

9. Case on Restrictions on Invitation to Election Broadcasting Debate

[23-1(B) KCCR 237, 2010Hun-Ma451, May 26, 2011]

In a vote of 7 (constitutional) to 2 (unconstitutional), the Constitutional Court held that the part of 'election of local constituency member of the National Assembly' of Article 82-2, Section 4, Item 3 ("the Instant Provision") of the Public Official Election Act ("POEA"), which sets forth certain restrictions on the qualification to be invited to an election broadcasting debate hosted by the National Election Broadcasting Debate Commission for candidates running for the National Assembly of local constituency, is not incompatible with the Constitution.

Background of the Case

The complainant, who had run for reelection of local constituency member of the National Assembly, was excluded from the list of candidates to participate in election broadcasting debate for not meeting the qualifications which the Instant Provision sets forth. The complainant filed this case with the Constitutional Court arguing that his right to equality was infringed and thus the Instant Provision is unconstitutional.

Provision at Issue

Public Official Election Act (revised by the Act No. 9974 on January 25, 2010)

Article 82-2 (Interviews or Debates hosted by the National Election Broadcasting Debate Commission)

(4) When the an Election Broadcasting Debate Commission of each level holds interviews or debates referred to in paragraphs (1) through (3), it shall hold them by inviting the candidates falling under any one of the following sub-paragraphs. In such cases, candidates who are invited by the Election Broadcasting Debate Committee of each level to the interviews and debates shall participate therein unless justifiable grounds exist that make it impossible for them to do so.

1. The presidential election:

(a) Candidates recommended by the political parties having five or more National Assembly members belonging thereto;

(b) Candidates recommended by the political parties that have obtained 3/100 or more votes of the total number of nationwide valid ballots in the immediately preceding presidential election, the election of the proportional representative City/Do council members or the election of proportional representative autonomous Gu/Si/Gun council members; and

(c) Candidates who occupy 5/100 or more support ratios averaging the results of public opinion poll conducted and publicized by the press under the conditions as set by the National Election Commission Regulations during the period from 30 days before the beginning date of election to one day before the beginning date of election.

3. The election of National Assembly members of local constituency and the election

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of the head of local governments:

(a) Candidates recommended by the political parties falling under subparagraph 1(a) or (b);

(b) Candidates who have obtained 10/100 or more votes of the total number of valid ballots by running for a presidential election, the election for National Assembly members of local constituency or the election for the heads of local governments (including the special elections, etc.) conducted within 4 years (including cases where the district of constituency was altered and the altered district overlaps with the district of immediately preceding election); and

(c) Candidates whose support ratio averaging the results of public opinion poll referred to in subparagraph 1(c) is 5/100 or more.

Summary of Decision

1. Court Opinion

If there is no restriction on candidates' qualification to be invited to election broadcasting talks or debates, such talks or debates can be degraded to hustings rather than effective talks or debates, and comparison of the candidates in terms of their qualifications or political capabilities would probably be impossible. In addition, transmission resources are limited. Therefore, a certain restriction on the candidates to be invited to talks or debates is based on the legislature's reasonable considerations such as above.

Also only candidates meeting a certain standards, considering such factors as recommendation of major parties, chances of winning the election and popularity with the public, should be invited so that their talks and debates on policies can be effective and practical. The Instant Provision, which allows the candidates falling under any of the followings to be invited to the debate, cannot be regarded to be particularly arbitrary or excessively strict: candidates recommended by the political parties having five or more National Assembly members belonging thereto, or by the political parties that have obtained 3/100 or more votes of the total number of nationwide valid ballots in the immediately preceding election; candidates who have obtained 10/100 or more votes of the total number of valid ballots by running for elections within 4 years; or candidates who occupy 5/100 or more support ratios averaging the results of public opinion poll conducted and publicized by the press during the period from 30 days before the beginning date of election to one day before the beginning date of election. Furthermore, a provision is set out to allow separate interviews and debates for the uninvited candidates, providing them with an opportunity to use broadcasted debates for their election campaigning. For the foregoing reasons, the Instant Provision should be considered reasonable since it strikes a balance between the conflicting interests, the public interest in inviting an adequate number of candidates to vitalize election talks or debates and the private interest in guaranteeing equal opportunity to election campaigns. Therefore, the different treatment of candidates under the Instant Provision is not an arbitrary discrimination and does not infringe on their right to equality.

2. Dissenting Opinion of Two Justices

Because an Election Broadcasting Debate Commission is a governmental institution that is established under each level of the Election Administration Commission, it, like Election Commissions, bear the constitutional duty to ensure equal opportunity in election campaigning under Article 116, Section 1 of the Constitution. Election campaigning via broadcasting can be one of the most effective means for election campaigns, while it plays a major role in helping voters to recognize and compare the candidates' positions and policies all at once. Besides, broadcasted talks or debates hosted by an Election Broadcasting Debate Commission constitutes a great part of campaigning since other forms of public speeches are prohibited under the POEA.

The Instant Provision, nevertheless, imposes restrictions on the candidate qualification to be invited to the debates, resulting in direct incompatibility with the purpose of Article 116, Section 1 of the Constitution, which emphasizes equal opportunity in election campaign. The provision of the POEA stating that a separate interview or debate can be held for uninvited candidates cannot alleviate the unconstitutionality of the Instant Provision, as such separate debate is only another form of discriminatory action sustaining the original discrimination by the Instant Provision. Furthermore, not allowing some candidates to participate in the election campaigning via broadcasting can lead to a critical impact on election results because voters may develop a perception that distinguishes invited candidates from uninvited candidates. In this case, it is difficult for the candidates uninvited to the election broadcasting debate to find ways to overcome such discriminatory effect.

As such, the Instant Provision did not give the complainant, who was not invited to the election broadcasting debate, an equal opportunity to election campaign, violating Article 116, Section 1 of the Constitution.