

6. Case on Restoration of Returned Electoral Deposit and Campaign Expenses By Candidate Whose Election is Invalidated

[23-1(B) KCCR 62, 2010Hun-Ba232, April 28, 2011]

The Constitutional Court held that the part 'a person whose election is invalidated under Article 264 of the Public Official Election Act' of Article 265-2, Section 1 ("the Instant Provision") of the former Public Official Election Act (hereinafter, the "POEA"), which requires a person whose election was invalidated by committing an election crime to pay back his election deposit and campaign expenses returned or compensated by the National Election Commission(hereinafter, the "Commission"), is not against the Constitution.

Background of the Case

Petitioner was elected school superintendent of Seoul Metropolitan Government. However, petitioner's election was invalidated when he was sentenced to a fine of 1.5 million KW for making a false report on spouse's assets in violation of the POEA. Thereafter, the Seoul Metropolitan Division of the Commission notified the petitioner that he was required to pay back his returned election deposit and already compensated campaign expenses. In response, the petitioner filed a suit for the confirmation of invalidity of that Commission's notification and, at the same time, moved the court to file with the Constitutional Court for review of constitutionality of the Instant Provision. After the court dismissed that suit and the motion, petitioner filed the instant constitutional complaint.

Provision at Issue

POEA (revised by Act No.7681 on August 4, 2005, but before revised by Act No. 9974 on January 25, 2010)

Article 265-2 (Return of Expenses by Persons, etc. whose Election is Invalidated)

(1) A person whose election is invalidated (including any person who resigns his post prior to the final judgment after having been indicted) under Articles 263 (election invalidated for overspending the election expenses) through 265 (election invalidated for election crime committed by campaign staff including campaign manager) shall return the amount returned or preserved under the provisions of Articles 57 (return of election deposit) through 122-2 (preservation of election expenses). In such cases, when the election of a candidate recommended by a political party in the presidential election is invalidated, and when the election of candidates in the elections for proportional representative National Assembly members and for the proportional representative local council members have been all invalidated, those political parties that recommended them shall return the said amount.

Summary of Decision

In a vote of 8 (constitutional) to 1 (partial unconstitutional), the Constitutional Court held the Instant Provision not against the Constitution.

1. Court Opinion

A. Whether there is a restriction on basic rights

The Instant Provision prescribes only monetary penalty against the person who has committed an election crime rather than removal from public office or deprivation of government employee status. That penalty also cannot be deemed to prevent an indigent person from running for election. Therefore, the Instant Provision does not restrict people's right to hold public office but, by imposing monetary disadvantages, only limits the property right of those punished under the Instant Provision.

B. Whether any property right is infringed

The Instant Provision pursues the legitimate aim of deterring election crimes by imposing penalties on the elected person who committed such crime and of ensuring clean and fair elections. It is necessary to reinforce punitive measures against election malpractice in order to deter election crimes and establish fair elections. Moreover, we find that the standard of punishment and its details articulated in the Instant Provision is not excessive because it limits the scope of punishable conducts based on the sentenced penalties, excluding cases where the crime is insignificant and minor or where mitigating circumstances are considered in deciding penalties. Thus, the Instant Provision does not infringe on the property right in violation of the principle against excessive restriction.

C. Whether the right to equality is violated

The Instant Provision, as it is applied only to elected candidates, treats unsuccessful candidates differently from successful ones. However, even though the Instant Provision does not make an unsuccessful candidate subject to the punishment at issue, the same effect on attaining the legislative purpose of the fair and clean election may be expected because every election candidate would regard the provision at issue, which imposes penalty only on the elected candidate, as a provision to be a constraint on himself/herself so far as all of the election candidates have the same goal of being elected. Consequently, we do not find the Instant Provision, as an arbitrary legislation, infringes on the petitioner's right to equality.

D. Whether the principle of the public financing in elections is violated

The principle of public financing in elections is a principle that the people shall bear all the election expenses in that election itself is a process to select people's representatives who have to perform their public duty and that a citizen with limited

financial resources shall be provided with opportunities to run for elections. It is not against the spirit of the principle to not compensate election expenses to a candidate who has committed the election crimes. In addition, it is necessary to consider that: 1) an election candidate would seek to receive more votes even by committing the election crimes if the government preserve his or her election expenses only based on the rate of votes received; and 2) it would be too much a burden for the government if it has to bear the double expenses of reelection when a person's election is invalidated. For the reasons foregoing, we find that the Instant Provision does not violate the principle of public financing in elections as the provision at issue is stipulating a limited exception not against the purpose of such principle.

2. Concurring Opinion of One Justice

The election deposit system was installed with the intention to improve efficiency in electoral management by means of preventing too many candidates running for elections. In my view, the election deposit system would likely be distorted if the government, not pursuing the original purpose, exploits that system as a means to deter election crimes. Furthermore, because reelection candidates would also have to make their deposit, the government would not be doubly returning deposits; moreover, we cannot find any example of election law in other countries that uses an electoral deposit paid by candidate as a tool to restrict election crimes. In light of the reasons explained above, it is desirable that the Instant Provision be revised as to maintain the original purpose and characteristic of the electoral deposit system.

3. Dissenting Opinion of One Justice

It is unconstitutional that an elected person be required to return his or her electoral deposit in the instance of invalidation of that election. We need to encourage as many candidates as possible running for public office to register because the public offices election, as a core process to realize representative democracy, is one of the means to exercise basic rights including the right to hold public office. Thus I cannot recognize any need to require the return of electoral deposit to prevent the election from being overrun with candidates. Therefore, in light of its restraint on the basic rights without any justifiable reason, such electoral deposit system violates the Constitution, and therefore the Instant Provision requiring the elected person to return the compensated electoral deposit in the instance of invalidation of his or her election is also against the Constitution.