Freeing Political Expression

How a Milestone Decision of the South Korean Constitutional Court Might Transform Election Campaigns

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The South Korean parliament is in the midst of an intensive debate on electoral reform. The current legislature aims to pass the revision of the Public Official Election Act ('Election Act') by 28th April. Yet, so far, both public statements and press interviews of the ruling party (the People Power Party) and the opposition (the Democratic Party) on the draft bill solely revolve around the question of proportionality among electoral districts, with more heated dispute over different methods of proportional representation to be expected in the coming weeks.

What has been neglected in this debate, however, are the *methods* of election campaigning in South Korea. This is alarming, considering that a Constitutional Court decision[1] from last year declared a controversial paragraph from the Electoral Act as unconstitutional and unjustly restricting freedom of expression. Failing to revise the targeted paragraph corresponding to the Constitutional Court's decision in the upcoming legislature periods – at the latest by July 31, 2023 – would inevitably lead to a legal vacuum. Moreover, public attention and active discussion with the participation of civil society is required to steer political expression during election campaigns in a reasonable manner.

In this blog post, I shed some light on the Constitutional Court's 2022 decision and explain why the ruling could have a major impact on how election campaigns are conducted in South Korea.

Repeated Criticism of the Election Act

The court's welcome decision deserves political attention as it is the result of many prolonged efforts to expand the freedom of political expression in South Korea. In the past twenty years, the constitutional court held in various judgments that Paragraph 90 of the Election Act, which prohibits anyone from installing, presenting advertisements, or wearing symbolic items with the intention to influence election results starting from 180 days before election day, to be proportional and thus constitutional. Despite several legal actions questioning the rightfulness of the judgement, which even led to constitutional complaints, the paragraph remained valid.[2]

In its new decision, the Korean Constitutional Court changed these precedents by carrying out a thorough proportionality test for the collision between freedom of speech and the public interest in fair and equal elections.

The subject case leading to the decision started with a volunteer campaign worker for the parliamentary elections in February 2016. The volunteer, accused of violating §90 of the Election Act, had greeted passers-by on the street while holding a placard with the first name "Lee" of an electoral candidate. Using the name of a political party, the name or photograph of a candidate, or displaying contents which make it possible to analogize such a name was defined by §90 as sufficient for exerting unlawful influence on the election.

The Suwon District Court took the case to the constitutional court, calling on a concrete judicial

[1] Decision of South Korean Constitutional Court from July 21, 2022 (2017[redacted]).
[2] Decision of the South Korean Constitutional Court from December 20, 2001 (2000[redacted]96), April 30, 2015 (2011[redacted]63).

review of the norm in question. The district court pointed to the fact that §90 combined with §256 of the same Act prescribes criminal penalties on ordinary political communication that generally does not compromise the fairness of the election. In its eyes, such restraint lacks sufficient justification and therefore unconstitutionally infringes on the fundamental right to freedom of speech.

The Proportionality Test of the Constitutional Court

The Korean Constitutional Court, being considerably influenced by the jurisdiction of the German Constitutional Court on Article 5 Section 1 of the German Constitution, has explicitly defined the freedom of expression as a per se constitutive element of liberal democracy which can solely be restricted under the strict condition that such restriction is necessary and proportional on the grounds of colliding interest.[3] Although this particular status of the right to freedom of speech has been recognized over numerous decisions on related cases, far-reaching restrictions during election campaigns were deemed as necessary measures. The court decision of July 2022 distinguishes itself from these previous decisions through an extensive assessment of the necessity and reached the conclusion that §90 violates the principle of necessity.

Since eligible voters' freedom to support and criticize candidates and exercise political influence, hence the freedom of political expression is severely restricted, the measure must prove itself as necessary in order to conform to the demands of fundamental rights. After affirming the adequacy of legal measures to maintain and promote the fairness of election campaigns, the court argues that the elements of §90 restrain the freedom of political expression more than it is required to protect public interests. Even marginal methods of expression such as badges and posters fall within the range of the provision and are therefore an offence. Moreover, the subject of regulation includes those who participate formally in election campaigns, such as regular members of a campaign committee for parties. Reflecting on the ordinary practices of political communication, this demonstrates how such legal measures exceed the boundary of necessity.

The court rightly claims that other legal measures to promote the fairness of electoral procedures already exist, such as restrictions on financial contributions and expenses. The legitimate goal – equality of opportunity and fairness of election – can be sufficiently reached through existing law, that does not compromise freedom of expression. On top of that, it should be taken into consideration that this act applies to all state elections including the presidential, parliamentary, and nationwide local elections. Since these elections have different cycles and are held alternately, restrictive measures on election campaigns factually lead to a situation, in which political expressions are comprehensively and constantly restricted over several months a year.

As the last step, the court held the balancing test noticeably brief since the lack of necessity already determines a legal norm as unconstitutional. The intensity of infringement on the freedom of political speech weighs disproportionately more than the extent of public interest achieved through the measure.

Judicial Reaction to Social Changes

The conflicting interests and empirical premises surrounding §90 of the Election Act haven't changed substantially in the past few decades. A comparison of the precedents and the recent decision makes it clear that there are no noteworthy changes, at least in the legal argumentation. For decades, the court has put disproportionate emphasis on the public interest in fair elections while not taking sufficiently into account the right to freedom of expression. The shift in position becomes clear with the following acknowledgement of the Constitutional Court, which is stated clearly in its ruling reasons: "The fairness of election is not an end in itself, but a way to realize democratic principles during the election process."[4]

[3] *Decision of German Constitutional Court from* January 15,1958 (BVerfGE 7, 198).
[4] See Decision of the South Korean Constitutional Court from July 21, 2022 [2017헌바].

Traditionally, laws with extensive restrictions on ordinary political expression have been justified with the assumption that the historical relics of undemocratic electoral practices during past authoritarian regimes may still affect the political atmosphere in South Korea and thus stronger legal regulations are required to protect the equality of opportunity and fair procedure in election campaigns. This argument is indeed rather of a historic nature than legal. It was often claimed in the ruling of precedents that excessive expenditures and illegal contributions will potentially distort the election, so that the possibility of such manipulation should be prevented from the outset. The cultural attribute of Koreans valuing "personal relationships stemming from family, hometown and school" has even been stated as a major factor which could lead to illegal manipulation of election results.[5] Of course, such skepticism towards the political participation of citizens can partly be understood as a paternalistic "safety measure" considering the long-lasting dictatorship and historical experience of undemocratic elections. Such an assumption is however – after 35 years of democracy and its continuous progress – not able to provide sufficient grounds to restrict the fundamental right to freedom of speech more than what is absolutely needed.

In my view, this unanimous judgement to expand the possibilities of political expression is a belated, yet fully justified reaction to significant changes in the political culture. The state should not view active political expression of citizens as a jeopardizing factor but as an essential element in forming public opinion and as a way of exercising political rights. In this sense, the court decision has brought to life what has long been accepted in theory and academic discourse – the significant position of the fundamental right to freedom of expression in a democratic society.

The factual motivation behind the decision and political considerations beyond legal arguments will remain unclear. An unexpected change of precedent tends to put the legitimacy or rationality of previous decisions in question. For this reason, it is all the more important to reflect on the possible causes of this change. In any case, the recent decision of the South Korean constitutional court can be regarded as a product of a continuous rationalizing process, in which legal and non-legal arguments become transparent and gain structure through the frame provided by the principle of proportionality. The remaining task is for the legislative power to mobilize this court decision to substantially expand the freedom of political expression. Hopefully, the court's initiative will soon find concrete paths for realization, especially in light of recent debates on electoral reform.

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[5] 2011 ⊠ 63