of proportional representation National Assembly members within 180 days before the day the term expires, normal functioning of the National Assembly may be unjustly restricted. Therefore, the Instant Provision is incompatible with the principles of representative democracy, or the basic principles of the Constitution, in that it may disregard and distort the will of voters and hinder normal functioning of the National Assembly.

B. As reviewed earlier, the Instant Provision is incompatible with the principles of representative democracy, only resulting in unreasonably disregarding and distorting the political will of voters expressed through proportional representation National Assembly member elections. Thus, it hardly meets the requirement for the suitability of means.

Additionally, 180 days, which amounts to one eighth of the entire term of proportional representation National Assembly members (4 years), is by no means a short period of time to administer state affairs, and complete prohibition on succeeding the vacant seat of a proportional representation National Assembly member with less than 180 days left as the remaining term is excessive in view of the legislative purpose and thus contradicts the principle of the least restrictive means. Therefore, the Instant Provision violates the rule

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against excessive restriction and thereby infringes on the complainants' rights to hold public office.

C. As regards the type of the Holding, four Justices contend that the Instant Provision has to be ruled unconstitutional since it is deemed neither reasonable nor legitimate to stipulate an exception to succession based on the remaining term of office, whereas three Justices maintain that the Instant Provision, despite its unconstitutionality, should be held incompatible in due respect for the legislative power because precisely how a specific unconstitutional portion will be adjusted in a constitutional fashion, in principle, falls under the boundary of legislators' legislative discretion. Since an opinion of unconstitutionality and incompatibility are the same with respect to the constitutionality of a provision itself, the Court decides to rule the challenged provision incompatible with the Constitution, on the condition that it remains effective until the legislators revises it by December 31, 2010.

2. Dissenting Opinion of 2 Justices

The Instant Provision is not directly aimed at disadvantaging a specific political party or the next eligible candidate on the list of the political party. Also, the total number of members in the National Assembly is 299, among whom 54 are proportional representation members, and the number of seats reserved for proportional representation which may become vacant within 180 days before a day prior to the term expiration date would be extremely minimal.

Meanwhile, the date of National Assembly member elections is, in principle, designated in law as the first Wednesday after 50 days before a day prior to term expiration, so "in case a vacant member accrues within 180 days before the date on which his term of office expires" in effect only a month or so will be remained if the year end and beginning, election campaign periods, and post-election days during which the conduct of substantial state affairs is in fact difficult are excluded. For this reason, it would be actually impossible for a National Assembly member to discharge his/her regular duties during that period. Also, it is stipulated in law that by-elections may not be

held in case less than a year is left before the term expires when there is a vacancy in the seat of a National Assembly member of local constituencies.

All considered, the Instant Provision, by disallowing the merely nominal succession of a proportional representation National Assembly member limited to the extent that no specific damage is done to the functioning of the National Assembly, serves as a suitable means to fulfill the legislative purpose to further develop our political culture. It is hardly considered an unnecessarily excessive restriction, either. Therefore, the Instant Provision is neither against the principles of representative democracy nor infringes on the complainants' rights to hold public office.