

# The Constitutional Court of Korea

## Confronting New Issues on Election Campaigns in the Digital Age

Sojung, Kim

Constitutional Rapporteur Judge, Constitutional Court of Korea

The digital transformation has had a significant impact on the medium and means through which one of the most important elements of democracy, election campaigns, take place. In the past, traditional one-way media such as TV and printed materials, including televised speeches, newspaper advertisements, election leaflets, and banners, was used to inform voters about candidates and their policies and persuade them. However, after the digital transformation, efforts shifted towards two-way communication on online platforms such as social media, where candidates could deliver their messages and rally supporters. The timing of this transformation may vary from one country to another, but in the case of South Korea, significant changes occurred after the widespread adoption of high-speed internet in the 2000s.

Consequently, the nature of constitutional issues related to election campaigns has also changed at the Constitutional Court of Korea(CCK). Previously, the main focus was on whether restrictions imposed on traditional campaign methods, as mentioned earlier, were infringing on candidates' freedom of campaigning or if these restrictions were applied equally to all candidates. For instance, issues like whether regulations prohibiting the publication of irregular academic credentials in campaign promotional materials violated campaign freedom(**99Hun-Ba5, September 16, 1999**), or whether election laws limiting participation in debates organized by local broadcasting organizations to candidates recommended by

parties with more than five members in the National Assembly or parties that received more than 3% of the votes in the previous election, or candidates who obtained more than 10% of the votes in recent elections or showed a public support rate of over 5% in opinion polls for district representative elections violated rights to equality (**2010Hun-Ma451, May 26, 2011**), were examined.

However, with online platforms becoming the major stage for expressing opinions related to elections since the 2000s, new issues emerged. New provisions were added to South Korea's Public Official Election Act in 2004 to require internet news sites to take technical measures to verify a user's real name before allowing the person to post information concerning his/her support for or opposition to political parties or candidates on bulletin board, etc. of their web-sites during election campaign period (22 days for presidential elections and 13 days for National Assembly and local government elections). If such posts are not verified and are deemed expressions of support or opposition for a political party or candidate, they must be removed, and penalties can be imposed for violations. The legislative objective was to avoid the possible side effects caused by personal attacks and negative propaganda against political parties or candidates, and to ensure a fair election. The constitutionality of this regulation became a point of contention, as it raised concerns about the freedom of expression for users who wished to express their support or opposition to political parties or candidates anonymously on bulletin boards, the press freedom of internet news sites, and the right to self-determination of personal information for users. This means that in constitutional court cases concerning election campaigns, the position of voters has transformed from being mere "an object of election campaigns" to "an active subject of the freedom of expression regarding elections."

CCK, in its first constitutional review of these provisions (**2008Hun-Ma324 et al., February 25, 2010**), deemed it to pass the four-stage test of excessive restrictions. The court's rationale for considering the provisions to meet the “necessity” requirement was that due to the nature of the internet, the rapid spread of false information and negative campaigning during the short election period could not be effectively remedied solely through post-hoc measures. However, there were dissenting opinions by 2 Justices (Justice Kim Jong-dae and Justice Song Doo-hwan), which argued that regulating anonymous political expression on the internet, which functions as the most participatory medium and promotes expression, could undermine democratic values by inhibiting political expression itself.

In the second constitutional review of these provisions (**2012Hun-Ma734 et al., July 30, 2015**), the court reached a similar decision, while the number of dissenting justices increased to four (Justice Lee Jung-mi, Justice Kim Yi-su, Justice Lee Jin-sung, Justice Kang Ilwon).

However, in the third constitutional review (**2018Hun-Ma456 et al., January 28, 2021**), the court's legal opinion changed, and it concluded that the provisions violated the rule against excessive restriction. The court acknowledged that the provisions served the legitimate purpose of reducing personal attacks and negative campaigning against candidates to ensure fairness in elections. Still, it held that “in the free marketplace of ideas created by the internet, the regulation suppressed diverse opinions and, thereby, could undermine the expression of public will, a foundation of democracy.” The court pointed out several factors, such as the comprehensive regulation of anonymous expression for administrative

convenience, restricting anonymous expression during the essential period of political expression (the election campaign period), introducing new means to secure fairness in elections without limiting users' freedom of expression or the right to self-determination of personal information, and having existing post-hoc sanctions for election crimes using the internet (e.g., defamation), indicating that the provisions failed to meet the “necessity” and “proportionality” requirements.

This shift in decisions reflects how online platforms have grown in stature. In the past, there were concerns that online platforms, based on anonymity, would be overwhelmed by amount of baseless criticism directed at political parties and candidates, and voters would indiscriminately accept such content, resulting in distorted public opinion. This was why regulations on anonymous expression were considered constitutionally justified. However, as online platforms became essential to political discourse, the potential negative impact of regulating anonymous expression became more apparent, in terms of inhibiting political expression. Also, given the active verification and self-correction mechanisms in place to address misinformation, it is believed that the drawbacks of regulating anonymous expression outweigh the benefits. In light of this decision, it is expected that anonymous expression on politics and elections online becomes more active and, thereby, diverse public opinions reflecting the views of various segments of the population will form, leading to further improvement of democracy.

Thus far, we have examined the constitutional issues related to election campaigns raised before and after the digital transformation and the trends in the CCK’s decisions regarding the regulation of anonymous expression in the online sphere concerning elections. CCK provides the summary of the latest decision I

covered today through English version web-site. If you want to learn more about the decision, please visit our web-site (<https://english.court.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.