

Use of Loudspeaker in Election Campaign Case

[20-2(A) KCCR 345, 2006Hun-Ma711, July 31, 2008]

In this case, the Constitutional Court upheld the provision of the Public Officials Election Act that allows use of loudspeakers in election campaign, not providing for the tolerance limit, on the ground that it does not infringe on the complainant's right to environment.

Background of The Case

The current Public Officials Election Act (hereinafter the "POEA") allows use of loudspeakers but does not provide for the noise tolerance limit such as output frequency (hereinafter the "Provision"). During the campaign period of nationwide local election, the candidates used the loudspeaker. The complainant brought a constitutional complaint with the Constitutional Court, claiming that the noises from the loudspeaker caused mental and physical pain to him and thus his right to pursue happiness and environmental right was infringed upon.

Summary of Decision

The Constitutional Court decided that the provision in this case did not infringe upon the complainant's environmental right as it failed to satisfy the quorum of six Justices to declare a statute unconstitutional four Justices issued the opinion of the Provision being constitutional while the other four Justices issued the opinion of the Provision being incompatible with the Constitution. The summary of the reasons are as follows.

1. The complainant challenged the constitutionality of the legislative omission of not providing for the noise restriction standard in using loudspeaker under the POEA. However, it cannot be said that the POEA did not enact any provision regulating the noise caused by loudspeaker at all; rather the POEA has imperfect and insufficient regulation because the provision concerned with noise restriction did not prescribe any concrete standard such as output frequency. Hence, the constitutional complaint in this case concerning the defects of the noise regulation in election campaign caused by loudspeaker constitutes a challenge against the quasi legislative omission, where the legislature has enacted certain statutes and there are defects, inadequacies, or unfairness in the substance, scope or process of the legislature's regulation of the subject matter.

2. The constitutional right that could be infringed upon by the Provision is the environmental right. The substance of the environmental right shall be specified by the legislation (Article 35 Section 2 of the Constitution). However, this constitutional provision does not mean that National Assembly could neglect to enact any legislation when environmental right becomes completely meaningless nor that the legislators could make any law whatever through legislation rather the Constitution expressly requires the legislators to embody the purports of constitutional environmental right in the statute. Therefore, if there is no legislation or insufficient legislation for the protection of

environmental right when certain requirements are satisfied and if the people's environmental right is excessively infringed upon by that, people may seek a remedy from the Constitutional Court.

3. Opinion of Four Justices (Constitutional)

A. Opinion of Three Justices

The State has the duty to actively take actions for protection of the constitutional right of people from the noise in election campaign caused by an individual third party. In deciding whether the State fails to fulfill its duty to protect basic rights of the people, the Constitutional Court employs the 'principle of prohibition of insufficient protection', meaning that the nation should provide relevant and sufficient protective measures at a minimum to safeguard the people's basic rights.

In this case, it is not clear that the complainant's basic right is infringed. When examining the provisions of the POEA, we cannot conclude that the provisions preventing the noise caused by loudspeaker are insufficient. In addition, although the use of loudspeaker may cause inconvenience, whether to acknowledge the duty of the State to protect basic rights against such inconvenience should be reviewed by balancing with the freedom of election campaign. Hence, omitting to specify the noise tolerance limit for loudspeaker cannot be deemed as neglecting the legislator's duty to protect the petitioner's right to live in calm environment.

B. Concurring Opinion of One Justice

Not the principle of prohibition of insufficient protection, but the principle of prohibition of excessive restriction (Article 37 Section 2) of the Constitution) should be the criterion in reviewing whether the environmental right of the complainant is infringed upon by the Provision which allows the use of loudspeaker in election campaign, not providing for the noise tolerance limit for the loudspeaker. The Provision is constitutional because it does not excessively violates the complainant's environmental right.

4. Dissenting Opinion of Four Justices (Incompatibility with the Constitution)

Noise in election campaign like in this case would be brought about repeatedly in all kinds of public election in the future, and the impact from the noise in public election campaign would not necessarily end soon. In addition, we should consider that the noise damage could strike a fatal blow to the people or depending on circumstances, to the people's legal interests of life and body.

Besides, the old-fashioned election campaign method using loudspeaker outdoors has become less popular in the real world. Considering this fact, strictly limiting the noise from loudspeaker in public election campaign restricts less and less freedom in election campaign. On the other hand, it protects more and more environmental right of the people from the noise. Hence, even if the Provision provides for the output frequency

limit of loudspeaker causing election campaign noise, it is not likely that such regulation gives negative impact to the constitutional right of the third party and public interests.

In light of the above, the Provision does not provide sufficient protection to safeguard the environmental right of people and thus leads to infringement upon the complainant's right to live in calm environment. Therefore, the Provision is incompatible with the Constitution and we request the legislators to revise the Provision on the noise from election campaign during the public election.