

**ELECTION
FRAUD**

**LEGAL
DOCUMENTS**

LEGAL ASPECTS OF THE TRANSFER
OF THE NATIONAL ELECTION
COMMISSION'S SERVER DURING
THE ELECTION LITIGATION IN
KOREA

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Synopsis for “Legal aspects of the transfer of the National Election Commission’s server during the election litigation in Korea”

The 21st National Assembly Election in Korea was held on April 15, 2020, and many lawsuits claiming electoral misconduct and alleged fraud are still in progress.

As this situation was unfolding, the Korean National Election Commission moved the central server used in the 21st general election from its original location to another location on September 30, 2020 – even while 127 election lawsuits are ongoing. The central server contains the most essential evidence for determining whether election fraud occurred on April 15th. This report argues that the act of terminating and deleting the leased server despite the ongoing election proceedings clearly violates the Public Official Election Act, despite the National Election Commission’s legal responsibility and may also be grounds for invalidating the election itself. This paper discusses the legal issues surrounding the jurisdiction of the election lawsuits and reviews the key legal aspects involving the election litigation.

It is argued that the removal of the servers more of a criminal case than a simple administrative matter. However, given the current political situation in South Korea, it is argued that domestic agencies are unable to effectively investigate and uphold election integrity.

Therefore, it is argued, since the use of high-performance electronic devices in elections worldwide is expected to increase in the future, it is appropriate for an international group of experts to carry out a follow-up investigation on the ROK election computing equipment and records. This would be in line with the trend towards greater international cooperation in monitoring elections worldwide.

Legal aspects of the transfer of the National Election Commission's server during the election litigation in Korea

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Preface

The 21st National Assembly Election in Korea was held on April 15, 2020, and is currently surrounded by controversy over election fraud, and litigations on the election are in progress. As this situation was unfolding, the Korean National Election Commission (hereinafter referred to as the "NEC") moved the central server used in the 21st general election from the original location to another location on September 30, 2020. This server contains the integrated electoral register and various electronic records, which are the most essential evidence for determining whether fraud was committed during this election. Since the transfer of these servers were carried out in the midst of 127 election lawsuits that are in progress, legal responsibilities have been raised in relation to the obligation to preserve election materials under the Public Official Election Act in Korea. Also, the removal of the temporary server used for the election held on May 1, 2020, is going through similar legal problems. In this article, these issues and related issues such as the jurisdiction of the election lawsuits and legislative deficiencies will be reviewed.

Duty to keep election materials under the Public Official Election Act in Korea

According to Article 186 of the Public Official Election Act and Article 107 of the Public Official Election Management Regulation on the preservation of election materials, in principle the election commission should preserve the ballot papers, ballot boxes, voting records, ballot-counting records, election records, and all other documents related to the election during the term of the elected persons. Provided that there are no disputes over the election arises or is pending, the preservation period of the records may be until one month of the filing deadline, or until one month after the date of receipt of the notification of the final judgment or decision when the dispute over the election is terminated.

This regulation on the preservation of election materials stipulates the obligation of the election commission to preserve election materials by the prescribed time limit of the act, and in view of its purpose and nature, it is a mandatory rule, and it should be seen that it cannot be shortened or changed by the election commission.

Nevertheless, it is illegal for the NEC to damage or destroy election materials in violation of the deadline for the preservation of election materials and should be found liable accordingly.

Filing an election lawsuit and dismissing the application for preservation of evidence

Initially after the election, the number of original election lawsuits related to the 21st general election was 139, of which 137 are known as an election invalidity suit and 2 as a lawsuit against candidate's election. Some of these lawsuits have been withdrawn, and there are 127 election lawsuits pending as of October 7, 2020. 11. 20.

Many of these parties have applied for preservation of evidence before bringing the lawsuit in preparation for legal proceedings. In the evidence preservation trial for this application, the court accepted the preservation of evidence for documents, such as the ballot papers, ballot boxes. However, the ballot classifier, counter, laptop, early voting equipment, the NEC server, computer data stored in the server, relay (router), which are the core evidence for uncovering election fraud through computer manipulation was rejected or dismissed without exception.

However, electronic records and media related to electronic voting, such as electronic devices used for early voting, their electronic records, ballot classifier programs, ballot classifiers that were actually used, log data or the computer central processing unit in which they are stored, are actually an important and essential part of the election, therefore, the court had to accept the application for preservation of evidence against them.

Evidence preservation trials were conducted in separate cases, but the results of the evidence preservation trials were the same nationwide.

Therefore, the Solidarity of Lawyers for the Truth of the 4.15 Rigged Election has accused Chief Justice Kim Myung-soo on May 25th on suspicions that the Supreme Court had systematically intervened and controlled the outcome of the court's decision in connection with the April 15th general election lawsuit, and such an act of the Supreme Court is an overt abuse of authority and an act of interfering with the election trial. The progress of the Prosecutor's Office investigation into this accusation is unknown.

Liability for central server transfer actions

Act of transferring the central server

On September 30, 2020, when the election trial at the Supreme Court was imminent, the NEC dismantled the server that held the election records kept at the Gwanak office and transferred it to the Gwacheon office. This transfer was made possible because the court rejected the application for preservation of evidence against the server. Otherwise, this would never had happened.

The debate over fraud in the 21st general election is in a hot state, and whether or not fraud was committed during early voting is a key issue. However, because the election commission tried to cover all the CCTVs during early voting, it is near to impossible to check whether the actual voting took place and the only thing left was the computerized records in the server, so if the server is damaged, it will have a significant impact on the election litigation.

On the other hand, the NEC explained that the plan to relocate the Gwacheon office was already established in 2014, and the move was in no way related to the general election server. The NEC claimed that this project was to introduce a server for monitoring the operation status of the computer center's auxiliary facilities and the internal environment, and it has no relation to the election data, and that the election data from the April 15th general election has been preserved.

However, many IT experts believe that the transfer of the server is intended to manipulate evidence, such as the correction and deletion of electronic records in preparation for the trial. Since the current plaintiff's and defendant's claims are different, this claim must be corroborated by evidence later. To this end, the NEC must provide the central server as evidence to the court and receive a neutral expert's appraisal.

Legal responsibility

Article 186 of the Public Official Election Act restricts the obligations of preserving election materials in writing of the ballot papers, ballot boxes, voting records, ballot-counting records, election records, and all other 'documents' related to elections. There may be controversy over whether or not to preserve 'electronic records and media' related to the electronic ballot counts, such as the electronic records, ballot classifier programs, ballot classifiers actually used, log data or computer central processing unit in which data is stored.

As for the electronic records and media related to the electronic ballot counts, it may be interpreted that the election commission is not obligated to preserve them because the law did not specify them as objects of materials to be preserved. This interpretation can be regarded as based on the principle of the criminal law interpretation of the prohibition of analogical application (Analogieverbot), and it will be developed from the point of view that expanding the interpretation should be cautious as the regulation is not about rights, but about imposing obligations. However, this interpretation is absurd, and this is an issue that the prohibition of analogical application should not be applied.

In interpreting laws, the current objective legal intention should be the standard for legal interpretation. Therefore, electronic records and media related to the electronic ballot counts, such as the electronic records, ballot classifier programs, ballot classifier actually used, log data or the computer central processing unit in which data is stored, naturally must be subject to the preservation obligation.

According to the German Constitutional Court, the law is not a non-living document, but a living and developing spirit (Geist) that tries to come into effect while keeping pace with the state of our daily lives.

In the case of early voting, which is a key issue of the fraudulent election, considering that computers are used to process the ballots and the reality that so-called electronic counting is being made using a ballot classifier in general, it is undeniable that the electronic records media related to electronic voting, such as the electronic records, ballot classifier programs, ballot

classifiers actually used, log data or the computer central processing unit in which data is stored, occupy a very important and essential part in the whole process of the electoral system.

If so, it is reasonable to interpret that due to the nature of the computer organization and media used in the election and the electronic records stored therein should be included under the obligation to preserve election materials.

Unless there are special circumstances, the duty to preserve election materials includes the duty to preserve original election materials unchanged at its storage location in accordance with legal procedures. This is because the storage location of various election materials differs depending on the type, and it is highly likely to be damaged if it is out of its location. Therefore, it can be said that the NEC's relocation of the central server based on its existing office relocation plan, it is an act of violation of the law, which may damage the original election materials (data) and render a fair trial impossible. As such, it should be viewed as a very serious violation of the law and as long as an election lawsuit is filed, the existing plan to relocate should have been temporarily suspended in accordance with the law because the suspension period is not a long period that would have a significant impact on the extent of not being able to execute the existing plan.

Therefore, the transfer of the server violates the obligation to preserve election materials, and in accordance with the law, all public officials who participated in the planning and the execution of this illegal act should be punished for their crime, i.e., the crime of abandonment of duties under Article 122 of the Criminal Act, the crime of abuse of authority under Article 123 of the Criminal Act, and the crime of invalidity of public documents under Article 141 of the Criminal Act. In addition, in accordance with Article 78 of the State Public Officials Act, they will be held responsible for violating their duties with disciplinary action.

Legal responsibility for the act of terminating the temporary server

Temporary server termination

The NEC leased and used a temporary server from the outside for the April 15th general election, but the lease period was until the end of April, and this was not extended after the election and was terminated and discarded on May 1st according to the contract. These acts of the NEC that appear to be legitimate on the outside should be evaluated differently from a legal point-of-view.

Legal responsibility

Unless there were special circumstances, the duty to preserve election materials includes the duty to preserve the original materials in accordance with legal preservation procedures without altering the election materials at its kept location.

It is an obvious violation of Article 186 of the Public Official Election Act that in a situation where an election lawsuit can be predicted, the NEC signed a contract in which the lease period

expired earlier than the prescribed period of preserving election materials according to Article 186, and deleted data on the leased server early.

Even if the data of the leased server is backed up and stored, it does not affect the breach of obligations under Article 186 because it is not the original data. Also, data may remain on the central server, but as for whether it is all the data on the leased server or not, it is impossible to verify that it is authentic because all the data on the leased server was destroyed.

Therefore, all public officials who participated in the planning and the execution of this illegal act should be punished for their crime, i.e., the crime of abandonment of duties under Article 122 of the Criminal Act, the crime of abuse of authority under Article 123 of the Criminal Act, and the crime of invalidity of public documents under Article 141 of the Criminal Act. In addition, in accordance with Article 78 of the State Public Officials Act, they will be held responsible for violating their duties with disciplinary action.

It is not known which electronic records were in this deleted temporary server. According to Article 224 of the Public Official Election Act, in cases where there is a violation of the rules on elections, only when it is deemed to have had a substantial effect on the election results, all or part of the election is invalid. Therefore, if the NEC fails to prove that the electronic records in the temporary server did not affect the election results, the deletion of the temporary server will be grounds for invalidating the entire 21st general election.

Problems in the jurisdiction of election litigation

According to Articles 222 and 223 of the Korean Public Official Election Act, the Supreme Court has the jurisdiction to judge lawsuits concerning the election of the President, National Assembly members, and mayor/governors (more precisely, the election of the council members of the proportional representative city/Do (state), and the election of the mayor/governor). Therefore, in these cases parties claiming invalidity of the election itself or invalidity of a candidate's election must file a lawsuit with the Supreme Court.

In Korea, the chairperson of the relevant constituency election commission becomes the defendant in an election lawsuit against the validity of the presidential and parliamentary elections itself. The constituency election commission is affiliated with the NEC.

Article 114 (2) of the Constitution stipulates that the chairman of the NEC is elected from among the members, but customarily a member, who is the Supreme Court Justice, is elected as the chairman. As a result, when an election lawsuit is filed, there is a concern that the fairness of the trial will be undermined because the Chief Justice has to make a trial with the chairperson of the constituency election commission, which is headed by a fellow Chief Justice. In theory, there is a risk that members of an independent constitutional institution becoming heads of another constitutional institution will lead to self-contradiction of the independent institution.

Since the judgment of an election lawsuit belongs to a type of constitutional court in its nature, it is a principle to leave it to the constitutional court in a country where the constitutional court

system has been established. Since the constitutional court is established in Korea, it is desirable to make it under the jurisdiction of the constitutional court, and it is a mistake to prescribe it under the exclusive jurisdiction of the Supreme Court. At present, when there is a controversy over a fraudulent election, the fact that the problem arises from the preservation of evidence in the early stages is deeply related to such institutional errors.

As can be seen in the case of Venezuela, the politicization of the judiciary is closely related to the collapse of the state. Currently, the Supreme Court of Korea is showing considerable political bias, and in this situation, amid controversy over fraudulent elections, maintaining a national system in which other Supreme Court judges preside over election proceedings, it should be improved immediately because of breaking the principle of checks and balances in the distribution of state power.

In Article 111 of the Constitution, the five powers of the constitutional court are specified, and it is logically not an issue to add election trial judges to them. The law should be amended to allow the constitutional court to judge election lawsuits through amendments to the Constitution and the Public Official Election Act.

Legislative deficiencies in the Public Official Election Act

Regarding the preservation of election materials, the Korean Public Official Election Act has two deficiencies. The Public Official Election Act neglects the importance of preserving election data using a computerized server and the possibility of damage, so it does not clearly stipulate electronic records and electronic media as a subject of obligation to preserve election materials and does not stipulate punishment clauses in the Public Official Election Act.

Even if interpretation or other laws can compensate for these deficiencies, in the future the Public Official Election Act should include electronic devices and records in the preservation obligation to eliminate controversy and stipulate punishment clauses.

The electoral system is a very important system that embodies the value of representative democracy, and the preservation of election materials is an essential part of the operation of the electoral system, and it is very important to observe the retention period. In particular, forgery, falsification, damage, and disposal of election materials by election officials who are chosen are very important matters that shake the roots of democracy.

Election officials should be treated to be subject to aggravated punishment rather than abandonment of duties, abuse of authority, or invalidating public documents compared to other public officials. By laying the groundwork like this on which election management can be carried out strictly, it is necessary to eradicate the actions of election officials who violate the law without hesitation.

The legislature must promptly amend the Public Official Election Act to stipulate the obligation to preserve electronic records and establish a strict order of election management by stipulating directly strengthened penalties for violating these obligations under the act.

Conclusion: Summary and Implications

In principle, the duty to preserve election materials under Article 186 of the Public Official Election Act also includes the duty to preserve the original election materials unchanged at the storage location, and the election commission, which transferred election materials that could damage the materials due to non-urgent reasons, violated the duty to preserve such materials. As such, the relevant public officials should be held legally responsible. In addition, the act of terminating and deleting the leased server during the election proceedings clearly violates Article 186 of the Public Official Election Act and must bear corresponding legal responsibility and may be grounds for invalidating the election itself.

There are several legal deficiencies surrounding the preservation of election materials, but these deficiencies can be resolved through amendments to the Constitution and laws. Amending the Constitution is not an easy matter, but amending the law is relatively easy.

From a different perspective, this election lawsuit is more of a criminal case than a simple administrative case. The issue of being in violation of the Public Official Election Act is a criminal issue, and despite the fact that the Prosecutor's Office must proceed with an investigation, no investigation has been conducted. This is deemed to be somewhat related to the political situation in Korea and implies that it is pointless to rely solely on the judgment of domestic investigative agencies to investigate evidence on a series of election irregularities, such as server transfer and the deletion of the temporary server. Therefore, it is of the opinion that it is essential to entrust the investigation to a group of international experts on the audit of the election computing equipment and election computer records.

In conclusion, since the use of high-performance electronic devices in elections worldwide is expected to increase in the future, it is predicted that there will be many disputes over the illegality of these devices. The legal aspects of the preservation of electronic election data in Korea this time is considered to have great implications globally. In preparation for election disputes caused by electronic records and electronic devices, it is considered that the solidarity for international surveillance and follow-up investigation should be further organized and strengthened.