

Case on Restricting Online Media from Publishing Columns, etc. Written by Candidates for Public Official Election

[2016Hun-Ma90, November 28, 2019] * First Draft

In this case, the Court decided that the complaint over a provision of the Public Official Election Act, which states that the Internet Election News Deliberation Commission shall determine and pronounce matters necessary to ensure fair election news online, is inadmissible as it does not fulfill the directness requirements for constitutional fundamental right infringement, and that former and current provisions of the Regulation on Deliberation Standard, Etc. for Internet News Reporting of Election, which restrict online media from publishing columns, etc. written by any candidate for 90 days until the election day, infringe upon the freedom of speech and, therefore, violate the Constitution.

Background of the Case

The Complainant, joint operation chairman of a political party, published a column under his/her own name on a website of an online news outlet.

The Complainant registered as a preliminary candidate to run for the 20th General Election. The Internet Election News Deliberation Commission (the “Deliberation Commission”) requested the aforementioned online news outlet to cooperate for fair news reporting stating that the columns by the Complainant on January 29, 2016 violated the Public Official Election Act, etc. that restrict such publication for 90 days until the election day. Hearing the request, the Complainant stopped publishing columns.

The Complainant filed a constitutional complaint on February 2, 2016, arguing that Article 8-5 Section 6 of the Public Official Act and Article 8 Section 2 of the former Regulation on Deliberation Standard, etc. for Internet News Reporting of Election, which restrict online media from publishing columns, etc. written by any candidate, infringe upon the freedom of speech.

Subject Matter of Review

The subject matter of review in this case is whether Article 8-5 Section 6 of the Public Official Election Act (amended by Act No. 7189, March 12, 2004) (the “POEA Provision”);

Article 8 Section 2 of the former Regulation on Deliberation Standard, etc. for Internet News Reporting of Election (enacted by Directive No. 9 of the Internet Election News Deliberation Commission, December 23, 2011 and the one before the amendment made by Directive No. 10 of the Internet Election News Deliberation Commission, December 8, 2017) (the “Former Deliberation Standard Provision”); and Article 8 Section 2 of the current Regulation on Deliberation Standard, etc. for Internet News Reporting of Election (amended by Directive No. 10 of the Internet Election News Deliberation Commission, December 8, 2017) (the “Deliberation Standard Provision”) (the two provisions above are collectively referred to as the “Time Restriction Provisions”) infringe upon the Complainant’s fundamental right.

Provision at Issue

Public Official Election Act (amended by Act No. 7189, March 12, 2004)

Article 8-5 (Internet Election News Deliberation Committee)

(6) The Internet Election News Deliberation Committee shall determine matters necessary for guaranteeing the political neutrality, equality, objectivity of Internet election news, and redress of injuries of rights and impartiality of other election reports, and make a public announcement thereof.

Former Regulation on Deliberation Standard, etc. for Internet News Reporting of Election (enacted as Directive No. 9 of the Internet Election News Deliberation Commission, Dec 23, 2011 and before amended as Directive No. 10 of the Internet Election News Deliberation Commission, Dec 8, 2017)

Article 8 (Special Restriction on Timing)

(2) No internet media can publish any column or writing written by any election candidate for 90 days until the election day. However, this does not apply when the publication continued more than 180 day before the election day and the candidate’s name is not shown on the contribution.

Regulation on Deliberation Standard, etc. for Internet News Reporting of Election (amended as Directive No. 10 of the Internet Election News Deliberation Commission, Dec 8, 2017)

Article 8 (Special Restriction on Timing)

(2) No internet media can publish any column, comment, contribution or writing, etc. written by any election candidate for 90 days until the election day.

Summary of the Decision

1. Judgment on the POEA Provision

The POEA Provision authorizes the Deliberation Commission to determine and pronounce matters necessary to ensure fairness of online election news reports. Banning online media from publishing columns, etc. written by election candidates for a certain period and subsequently limiting the Complainant's freedom of speech is based on the Time Restriction Provisions. The POEA Provision itself is not regarded to have directly infringed upon the fundamental right of the Complainant. Thus, the complaint over the POEA Provision is inadmissible as it does not fulfill the directness requirement for constitutional fundamental right infringement.

2. Judgment on the Time Restriction Provisions

a. Violation of Statutory Reservation Principle

The Time Restriction Provisions were grounded in law, being delegated by the POEA Provision and Article 8-5 Section 9, etc. of the Public Official Election Act. The Time Restriction Provisions do not preemptively prohibit online media from publishing columns, etc. written by an election candidate. Instead, they regulate the online media to voluntarily follow the rules and correct violations, if any, afterwards. This is to widely ensure both freedom of election news reports and fairness of online election news reports. Therefore, it is acknowledged that the mother law needs to somehow broadly delegate the matters that should be included in the Deliberation Standard Provision. In the meantime, publishing columns, etc. that a candidate wrote for the online media when the election nears would likely undermine the fairness in the election news reports and, accordingly, the Deliberation Standard Provision needs to impose restrictions on such publication. The Public Official Election Act has various restrictions as of 90 days before the election and the Time Restriction Provisions are regulated by the 90-day time limit to respect the purpose. Thus, the Time Restriction Provisions do not violate the principle of statutory reservation or infringe upon the Complainant's freedom of speech.

b. Violation of Principle against Excessive Restriction

The Time Restriction Provisions are legislated to ensure a fair election as well as fair election news reports online, suggesting that the legislative purpose is legitimate and they are appropriate means to serve the legislative purpose.

However, the Time Restriction Provisions simply regard such election reports unfair without specifically reviewing whether they could be seen unfair. The Time Restriction Provisions restrict publication of columns and etc. written by election candidates that have nothing to do with an election or political speech or that are necessary to satisfy people's right to know on such issues of enormous public interests. This implies that the Time Restriction Provisions uniformly and comprehensively restrict even the reports that would not hamper fairness of the election.

Very broad is the concept of the online media that are subject to deliberation of the online news reports under the Public Official Election Act. Combined with the broad concept of the online media, the Time Restriction Provisions would impose greater restrictions on freedom of speech.

Online media have high degree of accessibility, openness, autonomy and spontaneity and are expanding their influences in the media market with the development of Information Technology. It would be desirable to guarantee as much autonomy as possible while minimizing restrictions on freedom of speech.

It is necessary to prevent candidates from writing columns, etc. for the online media and using them to help their election campaign to circumvent the law when the public election nears. The Deliberation Standard Provision entails various provisions to regulate such practice, however, and the Public Official Election Act also has many provisions to prevent the press from exerting unfair influences over elections.

Hence, the Time Restriction Provisions violate the principle of minimum restrictions.

In conclusion, they violate the principle against excessive restriction and infringe upon the Complainant's freedom of speech.

Dissenting Opinion of Three Justices

The legislative purpose of the Time Restriction Provisions is to root out the possibility of unequal access or exposure to the online media among candidates at a sensitive time related to election and eventually ensure fair online election news reports. Therefore, legitimacy of the

purpose and appropriateness of means are recognized.

It is necessary to take action to discourage the online media from enhancing the image of specific candidates in order to assure fairness of online election news reports. The Time Restriction Provisions ban publication on the ‘online media’, not on the website operated by the candidates. And they ban the columns, etc. written by the candidates only ‘for 90 days until the election day.’ The effect of the Time Restriction Provisions comes into force only after the Deliberation Commission decides to prohibit such publication. This suggests that the Time Restriction Provisions conform to both the principle of minimum restrictions and balance of interests and, accordingly, do not infringe upon the Complainant’s freedom of speech.

Given the negative aspects of the internet and the strong influences of the online media, it is necessary to address inequality issues of opportunities among candidates that may arise from the media’s publication of columns, etc. written by specific candidates.

Concurring Opinion of One Justices

The Court opinion, unlike the point made in the dissenting opinion, demonstrates that the Time Restriction Provisions violate the principle against excessive restriction as they uniformly and broadly restrict the Complainant’s freedom of speech. And the Court opinion points out that the Time Restriction Provisions are not appropriate regulations for the online media since they fail to take into account the characteristics of the internet environment. The Time Restriction Provisions impose comprehensive and blanket restrictions on the Complainant’s freedom of speech without specifically examining fairness of the election news or considering the characteristics of the online media and, consequently, violate the principle of minimum restriction.

* This translation is provisional and subject to revision.