

***Case on Reversion of the Political Fund to the Nation Coffers***

[21-2(B) KCCR 846, 2007Hun-Ma1412, December 29, 2009]

In this case, the Constitutional Court held unconstitutional the part of 'a candidate for an intra-party competition for the presidential election' in Article 21, Section 3, Item 2 of the former Political Fund Act (hereinafter, the 'Instant Provision') which requires a candidate for an intra-party competition for the presidential election to return the total amount of political support money received from a supporters' association to the Nation Coffers when he/she is no longer eligible to maintain the relevant supporters' association due to his/her withdrawal of the intra-party competition, on the ground that it infringes the complainant's basic rights including the right to equality and freedom of election.

**Background of the Case**

On August 21, 2007, the complainant registered as a candidate for an intra-party competition to elect a candidate of the United New Democratic Party for the 17th Presidential Election (hereinafter, the 'candidate for an intra-party competition for the presidential election'). On August 27, 2007, the complainant designated and established supporters' association after registering himself as a candidate for the intra-party competition for the Presidential Election. The association raised the political support money of 294,518,594 won in total and contributed 275,000,000 won to the complainant from August 28 to September 15, 2007.

The complainant, however, resigned as a candidate for the intra-party competition for the Presidential Election on September 17, following the public opinion favoring a single candidate within the political party to which he belonged. As a result, on the same day, the complainant lost qualification for maintaining the supporters' association, and thereby the association was dissolved.

According to Article 21, Section 2, Item 2 of the former Political Fund Act, when a candidate becomes no longer eligible to maintain the relevant supporters' association, the total contributions from the supporters' association should revert to the Nation Coffers. In relation to this, the complainant filed this constitutional complaint on December 13, 2007, arguing that the Instant Provision infringes on the right to equality and the right to hold public office guaranteed by the Constitution.

**Provision at Issue**

Former Political Fund Act (before revised by Act No. 8880 on February 29, 2008)

Article 21 (Disposal of Residual Property, etc. in Case of Dissolution of Supporters' Association, etc.)

③ Notwithstanding the provisions of Sections (1) and (2), when a candidate for an intra-party competition in a presidential election, a candidate for a party representative competition or a preliminary candidate to run in an election for National Assembly members is no longer eligible to maintain the relevant supporters' association (excluding the time when they fail to win in an intra-party competition to elect a candidate to run in elections for public office or in the competition to elect the party representative), the

residual property falling under any of the following items shall revert to the Nation Coffers on or before the time when the accounting report provided for in the provisions of Article 40 is made:

2. Designated authorities of supporters' associations:

The total amount of support payments contributed by supporters' association (in the case of his death, refers to the balance of the expenses that are spent on or before the time when he dies).

### **Summary of the Decision**

In a unanimous vote (including two concurring opinions), the Constitutional Court rendered a decision of unconstitutionality regarding the Instant Provision. The summary of decision is as follows:

#### **1. Court Opinion**

##### **A. Whether the right to equality is infringed**

The Article 21, Section 3, Item 2 of the former Political Fund required a candidate for an intra-party competition for the presidential election who did not or did not have a chance to participate in an intra-party competition to return all the support money received from the supporters' association to the Nation Coffers, while requiring a candidate for an intra-party competition for the presidential election who has participated in the competition but failed to win to return only the remaining money, subtracting already spend money for competition from the total amount of the received money (the parenthesized part of the said Article).

In a case where a candidate for an intra-party competition for the presidential election registered as a candidate and launched election campaign, it cannot be denied that the candidate, although giving up participating in the competition, should be regarded as participating in a political process which has an important meaning to realize the representative democracy. Therefore, a candidate for an intra-party competition for the presidential election who withdrew the competition should be subject to the legislative purpose of providing relevant political funds, and the discriminatory treatment against such a candidate by collecting the total amount of money contributed by the supporters' association, as opposed to a candidate who participated in the competition, cannot be regarded as being founded on a reasonable ground.

Candidates for an intra-party competition for the presidential election may give up participating in the competition depending on various circumstantial changes such as trends in public opinion and changes in political landscape or economic situation. Also, it is absurd to strictly require them to participate in the competition without an exception regardless of such unavoidable circumstantial changes or, from the beginning require that only those who are certainly going to participate in the competition in any case can be candidates for an intra-party competition for the presidential election. Especially, the procedures for the Presidential Election, even it is an intra-party competition for it, necessarily include competitions and compromises between political

powers. Some of the candidates may decide not to participate in the intra-party competition as a result of competition and compromise during the highly political procedures or in some cases, may decide to withdraw the competition due to the pressure from public opinion.

Meanwhile, considering the facts that a designated person should be in charge of accounting on the revenue and expenditure of political funds and accounting report system has been maintained with the purpose of preventing abuse of the supporters' association system, abuse of the supporters' association seems to be prevented in most part even when a candidate who withdraw the intra-party competition is required to return only the remaining money after subtracting campaign funds spent during the election campaign for intra-party competition.

After all, the Instant Provision violates the complainant's right to equality because, in relation to the reversion of already used supporting money, the Instant Provision discriminates a person who lost intra-party competition for the presidential election from a person who withdrew it, and such discriminatory treatment does not have any legitimate ground.

#### **B. Whether the freedom of election campaign and the right not to run for election (freedom of withdrawing from public official election process) are infringed**

As election campaign naturally requires campaign fund, restriction on the use of campaign fund results in restriction on election campaign itself. The Instant Provision, when the candidate received political support money from legally organized supporters' association and legally and legitimately used them, restricts the freedom of election campaign, since it requires the total amount of support money including the legally used campaign money to revert to the Nation Cooffers for the cause of the candidate's non-participation in the intra-party competition.

Requiring a candidate for an intra-party competition for the presidential election to return the total amount of support money to the Nation Cooffers, even when the candidate legally designated a supporters' association and received supporting money used for the election campaign, due to the candidate's non-participation in the intra-party competition is grave restriction on the freedom of campaign election.

A candidate for an intra-party competition for the presidential election has the freedom to resign as a candidate when it is decided that a chance of wining the competition is very low, or due to economic · political reasons or other circumstantial changes such as health problem. However, due to the Instant Provision, people who participate in the election process as candidates for an intra-party competition for the presidential election are seriously restricted to exercise their right to resign as a candidate halfway through. Such restriction on political decision making process of candidates for an intra-party competition for the presidential election is not harmonized with the purposes of the system of candidate for an intra-party competition for the presidential election and the system of supporters' association, hampering healthy development of free democratic politics.

As a result, the Instant Provision prevents support money from being used for election campaign without legitimate grounds, and therefore, infringes on people's

political rights including the freedom of election campaign and the freedom to quit election campaign.

## **2. Concurring Opinion of Two Justices**

In order for the complainant to argue that his basic rights are infringed by the Instant Provision, it should be shown that the Instant Provision currently and directly infringes on his relevant basic rights. In this case, however, if a candidate for an intra-party competition for the presidential election participates in the competition with real intention to win the race, there would be no reason for the candidate to be reluctant to use the support money in the fear of the money's reversion to the Nation Coffers in case of the candidate's withdrawal from the competition. Therefore, the possibility that the Instant Provision would directly constraint the use of campaign fund for the intra-party competition for the presidential election seems very low. Even though a candidate for an intra-party competition for the presidential election is hesitant to spend campaign money bearing the Instant Provision in mind, such hesitation is only resulted from actual or economic consideration, and therefore, it is improper to think that the Instant Provision would infringe on the freedom of election campaign of a candidate for an intra-party competition for the presidential election.

Rather, it should be said that the Instant Provision violates the Constitution because it infringes on the complainant's right to withdraw his candidacy for the intra-party competition or in other words, the negative right to run for election, in violation of the principle of proportionality under the Constitution.