

14. Prohibition of Conducting Election Campaign before the Campaign Period and its Exception

[22-1(B) KCCR 497, 2008Hun-Ba169, June 24, 2010]

In this case, the Constitutional Court held constitutional Article 59 Item 3 of the Public Official Election Act, which prohibits an election campaign before the designated election campaign period in principle but allows an exception when a candidate or a person intending to become a candidate conducts election campaigns by utilizing the Internet homepages opened by himself/herself.

Background of the Case

Petitioner was indicted for the violation of Article 255 Section 2 Item 5 and Article 93 Item 1 of the Public Official Election Act by posting pictures and articles on Park, Keun-Hye's Internet homepage which contained opposition to Lee, Myung-Bak, a preliminary candidate for the 17th Presidential Election and support for Park, Keun-Hye, another preliminary candidate for the Election, from June 22 to September 23, 2007 and sentenced to a fine of 4 million won by the Seoul Western District Court. The petitioner appealed to the Seoul High Court and while the case was pending, filed a motion to request for a constitutional review of Article 59 Item 3 of the Public Official Election Act (hereinafter, the Instant Provision), which prohibits an election campaign before the designated period in principle but allows an exception when a candidate or other applicable person conducts election campaigns by utilizing the Internet homepages opened by himself/herself, arguing that the Instant Provision violates the principle of equal opportunity in election campaigns and the principle of equality. After the motion was denied, the petitioner filed this constitutional complaint on December 30, 2008.

Provisions at Issue

Public Official Election Act (Amended by Act No. 7681, August 4, 2005)

Article 59 (Period for Election Campaign)

An election campaign may be allowed during the period from the day next to the closing date of candidate registration, to the day before the election day: Provided, That the same shall not apply to cases falling under any one of the following subparagraphs:

3. Where a candidate or a person intending to become a candidate conducts election campaigns by utilizing the Internet homepages opened by himself/herself.

Summary of the Decision

In an opinion of 4 (constitutional) :2 (dismissal): 2 (unconstitutional), the Constitutional Court held the Instant Provision is constitutional. The summary of the decision is as follows:

14. Prohibition of Conducting Election Campaign before the Campaign Period and its Exception

1. Court Opinion

A. Whether the freedom for election campaign is violated

The Constitutional Court has held placing restriction on the period of election campaign constitutional (6-2 KCCR 15, 34-37 93Hun-Ka4 etc., July 29, 1994; 20-2(A) KCCR 750, 765, 2005Hum-Ba32, October 30, 2008).

Further, the legislative purposes of the Instant Provision are legitimate in that it intends to ensure the freedom and fairness in elections by placing restriction on the period of election campaign and thereby preventing inequality among candidates, unfair competition in election campaigns, and any undesirable consequences from economic disparity among candidates that might harm peace and fairness in elections. It intends to correct inequality in the opportunities for election campaigns among candidates and create a new election climate according to the expansion of internet usage.

In achieving these legislative purposes while minimizing any potential harm of the restriction to the fairness of elections, the statutory scheme that affords a specific form of pre-election campaign as an exception limited to candidates and other applicable people provides an appropriate means to balance the freedom and fairness in elections.

If election campaigns using Internet homepages are allowed to everybody before the designated election period, it is likely to result in overheated and unfair election campaigns, which would then affect the result of the elections. Therefore, considering the need to prevent such unintended effects, as well as the practical difficulties of election management, there seems no other effective means to harmonize the freedom of election campaign and the fairness in elections than prohibiting Internet-based election campaigns, like any other types of election campaigns, as to the general public.

Given the speed of information dissemination and anonymity in the cyberspace, a posteriori measures such as punishing publication of false facts or permitting counterargument by the affected candidate, alone cannot resolve the problems of inequality or corruption in elections. Moreover, election management becomes practically impossible as it takes enormous amount of time and money to manage and control this type of election campaign. Therefore, the Instant Provision cannot be considered as violating the principle of the least restrictive means. Also, considering the public interest in fair and peaceful elections, the limitation on general voters that they cannot conduct election campaigns before the election period does not seem unacceptably excessive. Therefore, the Instant Provision does not infringe on the freedom of election campaign in violation of the principle of balance between legal interests.

B. Whether the principle of equality and the principle of equal opportunity in election campaign are violated

Unlike candidates, voters post on websites opinions or information solely about others (candidates). In such case, the information is less reliable than when the candidate himself/herself posts articles, and it is also highly possible that false information may distort decision making process of voters. Moreover, as it is often difficult to identify the original writer due to the high speed of information spread in cyberspace, a

posterior management and control of election campaigns is not an easy task. Therefore, the differential treatment between candidates and voters is reasonable because the identity of candidates is easier to be verified than that of general voters, and unlike general voters, an order to correct false information or an imposition of criminal sanction can be promptly rendered to candidates. Thus, the Instant Provision is not in violation of the principle of equality or the principle of equal opportunity.

2. Opinion of Dismissal by One Justice

The legislative omission of Article 53 Item 3 of the Public Official Election Act (failing to provide a statutory provision that allows general people to conduct election campaigns by utilizing Internet homepages opened by a candidate or a person intending to become a candidate) cannot be applied to the original case because it is not an existing norm. Even if the legislative omission is declared unconstitutional, the arguably omitted content cannot be applicable to the original case before the content is actually incorporated into the law by legislative correction of the unconstitutionality; further, it is unlikely that the content would be retroactively applied after the legislative revision. Therefore, this constitutional complaint is non-justiciable and should be dismissed on the ground that it fails to establish its relevance to the original case.

3. Opinion of Dismissal by One Justice

In determining whether the provision at issue satisfies the prerequisite for a constitutional review, the rule is "whether the decision of the Constitutional Court concerning constitutionality of the provision at issue may alter the holding of the original case." This means that the Court looks to "whether the holding of the original case is affected by the constitutionality of the provision that is specifically applicable to the original case," rather than "whether the holding of the original case is affected by the constitutionality of the provision that is not even applicable to the original case." In the original case, the petitioner was indicted and found guilty for the violation of Article 255 Section 2 Item 5 and Article 93 Section 1 of the Public Official Election Act. Only these provisions are applied in the original case, and the Instant Provision is in no way applicable in the original case. Therefore, the constitutional complaint should be dismissed for lack of justiciability.

4. Opinion of Unconstitutionality by Two Justices

Internet-based election campaigns have almost no risk to bring about unfairness in elections, compared to the conventional methods of election campaign, and in some sense, its use should be encouraged. Therefore, a stricter standard of review is required for restrictions on this type of election campaign.

Although the legitimacy of legislative purposes of the Instant Provision itself is recognized, however, the means to achieve the legislative purposes seems not appropriate. The Instant Provision imposes the same restriction on Internet-based election campaigns as other types of election campaign, even though Internet-based election

14. Prohibition of Conducting Election Campaign before the Campaign Period and its Exception

campaigns are less likely to cause unfairness based on economic disparity than any other conventional methods of election campaigns. Also, the Instant Provision violates the rule of the least restrictive means because the Public Official Election Act has already provided various methods to stave off harmful effects caused by unfair elections, including Article 82-4 Section 2 and Article 82-5 Sections 1 and 4. Moreover, it breaks the balance of legal interests as the disadvantages caused by restricting the freedom of political expression in the cyberspace are fairly considerable.

Therefore, the complete prohibition of Internet-based election campaign by including it within the scope of prohibited pre-election campaigns violates the Constitution, because it infringes on the freedom of election campaign in violation of the rule against excessive restrictions.