

## ***27. Prohibition of Internet Use for Political Expression and Election Campaign***

[23-2(B) KCCR 739, 2007Hun-Ma1001, 2010Hun-Ba88, 2010Hun-Ma173 · 191(consolidated), December 29, 2011]

This case concerns interpretation of the language "the like" in Article 93 Section 1 of the Public Official Election Act (hereinafter "Instant Provision"). Article 93 Section 1 and Article 255 Section 2 Item 5 of the Public Official Election Act prohibit and punish the act of distributing or posting, with the intention to influence the election, of documents and pictures the content of which support, recommend or oppose a political party or candidate, or refer to the name of a political party or candidate, during the period of 180 days before the election day. The Constitutional Court held that interpreting "the like" to include "the act of posting writings, videos or other information on Internet websites or forums, or transmitting electronic mails" infringes on the freedom of political expression and the freedom of election campaign in violation of the principle against excessive restriction, and thus is unconstitutional.

### **Background of the Case**

#### **1. 2007Hun-Ma1001**

When the National Election Commission announced its regulatory standards on December 19, 2008, which included User Created Content (UCC) among regulated matters under the Instant Provision, the complainants brought this constitutional complaint on September 5, 2007, arguing that the Instant Provision infringes on their freedom to express political opinions.

#### **2. 2010Hun-Ba88**

The complainant was brought to court for his alleged violation of the Instant Provision because he posted writings online on numerous

occasions, opposing a certain candidate for the Presidential election held on December 19, 2007. Pending the case, the complainant requested to the court that it seek the Constitutional Court's review of the statute. Upon the court's dismissal, the complainant filed this constitutional complaint on February 11, 2010, arguing that the Instant Provision infringes on the complainant's freedom of speech.

### **3. 2010Hun-Ma173**

The complainant became subject to investigation for his alleged violation of the Instant Provision after posting on his own blog writings about potential candidates for Seoul Mayor in the local election of June 2, 2010. The complainant filed this constitutional complaint arguing that the Instant Provision violates the complainant's right to election and freedom of press and publication.

### **4. 2010Hun-Ma191**

When the National Election Commission announced its regulatory standards, which includes Twitter within the meaning of Article 83 Section 1 of the Public Official Election Act, in relation to the local elections held on June 2, 2010, the complainants filed this constitutional complaint, arguing that the Instant Provision infringes on freedom of expression and freedom of election campaign.

## **Summary of Decision**

The Constitutional Court ruled, by a vote of 6 (limitedly unconstitutional) to 2 (constitutional), that applying the Instant Provision to the act of posting writings, videos or other information on Internet websites or forums, or transmitting electronic mails, via the information and communication networks (hereinafter "the Internet") is unconstitutional. The Court's reasoning is summarized as follows.

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### **1. Court Opinion of Six Justices**

#### **A. The principle of free expression and the limitations on its restrictions**

Freedom of press and publication is a means with which people can freely manifest their personality, formulate reasonable and constructive opinions, and discover truth. It is a fundamental right that is indispensable to the existence and development of a democratic country. Because the freedom of political expression fully functions only when citizens can freely express and exchange their political opinions during elections, the tenet of "freedom in principle, restriction as exception," rather than "restriction in principle, permission as exception," must govern political expression and election campaigns.

Therefore, even when the legislature has no choice but to limit freedom of political expression during elections and freedom of election campaign, in order to ensure fair elections and to prevent elections being corrupted by illegal activities or money driven influence, the means adopted must have concrete and clear relevance to the achievement of the legislative purpose and have the least restrictive effect.

#### **B. Whether the principle against excessive restriction is violated**

##### **(1) Legitimacy of the purpose**

The Instant Provision, premised upon the principle of equal opportunity in election campaigning under Article 116 Section 1 of the Constitution, intends to avoid unfair competition in election campaigns, ill-effects of disparities in economic power among candidates, and any consequential harm to peace and fairness of elections. It thereby aims to achieve a common interest shared among election authorities, voters of the election districts, and the entire citizens, by ensuring freedom and fairness of elections. This legislative purpose is legitimate.

(2) The appropriateness of the means

Because the Internet is a medium easily accessible to anybody and incurs no or a relatively very low cost for its use, it is recognized as a political space where the expenditure on election campaigns can be dramatically reduced.

A defamatory statement or publication of false information against a candidate is directly prohibited and punished under provisions of the Public Official Election Act. Because these provisions set penalties more severe than the penalty under the Instant Provision, the effect is that only those political expressions not containing false information or defamatory statement remain subject to punishment under the Instant Provision. Furthermore, in case of using the Internet, receipt of information does not occur against the recipient's will; rather, it requires the recipient's voluntary and active act of selection. In this regard, prohibiting the use of the Internet for political expression concerning election or for election campaigning during 180 days before the election day cannot be deemed to be an appropriate means to achieve the legislative purpose, which is to avoid unfair competitions attributed to disparities in economic power among candidates or use of negative publicity and to prevent any consequential harm to peace and fairness of elections.

(3) The least restrictiveness

The Instant Provision prohibits using the Internet for political expression concerning election or for election campaigning during 180 days before the date of election. Considering the reality that Presidential elections, National Assembly elections, and local elections successively take place at short intervals from each other, the total period can be excessively long for a fundamental right to be restricted. Further, preventing expression of support or opposition to the principles or policies of political parties may silence citizens from criticizing against political parties or governmental policies and thereby weaken the ideological basis of the representative democratic system. Separate laws are in place as preliminary measures to deter prohibited persons, as

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specified by law, from engaging in online election campaigning and avert spread of defamatory statements or false information. For example, the election commissions regularly run cyber election monitoring teams and may request deletion of any material that is in violation of the Public Official Election Act. In addition, the National Election Commission, which is the main body that manages elections, has indicated a plan to allow regular use of online campaigning. Finally, the fact that political expression and election campaigning may carry negative features including defamatory statements and false information cannot justify the complete ban and punishment of online campaigning for a certain period of time. The ban and punishment is excessive and therefore fails to satisfy the requirement of least restrictiveness.

### **(4) Balance of legal interests**

In determining whether the Instant Provision strikes a balance among legal interests, we must consider not only the balance between the restriction on fundamental rights and the public interest in fairness and peace, but also the public interest in developing democracy and advancing democratic legitimacy through citizens' participation in elections. While fairness of elections achieved from implementation of the Instant Provision by banning online political expression and election campaigning is neither clear nor concrete, the disadvantage caused by the complete ban of using the Internet for political expression and election campaigning for such a long period of time, 180 days to the election day, is great, especially considering the reality that communication through the Internet has become common and that various elections take place with frequency. Therefore, the Instant Provision fails to satisfy the requirement of balance among legal interests.

### **C. Conclusion**

Accordingly, interpreting the language "the like" in the Instant Provision to include the Internet and thereby prohibiting and punishing its use infringes on the complainants' freedom of political expression

and freedom of election campaign in violation of the principle against excessive restriction.

## **2. Dissenting Opinion by Two Justices**

When the legislators have determined that restriction on election campaigning is necessary after comprehensively reviewing the overall conditions, including the level of political and social development of the nation, civil maturity, and the election climate in the past, this decision must be respected to a great extent.

The Instant Provision has a legitimate legislative purpose, which is to guarantee freedom and fairness of election by avoiding ill-effects of unfair competitions and disparities in economic power among candidates, as well as any consequential harm to peace and fairness of elections. Even in online election campaigning, such disparity is very likely to appear among candidates in their mobilizing capacity and economic power. Moreover, the harm to peace and fairness of election can be greater if expressions affecting outcome of the election, including false information, defamatory statements, and exaggerated propaganda, are limitlessly released by general voters, as well as political parties, candidates and related groups, from the election campaign period until day of election. Therefore, the appropriateness of the means is found.

Additionally, the current scheme for election management and monitoring, including punishment of publication of false information and defamatory statements under Articles 110, 250, and 251 of the Public Official Election Act, correctional measures by the election commissions, and operation of cyber election monitoring team, is insufficient to prevent such ill-effects illustrated above. This means that there is virtually no other alternative to effectively achieve the legislative purpose other than banning the act of expression itself that affects the election. Therefore, the restriction on fundamental rights is limited to the least.

Further, compared to the public interest in achieving peace and fairness of elections by ensuring equal opportunity in election campaigns

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and avoiding overheated competitions among candidates, the disadvantage of being prevented from engaging in acts of expression that, having the effects comparable to election campaigning, use non-permitted media or other means before the start of the election campaigning period, is not substantial. The requirement to strike balance among legal interests is thus satisfied.

Hence, the Instant Provision, in restricting freedom of political expression, does not violate the principle against excessive restriction. The holding of limited unconstitutionality is improper also because it leaves out the possibility to regulate online expressions and election campaigning by taking into account the characteristics of the Internet, including its anonymity, speedy transmission of information and far-reaching effects.

### **Aftermath of the Case**

Upon this decision, the political parties and the civil society uniformly expressed positive responses. The National Grand Party released a comment stating that it "hopes the decision will become a momentum to turn the Internet and Social Network Service into a lively venue to communicate healthy criticisms and alternatives on the basis of a mature sense of citizenship." The Democratic United Party, welcoming the Court decision, stated that "it believes that the decision will become a momentum to overcome the unfairness in reality in which election laws have been misused to interfere with citizens' free expression of opinions, rather than serving as a foundation for democratic elections." Additionally, scholars commented that "the decision showed the quintessence of constitutional adjudication in that it allowed a dramatic turn to an aspect of the Constitution which was beyond the imagination of the constitution drafters by reflecting the spirit of the contemporary era." (Yonhap News, December 29, 2011; Hankyoreh, January 9, 2012; and others).