

Electoral systems and constitutional principles in Korea

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Introduction

The election is very important in the political process, because the election is an act of choosing a person to represent the political will of the people and to occupy public offices. The election is democracy itself in the modern world. The most of constitution of the nations in the world have some regulations concerning the representative democracy, the electoral systems, the right to vote, and the right to political participation etc. Also the Article 21 of Universal Declaration of Human Rights says that “Everyone has right to take part in the government of his country, directly or through freely chosen representatives. ... The will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures”. An election can be legitimated by the people, if that is conducted in accordance with constitution and acts established by the people. Therefore the electoral system which is based upon the free act in accordance with the constitutional principles is important for any nation. This paper will be focused in electoral systems and constitutional principles in Korea.

Electoral systems

According to the Korean constitution, there are separate elections for the executive and legislative branches like any other nations which have a

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presidential system. Judges are not elected by the people. Since the establishment of the Korean government in 1948, the election system has been changed more than any other part of the political system in Korea. At present the Korean political system has following types of elections in the public sector: a presidential election, general election to the national assembly, local election, educational autonomy election. The presidential election holds every 5 years and the president shall not be reelected. The candidates for the presidency must be elected directly by the people. The president can be determined not by a majority but by a plurality of the vote. It means that the candidate who gets more votes than any other candidate is elected. The general election to the national assembly holds every 4 years to choose whole members of Korean national assembly. The national assembly has 299 members, 245 members in single-seat constituencies and 54 members by proportional representation. Each voter has 2 votes, one for a candidate for the local constituency and one for a party which has a list of candidates. The 245 representatives are determined by a plurality. Local parliaments and governors are elected for four year terms. Local elections holds every four years simultaneous in prefectures, cities and villages. All citizens who are nineteen years old or older are eligible to vote with few exception.

Constitutional principles regarding the elections

According to the principles governing the law of elections set down in Art.41 and Art.67 of Korean Constitutional Law, elections are universal, equal, direct, secret.¹ The free election principle is interpreted from the constitution. The universal election means the universal adult suffrage. The principle of equal election is a manifestation of the principle of equality in

¹ Art.41 (2) "The National Assembly shall be composed of members elected by universal, equal, direct and secret ballot by the people." Art.67 (1) "The President shall be elected by universal, equal, direct and secret ballot by the people."

the election process. It mandates the principle of equality in the number of votes, namely, one vote per person, and equality in their weight, that is, the extent that one vote contributes to the entire system of election (one vote, one value).²It means the denial of gerrymandering, or discriminatory constituency rezoning, designed to prevent a certain group of people's political opinions from being reflected in the political process.³ The direct election means that eligible voters can participate in the voting process directly and personally. The secret ballot is a relatively modern development, but it is considered so important like any other electoral principles. Free election is an election in which the political system and processes guarantee that each voter will be allowed to vote according to conscience. Besides, the constitutional text says the right to vote, right to be voted, right to political participation, freedom to press, freedom to associate, and freedom of political participation etc.

But the constitution itself regulates not so much directly the detailed requirement about constitutional principles on the electoral acts. The constitutionality of the electoral acts is up to the constitutional court that has the authority to interpret the constitution and to review the acts and make void the unconstitutional acts.

Major decisions of Korean Constitutional Court regarding the elections

The Korean Constitutional Court was established in 1988. The current Constitution adopted an independently specialized court regarding the constitutional dispute in addition to the Supreme Court. The functions of the Constitutional Court include deciding on the constitutionality of laws, ruling on competence disputes between governmental entities,

² 7-2 KCCR 760,771, 95 Hun-Ma 224, Dec. 26, 1995.

³ 10-2 KCCR 742, 747, 96 Hun-Ma 54, Nov.26, 1998; 10-2 KCCR 764, 773, 96 Hun-Ma 74, Nov.26, 1998.

adjudicating constitutional complaints filed by individuals, giving final decisions on Impeachments, and making judgments on dissolution of political parties.⁴ There are nine Justices who serve a six-year renewable term.

National Assembly Election Redistricting Plan Case⁵

There are a series of decision on the principle of equal election in Korea.

2) The complainants in these decisions argued that equal election means not only equal votes for all, but also equal weight given to each vote in selecting their representatives and that it is therefore seriously implicated in redistricting of electoral districts.

The National Assembly Election Redistricting Plan exhibited excessive differences in district populations, they argued, and therefore violated their equality right. The Constitutional Court agreed that equal election requires not only equality in number of votes but also equality in their weight, and that it is the most important factor in redistricting. The Court held the plan in question unconstitutional, finding no reasonableness in general and no justification even under the special circumstances of our country (CC 1995.12.27, 95Hun- Ma224, etc. 상세판결문 영어로 있음). Indeed, the plan in question had left the ratio between the most and the

⁴ The Constitution divides power of constitutional review between the Constitutional Court and the ordinary court system and imposes on both agencies a duty to uphold the Constitution as the supreme law of the lands within their respective jurisdictions. The review of those statutes that underlie actual judicial proceedings against petitioners (Article 107 (1) of the Constitution) and the laws and regulations that directly infringe upon individual's constitutional rights (Article 111 (1) (v)) are placed under the jurisdiction of the Constitutional Court while the review of those executive orders, rules and regulations, administrative actions that form the premise of judicial proceedings against the petitioners (Article 107 (2)) are left with the Ordinary Court system. The first ten years of the Korean Constitutional Court, The Korean Constitutional Court, 2001, p.77.

⁵ 13-2 KCCR 502, 2000Hun-Ma92, 2000Hun-Ma240 (consolidated), October 25, 2001.

least populous districts at 5.87 : 1, and the ratio of about one fifth of all districts to the least at 3:1 or higher. This decision is significant as the first constitutional review of the unequal state of affairs in electoral redistricting.

The Court prescribed the ratio of 4:1 as the maximum population disparity permissible under the equal election principle. Some thought it too generous for our system since we elect the most popular candidate in each district and therefore depend decisively on the balanced district population for fulfilling the requirements of the principle of equal election. They contrasted it with the system of proportional representation whereby parliamentary seats are distributed according to the total number of votes obtained nationwide by each political party. (95헌마224)

A wide scope of legislative discretion in constituency rezoning does not mean that the redistricting of electoral districts is free from constitutional control. In other words, the constitutional principle of equal election limits legislative discretion in such matters. First, the equality in the value of each vote is the most important and basic factor in constituency rezoning. Accordingly, unreasonable redrawing of electoral districts, violating the constitutional mandate of equal weight of votes, is arbitrary, and hence, is unconstitutional. In this light, there is an inherent limit to legislative discretion in readjusting the electoral constituencies. On this point, the Court earlier ruled that "while the National Assembly may consider factors other than population, it is unconstitutional if there exists grave inequality beyond any reasonable limits in the value of votes among electors" (7-2 KCCR 760, 773, 95Hun-Ma224 and etc., December 27, 1995). Second, gerrymandering⁶ is not within the constitutional limits of legislative

⁶ The term 'Gerrymandering' comes from a cartoon depicting an odd, salamander-like creature suggested by a district drawn under the administration of Elbridge Gerry, an

discretion, and is unconstitutional. Gerrymandering refers to an intentional discrimination of electors in a particular region through arbitrary division of electoral districts. It would be gerrymandering if electors in a particular electoral district lose opportunities to participate in political affairs, because of an arbitrary division of electoral districts, or if a district is redrawn to prevent the election of a candidate supported by electors from a particular region (10-2 KCCR 742, 748, 96Hun-Ma54, November 26, 1998; 10-2 KCCR 764, 775, 96Hun-Ma74 and etc., November 26, 1998). The Court earlier ruled that "in redistricting the electoral constituencies, the legislature has to take into its consideration such factors as social, geographical, historical, economical and administrative association between localities, and an electoral district should be composed of a contiguous geographic area except for certain and inevitable circumstances." The Court further decided that unless there are inevitable circumstances, the redistricting of an electoral district by joining two completely separated localities without a common boundary, unless there are inevitable circumstances, was arbitrary and beyond the limits of legislative discretion, and hence unconstitutional (7-2 KCCR 760, 788-789, 95Hun-Ma224 and etc., December 27, 1995).

Restriction of Right to Vote of the Inmates Case⁷

1) The Act on the Election of Public Officials and the Prevention of Election Malpractices provides that "those who have been sentenced to, if the execution thereof has not been terminated on the day of the election, shall not have the right to vote."

early governor of Massachusetts in the USA. Gary C. Jacobson, *The Politics of Congressional Elections* (New York, Pearson Education Inc., 2009), p.13.

⁷ 16-1 KCCR 468, 2002 Hun-Ma 411, March 25, 2004.

2) The complainant was serving the criminal sentence of imprisonment in Prison upon the final sentencing of the imprisonment for the period of 3 years and 6 months following the trial for robbery with the infliction of bodily injury, and was not able to vote at the local election. The complainant filed the constitutional complaint that this statutory provision violated the right to political participation of the inmates.

3) The Constitutional Court, in an eight-to-one opinion, has issued a decision dismissing the constitutional complaint of the complainant on the merits, on the ground that this statutory provision is not in violation of the Constitution. The statutory provision does not restrict the right to elect of all persons who have been sentenced to criminal punishment for an indefinite period of time. Instead, the statutory provision restricts the right to elect of those who have been sentenced to incarceration, if the execution has not been terminated. Thus, the restriction is limited to those cases where the restriction of the right to elect is agreeably reasonable for the execution of the criminal punishment in isolation from the society due to the commitment of the considerably serious crime. Furthermore, the requirement of balance between the legal interests is also satisfied, as the public interest of securing the fairness of the election and the effectiveness of the execution of criminal punishment intended to be achieved through the restriction of the right to elect of the inmates is greater than the disadvantage of the restriction of the fundamental right on the part of the individual inmates caused by the inability to exercise the right to elect. Therefore, this statutory provision is not in violation of the Constitution.

Case on 50 times administrative penalty fee for violators of Public Official Election Act⁸

⁸ 2007 Hun-Ka 22, March 26, 2009.

1) The Article 261 (5)(a) of the Public Official Election Act states that in case a person receives goods from election related persons, that person shall be subjected to a administrative penalty fee 50 times worth the good.

2) Petitioners and complainants were imposed a administrative penalty fee of 450,000 Won by the Busan Election Commission for having each received a box of dried fish worth 9,000 Won during the election of local governments and local council members, violating the Provision. The petitioners made an immediate appeal against the decision on the administrative penalty fee and the court reviewing the case referred the case to the Constitutional Court for review of constitutionality of the Provision on the ground that there were sufficient reasons to acknowledge the Provision to be unconstitutional.

3) In an opinion of 7 to 2, the Constitutional Court held that the Provision is inconsistent with the Constitution. According to the majority opinion, the Provision states that the administrative penalty fee imposed on any person who received goods from people related to election is uniformly 'the amount 50 times worth the received money or the value of food, goods' with no possibility of reduction. However, in case of 'an action which received goods, food, books, travel etc., and convenient transportation by violating the regulations prohibiting donation which is subject to administrative penalty fee, there can be a big difference as to the level of violation according to the motivation and types of the violation, the context and the method of donation, the relationship between the donator and the violator, the circumstances afterwards etc. However, imposing administrative penalty fees that are uniformly decided just by the standards of the donated goods without considering specific and individual situations cannot be restrictions that correspond to levels of responsibility for specific violations.

Moreover, since the amount of administrative penalty fee imposed by such uniform standard is '50 times' the received money or the value of food,

goods, the difference in administrative penalty fee may be large depending on the value of goods. In this regard, an administrative penalty fee of 50 times worth the received goods for average citizens cannot be perceived as a light regulation. Especially, the administrative penalty fee regulated by the Provision is imposed on light matters such as when the received money or goods are less than 1,000,000 Won in order to eradicate small amounts of donation. On the other hand, when the received money or goods exceeds 1,000,000 Won, a criminal fine less than 5,000,000 Won is imposed according to Article 257, (2) of the Public Official Election Act. Although the criminal fine is less than 5,000,000 Won when the good received exceeds 1,000,000 Won, when the violation is lighter such as when the good received is worth 1,000,000 Won, the fact that the administrative penalty fee would be 50,000,000 Won uniformly according to the Provision makes the penalty regulation excessively heavy. Moreover, the goal of fair election by eradicating small illegal donations can be accomplished by imposing administrative penalty 'less than 50 times,' not '50 times' etc., or other mitigated legal methods.

Therefore, not only is the standard and the amount of penalty fee imposed on the violated act standardized disproportionately to the responsibility principle but they are excessively heavy that they deviate from the amount needed to accomplish the purpose of the act. Therefore, since the Provision violates the principle of prohibiting excessiveness, it should be decided as unconstitutional. However, in consideration of the fact that the unconstitutionality is not the fee regulation itself but its standard and the amount, the fact that there could be confusion in enforcing the law and problems of fairness due to the absence of legal regulations in case the Provision loses its effect from the decision of its unconstitutionality, the fact that the duty mediating unconstitutional provisions into constitutional provisions is included in legislative discretion of the legislators, we declare that the Provision is not in conformity with the Constitution. Until the

legislators eliminate the unconstitutionality by amending the law, the Provision will be suspended.

In conclusion, the Constitutional Court ruled that this '50 times administrative penalty fee' provision of the Public Official Election Act violates the Constitution. After the decision of the Constitutional Court, the National Assembly has confirmed its position to respect the Constitutional Court's decision and prepare an amendment and the National Election Commission has prepared an amendment opinion and submit it to the National Assembly.⁹ On the other hand, although agreeing with the Constitutional Court's intent of the decision, as much as the '50 times' fee has contributed to the improvement of the election culture, there are still indications that the basic purpose of the '50 times fee' regulation of the Provision still needs to be maintained.¹⁰

Deposit money in presidential elections Case¹¹

1) Article 56 Section 1 of the Public Official Election Act requires a person who applies for candidate registration in presidential elections to pay 500 million Won in deposit money to the competent constituency election commission at the time of application.

2) The complainant here is one who desires to run for the 17th presidency, who filed a constitutional complaint arguing that the Provision infringes the right to hold public office.

3) The legislative purpose of deposit money in presidential elections lies with preventing many insincere and indecent candidates from applying for registration. However the legislator's policy discretion should be exercised within the boundary of not excessively restricting the franchise and

⁹ Yonhap News, March 26, 2009.

¹⁰ Chosun Daily News; Saegae Daily News April 27, 2009.

¹¹ 2007 Hun-Ma 1024, November 27, 2007.

freedom of political expression of the preliminary candidates. Also, the deposit money should not be set at a notably excessive or unreasonable amount. Yet, 500 million Won is a very large sum for preliminary presidential candidates, which is not easy to collect without taking out loans or receiving donation unless he/she is very rich or recommended by a major political party funded by state subsidies. The Political Fund Act revised on February 29, 2008 provides that "any candidate and any preliminary candidate to run in the election for the constituency" are also entitled to support payments, but 500 million Won is not a sum easy to collect and a candidate's high approval ratings does not necessarily result in the amount of support payment.

Even for candidates who have collected the deposit money, the candidate who obtains 10 to 15 percent of the gross number of valid votes will have 50 percent of the deposit money returned, and only those who obtain 15 percent or more will have the entire sum returned. Therefore, nobody but those who are willing to sacrifice 500 million Won in case they fail to obtain the stated number of votes will be able to exercise his/her right to be elected as the president.

The Constitutional Court, in its decisions such as one in case 92Hun-Ma269 on May 25, 1995, declared constitutional Article 26 Section 1 of the former Presidential Elections Act that prescribes deposit money worth 300 million Won in presidential elections. Then, the former Presidential Elections Act stipulated that the State, using the deposit money, bears the expenses required to make copies of the electoral register and the absentee report and to organize one speech session for each candidate and supporting member on TV and radio while deducting from the deposit money in case the candidate fails to obtain seven percent or more in votes. However, under the current law, expenses for keeping the electoral register is no longer disbursed from deposit money, and the candidate himself/herself has to fully shoulder the broadcasting costs except for the panels,

seminars, and policy fora organized by the National Election Broadcasting Debate Commission. Eventually, the amount of deposit money has increased to 500 million Won instead although the necessity to maintain the previously prescribed 300 million Won has decreased, and the requirements for returning the deposit money has become stricter as the current Public Official Elections Act requires no less than 15 percent (full return) and 10 to 15 percent (half return) of the number of valid votes for return, compared to the previous seven percent or more.

4) Consequently, the Provision imposes extremely excessive burden on individuals, which is an unreasonable discrimination in offering the opportunity to exercise the right to hold public office according to the amount of candidates' assets. This, therefore, infringes the complainant's right to hold public office.

The Constitutional Court, in an opinion of 8 to 1 (5 voting for incompatible with the Constitution, 3 for simple unconstitutionality, 1 for constitutionality), declared that the Provision is not compatible with the Constitution.

정당후보와 무소속후보간의 기탁금차이 2000원마91, 2001.7.19

The amount of deposit required for public elections shall remain at a minimum level, great enough to prevent insincere applicants' candidate registration, and it should not be so excessive as to restrict the right to hold public office of people who are serious about running for election.

In this case, the Constitutional Court decided that the provision of the Public Official Election Act which requires the applicants to pay 500 million Won as deposit money upon registration of presidential candidate is not compatible with the Constitution.

National Assembly Candidacy Deposit case, 1 KCCR 199, 88Hun-Ka6,
September 8, 1989

A. Background of the Case

In this case, the Court found non-conforming to the Constitution Articles 33 and 34 of the Election of National Assembly Members Act (hereafter 'the Act') which required the candidates to deposit substantial amounts of money in order to prevent too many candidates from running and ensure a clean election.

Article 33 (1) of the Act (revised by Act No. 4003, March 17, 1988) requires independent candidates to make a deposit of twenty million won to the local Election Commission at the time of registering as a candidate and party nominees to deposit ten million won. Article 34 then forfeits the deposits minus some expenses in the event that the candidate resigns, nullifies his registration, or failures to gain one-third of the effective votes. A former candidate in a National Assembly election brought a suit to recover his deposit and applied for constitutional review of Articles 33 and 34 of the Act, which formed the premise of the suit, for allegedly violating his right of equality, right to participate in government, and right to hold public offices, guaranteed by the Constitution. The Seoul District Civil Court granted the motion, referring the case to the Constitutional Court.

B. Summary of the Decision

The Court, in the following majority opinion of seven justices, found both Article 33 and Article 34 violating Articles of 11, 24, 25, 41 and 116 of the Constitution, and therefore, nonconforming to the Constitution:

The average amount of savings of the economically active in this country is 6.93 million won. The deposit requirement of ten or twenty million is prohibitive to people of ordinary income or in their twenties' or thirties', and therefore permits only the wealthy to the candidacy. Therefore, it is excessive. They violate the basic principles of people's sovereignty and of free democracy in relation to right of equality (Article 11), right to vote (Article 24) and right to hold public office (Article 25) of the Constitution.

The role of political parties is indispensable to democratic polity. The Constitution does extend special protection to parties. However, the deposit requirement for independent candidates amounting to twice the amount required of party nominees gives the independent candidates substantial competitive disadvantages and suppress their candidacy. Therefore, it violates the principles of equal election (Article 41) and of equality (Article 11) of the Constitution.

Forfeiting the deposits from the candidates who fail to gain one third of the effective votes is too stringent and unprecedented in comparative-legal perspectives. It encroaches upon the principles of election that forms the foundation of a state, and violates Article 116 of the Constitution that prohibits charging the expenses of elections to the candidates. However, having respect for the authority of the legislature and the homogeneity of its membership, the National Assembly must do the revisions themselves; and in the meantime, the Act remains effective until another re-election or by-election. The Court hereby finds the Act non-conforming to the Constitution.

Justice Byun Jeong-soo dissented to the modified form of decision, arguing that the Court can rule only on the issue of constitutionality, and the ruling should become immediately effective; and the Court cannot arbitrarily

decide on the effective periods of its ruling. Justice Kim Chin-woo also dissented, arguing that an unconstitutional statute can remain effective only under exceptional circumstances in which the vacuum in law implicates a threat to national security, and that the Act must be voided on the date of the ruling in this case.

C. Aftermath of the Decision

After this decision, the National Assembly enacted the Act on the Election of Public Officials and the Prevention of Election Malpractices which required a equal deposit of 10 million won from independents and party nominees and relaxed the conditions of forfeiture (Article 56 (1) (i)).

It was reported that the decision put an end to the product of self-serving compromises between the incumbents, and that it would open wide the door of candidacy to the economically disadvantaged, the young in their 20s and 30s and independents for the coming 14th National Assembly Election if it leads to revisions. It was also pointed out that the decision, while eliminating the evils of unequal election, now created a need for preventive measures for unrestrained mushrooming of candidates.

In September 1989, the Court held that the provisions of the Election of National Assembly Members Act requiring the candidates to deposit a specified amount of money were constitutional as means to prevent mock candidacy and an excessive number of candidates. But, the Court added that, if they require excessive amounts of deposits, they could prevent serious but indigent people's candidacy, turning the election into that of the wealthy, and thus infringe upon people's right to participate in government (CC 1989.9.8, 88Hun- Ka6). Following this decision, the Court also struck down the provisions of the Election of Local Council Members

Act requiring the candidates to deposit 700 million Korean won, and lowered barriers for the indigent's participation in elections (CC 1991.3.11, 91Hun-Ma 21).

One-person One-vote Case¹²

1) The Public Election Act permits only one vote for each voter, (Article 146(2)), and does not allow an independent vote for the political party of one's choice. Article 189(1) of the Act states that the allocation of seats for proportional representatives will be proportional to the sum of votes obtained by all candidates of a particular political party in the nationwide district elections, thereby assuming that the voter's choice of a candidate is in accordance with his or her support for a particular political party.

2) Under the present proportional representative system, when an elector supports either a candidate or a political party, but not both, half of the value of his or her vote is either misused or wasted whether he or she votes for his or her favorite candidate or for the political party of his or her choice. Also, the current system cannot accurately reflect support for the newly formed political party, and is inherently prejudiced in favor of the existing major parties by allocating seats that exceed the actual support for them. This is contrary to democratic principles which call for the accurate reflection of people's opinions and guarantee people's freedom of choice in public elections.

The principle of direct election applied to the proportional representative system requires that elections of proportional representatives, as well as the acquisition of the number of seats of proportional representatives of a particular political party, be decided by the result of the direct election. Since the election of proportional representatives in the National Assembly

¹² 13-2 KCCR 77, 2000 Hun-Ma 91, July 19, 2001.

and the election of district assemblyperson are two different elections, the voter should be allowed to cast two separate ballots, one for his or her favorite candidate in the electoral district and the other for the political party of his or her choice. The present election system, however, only allows one vote for the candidate in the electoral district, and does not allow a separate vote for the slate of party nominees for seats of proportional representatives. This means that nomination by the political party has the final and decisive effect in electing the proportional representatives to the National Assembly, and voters cannot exert a direct and conclusive influence in the election of the proportional representatives. This is contrary to the principle of direct election.

Under the present election system allowing one vote per person and adopting the seat allocation for proportional representatives in the National Assembly, when a person votes for a party nominee in the electoral district, his or her vote contributes to the election of the district member of the National Assembly as well as to the allocation of seats for the proportional representatives. On the other hand, a vote for an independent in the electoral district is only counted for the election of the district Assembly member, and has no value in the allocation of seats for proportional representatives. Hence, there arises the problem of inequality in the value of a vote. When a person votes for an independent because the party of one's choice did not nominate a candidate in the electoral district, he or she is forced to suffer inequality in the value of his or her vote. This is unreasonable discrimination of voters who support independent candidates, and it violates the principle of equality in election.

Article 189(1) of the Public Election Act is unconstitutional because of the above reasons. Article 146(2) stating "one person shall be entitled to one vote" is unconstitutional as long as a separate vote for a political party is not allowed, while the election system implements both the majority representation system and the proportional representation system based

on party nomination. The basic rights in violation are the right to vote for proportional representatives and the right of equality of people voting for independent candidates.

Day and Time of, and Method of Determining the Elect at the Reelection and the Vacancy Election for Members of the National Assembly¹³

1) The Act on the Election of Public provides for the reelection and vacancy election for members of the National Assembly, as in the general election for members of the National Assembly, that the vote shall take place on a Thursday, from six o'clock in the morning to six o'clock in the afternoon, and that a candidate who obtains a simple majority of the valid votes shall be elected regardless of the voting rate. On the other hand, the government designates the election date for the general election for members of the National Assembly, unlike for the reelection and the vacancy election, as an official holiday, pursuant to a presidential decree of the Regulation on Public Office's Official Holidays.

2) The complainants in this case, who were the candidates and the voters at the reelection and the vacancy election for members of the National Assembly held on April 24, 2003, filed the constitutional complaint in this case on the grounds that the above provisions are against the principle of people's sovereignty and violate the right to equality and equal vote, as such elections are held on a Thursday that is not an official holiday and time for the vote at such elections is not extended thereby restricting the exercise of the voting right of those who have a vocation, and a candidate is elected by a simple majority regardless of the voting rate thereby intruding the representativeness that is the essence of the election.

3) The Constitutional Court, in a unanimous opinion, held that the above provisions at issue in this case are not unconstitutional. The reasoning are followings.

¹³ 15-2(B) KCCR 339, 2003 Hun-Ma 259, Nov 27, 2003.

(1) The Act on the Election of Public provides identically for the general election for members of the National Assembly and the reelection and vacancy election for members of the National Assembly in terms of the day of the week of the election and the time period available for voting. Therefore, it does not discriminate between voters and candidates at the general election and voters and candidates at the reelection and vacancy election, in these regards.

The government designates the election date for the general election as an official holiday. However, as indicated above, this is pursuant to the Regulation on Public Office's Official Holidays. Therefore, implementing the reelection and the vacancy election without designating the date therefor as an official holiday is not a question for the Act on the Election of Public Officials and the Prevention of Election Malpractices itself in this regard.

Furthermore, Article 41 of the Constitution provides that the National Assembly shall be constituted by the Assemblypersons elected by general, equal, direct, and secret vote of citizens (Section 1), and that matters concerning the election of members of the National Assembly including the election district and the proportional representation system shall be regulated in statutes (Section 2).

It would be desirable, in light of the principle of representative democracy, to secure representativeness of the elected by promoting convenience of voting on the part of the voters and increasing the voting rate. However, matters concerning whether or not to designate the date of the reelection and vacancy election for members of the National Assembly as an official holiday and whether or not to extend time for voting until after the normal business hours fall within the meaning of such other 'matters concerning the election' duly delegated by the Constitution to the purview of the legislators' law making power.

The current provision of the Act on the Election of Public Officials and the Prevention of Election Malpractices that designates a Thursday as the election date and designates the time for voting identically for both the general election and the reelection and vacancy election for members of the National Assembly does not fall outside the scope of such legislative discretion of the legislators.

(2) The Constitution requires that the method of election be that of general, equal, direct, secret, and free vote. The representativeness of the election is sufficiently secured and realized under the current method that provides all voters with an opportunity to participate in voting without discrimination thereagainst, assesses the votes of the voters participating in the election at equal value, and determines the candidate who has obtained a majority of valid votes to be elected.

There can be found no clear constitutional provision or constitutional principle that requests an additional requirement of the minimum voting rate system in order to further secure the representativeness of the election.

If the minimum voting rate system were to be introduced, as argued by the complainants, in case the actual voting rate would turn out to be lower than the required minimum voting rate, voting should be repeated until the voting rate would reach the minimum voting rate, which might cause complication and waste of time and cost. If such methods as civil penalties or fine were to be adopted in order to prevent such situation thereby compelling the voters to vote, this would unjustly abridge the freedom to form opinions of the voters and, as the result, might infringe upon the right to vote, thereby violating the principle of free election.

(3) To conclude, the provisions of the Act on the Election of Public concerning the date and the time of the reelection and the vacancy election for members of the National Assembly are within the scope of the legislators' law making power and, as such, do not abridge the right to

equality or equal vote or the right to participate in politics of the complainants who are the voters. The provision of the Act on the Election of Public Officials determining the election by a simple majority of the valid votes is not in violation of the essence of representativeness of the election or the principle of people's sovereignty.

The provisions of the Act on the Election of Public providing for the reelection and the vacancy election for the members of the National Assembly to be held on a Thursday that is not an official holiday, for the vote to be closed at six o'clock in the afternoon, and for the election to be determined by a simple majority of valid votes regardless of the voting rate are constitutional.

The decision of the Constitutional Court above holding the provisions concerning the date and the time of reelection and vacancy elections for members of the National Assembly constitutional does not, as a matter of course, prohibit legislative measures adjusting the date or the time of election in order to increase the voting rate.

The Act on the Election of Public, through its revision of March 12, 2004, adjusted the date and the time of election to address the problem of low voting rates at reelection and vacancy elections for members of the National Assembly. Considering the fact that the election date for reelection and vacancy elections is not designated as an official holiday unlike the general election, the date of election is now changed from a Thursday to a Saturday to accommodate more convenient exercise of voting rights. The time for voting is now extended by two hours so that the voting is open from six o'clock in the morning to eight o'clock in the afternoon, thus now two hours longer than in the general election.

Election Campaign Participants Limitation Case¹⁴

1) Article 34 of the former Presidential Election Act allowed campaigning between candidacy registration and the day before the election. Article 36

¹⁴ 6-2 KCCR 15, 93 Hun-Ga 4, July 29, 1994.

(1) prohibited all from participating in campaigns except political parties, candidates, campaign managers, campaign liaison office heads, campaign staffs or speakers, thereby inclusively limiting the scope of permissible campaign participants.

2) The complainant was prosecuted at the criminal court on the charge of speaking in support for president candidate for violation of PEA. The court, upon Claimant A's motion, referred the case to the Constitutional Court for review of Article 36

3) The Constitutional court struck down Article 36 (1) of EPA and its punitive provisions that comprehensively barred the general public from participating in election campaigns, and upheld Article 34 and its punitive provisions that limited the allowed period of election campaign activities for the following reason:

A citizen's participation in elections is an exercise of his sovereignty or his right to political participation, and therefore, in principle, must be unhindered and guaranteed. However, since some restrictions are inevitable to secure the fairness of election, freedom of election campaign can be limited according to Article 37 (2) of the Constitution. The legislature must skillfully harmonize freedom and fairness.

The concept of 'election campaigns' used in Articles 36 (1) and 34 of PEA is defined in Article 33 as 'acts making a candidate to be elected or to not be elected'. Despite its ambiguity and lack of clarity, this concept can be understood in light of the legislative intent and the overall structure of the statute, and clearly distinguished from simple expression of opinions. Then, the culpable act requires the specific intent to gain votes or win elections, the objective indicia of such intent, an affirmative act, and premeditation. Since ordinary people can make such distinction, it does not violate the clarity required by the principle of *nulla poena sine lege*.

Article 34 of PEA limiting the permitted period of campaign to after candidacy registration and the day before the election day has reasonable

bases and does allow between twenty three and twenty eight days. Considering the pervasiveness of the mass media and the means of transportation bringing every part of the country within a day's trip, such period is not excessively restrictive in view of the Constitution.

However, Article 36 (1) allows only "political parties, candidates, campaign managers, campaign liaison office heads, campaign staffs or speakers" to participate in campaigns, and does not allow ordinary people, despite their right to vote. This constitutes excessive restriction on people's freedom to participate in election campaign, stepping over the permissible boundary of the legislature's policy-making privilege, and violates Articles 21 (freedom of expression) and 24 (right to vote) as well as the principles of people's sovereignty and free election enshrined in the Constitution. In other words, the core content of regulations aimed at fair election should be regulation of election fund, intervention of public authorities or financial influences, blackmailing, and false rumors, not a comprehensive and total ban on ordinary people's campaign activities. Furthermore, PEA does not allow any campaign activity other than those defined in the statute; it provides detailed regulation for each one of those defined, as well as many penalties for acts damaging the fairness of election. In light of these regulations sufficient to accomplish the fairness by themselves, the comprehensive ban is beyond the necessary minimum. The public interest in fairness of election does not justify sacrifice of freedom of political expressions and right to political participation implicated in election campaign. The new Act on the Election of Public Officials and the Prevention of Election Malpractices in principle allows all to participate in campaign in its Articles 58 (2) and 60 (1), and enumerates those prohibited such as public employees in a concrete and limited fashion. Upholding the spirit of the new law, we find any ban on those not listed by Article 260 (1) of the new law unconstitutional.

Having established basic and important judicial positions on the constitutional significance of and justification and limit for regulation on election campaign and its concept, this decision became a guiding precedent providing a standard of review and a direction for the later cases on the Act on the Election of Public Officials and the Prevention of Election Malpractices. The later cases all upheld the statute emphasizing the question of harmony between freedom to participate in election campaign and the fairness of election:

Use of Loudspeaker in Election Case¹⁵

1) The Public Officials Election Act allows use of loudspeakers but does not provide for the noise tolerance limit such as output frequency. During the campaign period of nationwide local election, the candidates used the loudspeaker.

2) 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.

3) 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.

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

¹⁵ 20-2(A) KCCR 345, 2006 Hun-Ma 711, July 31, 2008.

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.

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.

(1) Opinion of Four Justices (Constitutional)

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.

(2) 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.

4) 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.

Conclusion (Final remarks)

Elections alone are not sufficient to sustain democracy, but elections are basic requirement for the democracy of any nation in modern world. The Korean Constitutional Court has decided the election acts unconstitutional, and national assembly as legislator has revised the election acts several times. The Korean Constitutional Court requires the lawmaker that the electoral systems have to be based on constitutional principles. But the lawmakers who are elected and will be elected as politicians try to make the election acts not 'constitutionally' but 'politically' occasionally. Until now the Korean Constitutional Court reviewed lots of the electoral acts and made an effort to keep the constitutionality of the acts. The Korean Constitutional Court checked the legislative power in the making the election acts especially and made an effort to keep the constitutional principles in the election acts. Certainly, there are still some unreasonable, unfair and unconstitutional suspected election acts in Korea. But the constitutionality of the acts is always monitored and complaint by the people and reviewed by the constitutional court. A democratic nation is

built always by the people as 'Rom was not built in a day.' Korea is one of them.

Key words: free election, fair election, regular election,