

## The Role of the Constitutional Court of Korea in Expanding the Opportunity for Participating in Election

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### 1. Introduction

It's a great honor to have an opportunity for sharing our experiences with other AACC member states. And I sincerely appreciate the Constitutional Court of the Republic of Indonesia for providing this meaningful conference.

The Constitution of the Republic of Korea provides that all citizens shall have the right to vote(Article 24) and the right to run for public office(Article 25). The Constitutional Court of Korea since its establishment in 1988 has proactively reviewed the constitutionality of the various aspects of the election law. Its decisions have far-reaching ramifications insofar as the election law has moved in a more democratic direction and reinforced representative democracy in Korea.

Especially, the Court has been playing a crucial role to protect the right to participate in election. Today, I'd like to address several major decisions of the Court in 2 parts, all of which expand the people's opportunity for participating in election.

#### **Constitution of The Republic of Korea**

**Article 24** All citizens shall have the right to vote under the conditions as prescribed by Act.

**Article 25** All citizens shall have the right to hold public office under the conditions as prescribed by Act.

## **2. Enlarging the Subject of Right to Vote**

### **A. Case on the Right to Vote of Nationals Residing Abroad [2004 Hun-Ma 644 et al., June 28, 2007]**

The Court declared that the provisions which do not grant overseas Korean nationals the right to vote are not conformable to the Constitution.

The Court pointed out that “Exercising the right to vote functions both as an important channel to reflect people's wishes upon state affairs, and as the means to control over state power via periodical elections. That is why the right to vote are considered to hold a supreme status over other fundamental rights in order to realize the principle of popular sovereignty.”

In this regard, the Court held that “Putting any restrictions on the right to vote can be justified only when there exists an inevitably particular and certain reason to do so. However, the provisions at issue have no just legislative purpose, therefore violates the right to vote, right to equality, and the principle of popular election. Especially, in this international era where more and more Korean nationals emigrate to foreign countries, the fact they have emigrated voluntarily cannot be a justifying reason to deny someone from exercising the right to vote.”

Reflecting the intent of the above ruling, in 2009 the Public Official Election Act adopted an overseas absentee voting system and an overseas election system for presidential elections and National Assembly elections held due to the expiration of terms. As a result, Koreans living overseas, such as short-term overseas sojourners who cannot vote in Korea, or permanent residents who are not registered as Korean residents, were allowed to vote at overseas polling stations after filing reports as overseas absentees or registering as overseas electors.

## **Public Official Election Act**

### **Article 218-4 (Reporting of Overseas Absentees)**

(1) Whenever a presidential election or a National Assembly election is held at the expiration of the term of office, any eligible voter who intends to vote overseas because he or she falls under any of the following cases, as a person who is registered as a resident, shall make a report of an overseas absentee to the head of the competent Gu/Si/Gun from 150 days to 60 days before the election day in writing, by e-mail or through the website of the National Election Commission. In such cases, any person staying or living in a foreign country shall make a report via a mission:

1. Any person who leaves Korea before the commencement date of the period for early voting and is scheduled to return home after the election day;
2. Any person who will not return home until the election day because he or she stays or lives in a foreign country.

### **Article 218-5 (Application for Registration of Overseas Eligible Voters)**

(1) Whenever a presidential election or an election of proportional representation members of the National Assembly is held at the expiration of the term of office, an eligible voter who has not been registered as a resident and has not been enrolled in the official list of overseas eligible voters but intends to exercise his or her voting right in a foreign country shall file an application for the registration of an overseas eligible voter with the National Election Commission by any of the following methods no later than 60 days before the election day of the relevant election:

1. Filing a written application with a diplomatic or consular mission in person. In such cases, a citizen of the Republic of Korea may file an application for the registration of an overseas eligible voter on behalf of his or her family members;
2. Filing a written application in person with a diplomatic or consular mission's employee who travels around its jurisdiction. The latter part of subparagraph 1 shall apply to such cases mutatis mutandis;
3. Filing an application by mail or e-mail, or through the web site of the National Election Commission. In such cases, a person who stays or resides in a foreign country shall file a report through a mission.

**B. Case on the Restriction on Probationers' and Prisoners' Right to Vote**  
**[2012Hun-Ma409 et al., January 28, 2014]**

The Court ruled that it is unconstitutional to restrict the right to vote of probationers(a person for whom the execution of sentence is suspended), and it is unconformable to the Constitution to restrict the right to vote of prisoners(a person who was sentenced to imprisonment for a limited term and whose sentence execution has not been terminated).

The Court emphasized that “Today, elections are the most important means for the people to exercise their sovereignty in a representative democracy. By exercising voting rights in an election, the people provide democratic legitimacy to state institutions elected through election, and the exercise of their state powers. Therefore, the legislature should enact laws that guarantee the right to vote to the fullest extent, while the Court should apply strict scrutiny in reviewing the constitutionality of laws that restrict the right to vote.”

The Court held that “Even if it is necessary to restrict offenders' right to vote, it is against the rule of least restrictive means to restrict the right to vote of both prisoners and probationers without considering the gravity of offenses, intention or negligence, the nature of legal interests infringed, etc. So, the provisions at issue infringe the right of the petitioners to vote.”

Reflecting the intent of this decision, the National Assembly amended the Public Official Election Act in 2015, and provided that “a person who is sentenced to imprisonment for less than one year and is still under such sentence, and a person who is given a suspended sentence and is still under the suspension of the execution thereof” shall be entitled to vote.

**Public Official Election Act**

**Article 18 (Disfranchised Persons)**

(1) Any of the following persons, as of the election day, shall be disfranchised:

2. A person who is sentenced to imprisonment with or without labor for at least one year, but whose sentence execution has not been terminated or whose sentence execution has not been decided to be exempted: Provided, That a person who is under the suspension of the execution of said sentence shall be excluded therefrom;

3. A person who commits an election crime, who commits the crimes provided for in Articles 45 and 49 of the Political Fund Act or who commits the crimes in connection with the duties while in office as the President, member of the National Assembly, member of local council, and head of a local government, which are referred to in Articles 129 through 132 of the Criminal Act and Article 3 of the Act on the Aggravated Punishment, etc. of Specific Crimes, and for whom five years have not passed since a fine of at least one million won is sentenced and the sentence becomes final or 10 years have not passed since the suspended sentence becomes final, or for whom 10 years have not passed since imprisonment was sentenced and the decision not to execute the sentence became final or since the execution of the sentence was terminated or exempted (including a person whose punishment becomes invalidated);

4. A person whose voting franchise is suspended or forfeited according to a decision by court or pursuant to other statutes.

### **3. Guaranteeing More Opportunity of Running for Public Office**

#### **A. Case on the Deposit Money in Elections**

The Court delivered decisions of nonconformity to the Constitution 3 times regarding the provisions on the amount of money to be deposited for elections. At the time of each decision, the Public Official Election Act required candidates for presidential election to pay a deposit of 500 million Korean won[2007Hun-Ma1024, November 27, 2008], for election of members of the National Assembly to 20 million won[2000Hun-Ma91 et al., July 19, 2001], and for election of proportional representation members of the National Assembly to 15 million won[2015Hun-Ma1160, December 29, 2016].

In these decisions, the Court held that “The legislative purpose of deposit money in

elections lies with preventing many insincere and indecent candidates from applying for registration. However, the deposit money should not be set at a notably excessive or unreasonable amount. The amounts of each case are very large sum that cannot be procured easily by average citizens without taking out loans or receiving donations, unless he or she is very rich or recommended by a major political party. Consequently, anyone who cannot raise such an amount will be effectively barred from running for public office, even if the person were to be the most qualified candidate.”

Furthermore, the Court added that “The provision on deposits for proportional representation National Assembly member candidates sets the same amount as for local constituency National Assembly member candidates is deemed as excessive. While local constituency member elections are by nature elections of individual persons, proportional representation member elections are those of political parties, which is so much less likely to bring about corruption or overheating through election campaigns. And as newly formed parties or minor parties find it difficult to secure even one seat, requiring such parties to pay deposits in proportion to the number of candidates would be excessive, having a daunting effect on their participation in the proportional representation elections and in recommending candidates.”

After these decisions, the Public Official Election Act lowered the amount of deposit required to register: 300 million won for presidential elections, 15 million won for elections of constituency members of the National Assembly, 5 million won for elections of proportional representation members of the National Assembly, etc.

**Public Official Election Act**

**Article 56 (Election Deposits)**

(1) A person who applies for candidate registration shall pay an election deposit referred to in the following subparagraphs per candidate to the competent constituency election commission at the time of the application for registration, as prescribed by the National Election Commission Regulations. In such cases, when a preliminary candidate applies for candidate

registration in the relevant constituency, which is the same as that of the relevant election, he or she shall pay the amount remaining after excluding the election deposit paid under Article 60-2 (2):

1. 300 million won, in cases of a presidential election;
2. 15 million won, in cases of an election of constituency members of the National Assembly;
- 2-2. 5 million won, in cases of an election of proportional representation members of the National Assembly;
3. 3 million won, in cases of an election of City/Do council members;
4. 50 million won, in cases of an election of Mayors/Do Governors;
5. 10 million won, in cases of an election of the heads of autonomous Gus/Sis/Guns;
6. 2 million won, in cases of an election of autonomous Gu/Si/Gun council members.

**B. Case on the Cancellation of Political Party's Registration [2012Hun-Ma431 et al., January 28, 2014]**

The Court ruled that the provision requiring the cancellation of the registration of a political party which fails to obtain any seat and at least 2/100 of the total number of effective votes in a National Assembly election, is unconstitutional.

The court stated that “Given the importance of political parties in the representative democracy, any restriction on the freedom to form a political party should be as minimal as possible. Particularly, any provision that stipulates the cancellation of the political party's registration should be legislated on a strict standard within the necessary minimum scope, because it deprives a political party of its existence and makes it impossible for the political party to conduct any kind of political activity.”

The Court stated that “It is hard for a newly established political party to attain a high level of political support from the beginning.” In this context, the Court acknowledged the existence of less restrictive means; “For instance, the cancellation of party registration can be decided either depending on the result of the election after several chances to participate

in public official elections for a certain period of time.”

#### **4. Concluding Remarks**

I hope that our experiences shared today will help other AACC member states to deal with the similar cases. Our Court provides the full-text or summary of all the decisions I covered today through English version web-site. If you need to learn more about the decisions, please visit our web-site(<https://english.ccourt.go.kr/site/eng/main.do>). And you can also find the English version of current Korean legislations on the web-site of Korea Law Translation Center(<https://elaw.klri.re.kr>).

Thank you very much for your attention.