

Revisiting the Constitutionality of the Voting Rights of Overseas Koreans

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Abstract

After the Constitutional Court of Korea ruled in June 2007 that it was “incompatible with the Constitution to limit voting rights to citizens on the condition of residential requirements in Korea,” voting rights were granted to overseas Korean nationals following amendments to related regulations under the Public Official Election Act in 2009. According to the Constitutional Court ruling in 2007, overseas Koreans must be able to exercise their voting rights based on the constitutional principles of democracy and protection of fundamental rights. This study attempts to critically examine the Constitutional Court’s decision of 2007 by focusing on a theoretical understanding of democratic principles and the fundamental rights theory. With regard to the principles of democracy, overseas Koreans may be constitutionally deprived of or denied their voting rights if the range of demos is determined based on the democratic value of the rule of law. In terms of fundamental rights, the limitation of suffrage is generally subject to a strict constitutional review, but a less stringent process may be involved in voting restrictions of overseas Koreans because restrictions are generally reflected in the political values between countries.

Keywords: overseas voting rights, overseas citizens, principles of democracy, protection of fundamental rights, universal suffrage, constitutionality

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Introduction

On April 11, 2012, Korea held overseas voting for the general election and on December 19, 2012, the second overseas voting since the amendment of the Public Official Election Act (hereafter, POEA) was held for the presidential election.¹ Before being reintroduced for the 2012 general election, overseas voting had not been permitted for 40 years, ever since it was last allowed in the presidential and general elections of 1967 and 1971. The debate on overseas voting has always existed, but it gained pivotal momentum after the Constitutional Court decided in June 2007 that it was “incompatible with the Constitution to limit voting rights to citizens on the condition of residential requirements.”² Overseas voting took effect in the general election in April 2012, following amendments to related regulations under the POEA in 2009 after the Constitutional Court’s decision of 2007.

The Constitutional Court ruling of 2007 and the amendments to the POEA of 2009 significantly contributed to attracting scholarly attention to the issue of voting rights of overseas Koreans. Studies on overseas voting rights have largely focused on (1) issues concerning system operation, methods, and procedures of voting rights, including voting method, eligibility, and the scope of granting voting rights (National Election Commission 2011; S. Lee 2010, 144-150, 158-171; Go 2011; Yoon, Lee, and Kim 2007), (2) effects of the reinstatement of overseas voting rights on local politics and overseas Korean communities (J. Kim 2009; C. Park 2008; Chin 2007; Chung 2008; Ji 2011), (3) overseas case studies and comparative analysis of voting systems for citizens living abroad (IDEA 2007; Hong

1. According to the National Election Commission of Korea, overseas voting for the general election was held in 158 polling stations across 107 countries. 123,571 out of 2,233,193 eligible voters preregistered, and 56,456 out of those preregistered actually cast their ballots in the election. This amounted to an overall voting rate of 2.5%. The presidential election had a registration rate of 9.95%, with 222,389 preregistered voters out of an estimated 2,233,695 eligible voters, and 158,235 out of those preregistered have taken part in the election. The voting rate barely reached 7.08% of eligible voters.

2. Constitutional Court Decision 2004Hun-Ma644, 2005Hun-Ma360 (consolidated), delivered on June 28, 2007.

2010, 234-240; S. Lee 2010, 150-158; Birch 2009), and (4) juridical interpretations of the Constitutional Court ruling of 2007 and amendments to the POEA in 2009 (Kwon and Song 2009; J. Park 2008; Jeong 2009).

Despite the various directions of research, a common premise of these studies is the normative basis of voting rights granted to overseas Koreans. Yoon (2012, 108) described the voting rights of overseas citizens as suffrage granted by 115 countries and classified these rights as “transnational rights of citizens.” According to Ji (2011, 151-152), compared with the “global trend” of overseas voting, Korea is considered a latecomer in the granting of voting rights to overseas nationals. Kwon and Song (2009, 121) claimed that it was “unquestionable” for all citizens to be granted equal voting rights regardless of their place of residence.

Indeed, the normative basis of voting by overseas citizens is clearly reflected in the Constitutional Court’s decision in 2007:

That all citizens, as sovereigns, should enjoy an equal right to vote no matter where they reside, and the state has an obligation to do all that is in its power to realize such an equal right to vote is a constitutional commitment stemming from the principles of popular sovereignty and democracy. . . . On the one hand, the legislative branch, when restricting the people’s right to vote, must respect the significance that right holds as a means to realize popular sovereignty and representative democracy in democratic countries. On the other hand, when examining the constitutionality of a law restricting the right to vote, the standard of review must be strict scrutiny.³

The Constitutional Court ruling guarantees voting rights to overseas Koreans based on the constitutional principles of democracy and protection of fundamental rights.

This article, however, casts doubt on whether the voting rights of over-

3. Constitutional Court Decision 2004Hun-Ma644, 2005Hun-Ma360, delivered on June 28, 2007 (available at http://english.court.go.kr/home/att_file/ebook/1272444851018.pdf). The electronic source has been cited for official translations provided by the Constitutional Court on its rulings. Translations have been made by the author for rulings available in Korean only.

seas Koreans must be constitutionally protected based on the principles of democracy and respect for fundamental rights, as decided by the Constitutional Court in 2007. In particular, we seek to investigate whether it is possible to reasonably determine the scope of granting voting rights without relying on the 2007 Constitutional Court ruling. Additionally, this article will further explore to what extent such a scope is compatible with the principles of democracy and respect for fundamental rights. First of all, regarding the aspect of democratic principles, we will focus on Robert Dahl's (1989, 1998) discussion on democracy. When using Dahl's argument that there is democratic value in the rule of law, it goes against the principles of democracy to grant voting rights to overseas Koreans, who live outside the country and thus have a very limited obligation to comply with domestic law. Next, with regard to the aspect of the fundamental rights theory, we will examine subjects with voting rights and restrictions on their right to vote.

As can be seen from the academic trends in discussions on overseas voting rights, few studies have taken a negative stance toward the Constitutional Court's decision to grant voting rights to overseas Koreans. One exception is the study by C. Lee (2008). This article concurs with Lee's view, which questions the constitutional assumption that it is appropriate to grant voting rights to overseas Koreans.⁴ While C. Lee claims overseas voting rights cannot be justified using the principles of democracy by presenting an empirical analysis of case studies and global trends, this study takes a critical approach to the Constitutional Court's decision of 2007 by focusing on a theoretical understanding of democratic principles and the fundamental rights theory.

In this article, overseas Koreans will be narrowly defined. Since overseas voting by temporary visitors with a resident registration in Korea falls under absentee voting, it is beyond the scope of this study. This study focuses instead on overseas voting of Korean nationals who have acquired

4. C. Lee (2008, 274) states, "What I want to address is that the issue of overseas voting rights is a trickier matter that cannot be easily supported with a normative premise rooted in the principles of popular sovereignty and democracy."

permanent residency in a foreign country and have not reported domestic domicile in Korea.

This article, in revisiting the constitutionality of overseas voting rights, has several goals. First, we expect this study to embrace new citizens and uphold their rights, particularly in a time of blurred boundaries between citizens and country. In particular, we will look at whether expatriates who have permanently left their homeland belong within the boundaries of traditional citizens and whether they can be discussed as a new subject of political rights. Second, the advent of globalization and multiculturalism has led to a heightened interest from academia in the issue of migrants' rights. Discussions on migrants' rights have mostly focused on basic human rights and socioeconomic rights. By contrast, the political rights of migrants have yet to be thoroughly studied. Since the right to vote is a key component of political rights, this article will develop the debate on political rights by dealing with the issue of overseas voting rights. Lastly, existing studies on political rights are centered on migrants living in Korea, but only a small number have looked at the political rights of overseas Koreans. As mentioned earlier, overseas Koreans are assumed to have political rights simply because they are of Korean nationality and the common perception is that they must inevitably be granted political rights. By dealing with the issue of overseas voting, this study seeks to show that there exists a close relationship between the voting rights of overseas Koreans and those of foreign residents in Korea (Kalicki 2009; Hong 2010; Bauböck 2007).

In order to do so, this article is organized as follows. First, it provides an overview of the voting system for overseas Koreans, policies on the voting rights of overseas Koreans, and juridical changes over the years. Second, it focuses on philosophical discussions on democratic principles and criticizes the granting of voting rights to overseas Koreans, thus, stimulating discussions on the scope of voter eligibility. Third, it reviews the issue of overseas voting rights in light of the constitutionality of fundamental rights, which embody the principles of democracy. Lastly, it explores the implications of voting rights of overseas Koreans on the voting rights of foreign residents in Korea.

Korea's Overseas Voting System and Voting Rights of Overseas Koreans

In 1966, Korea first introduced overseas voting by enabling overseas absentee voting through amendments to the Presidential Election Act (Article 8, Article 16) and the Election of National Assembly Members Act (Article 8, Article 18). At that time, amendments were made primarily to ensure voting rights for troops dispatched to Vietnam, and voters were allowed to cast their ballots by mail in the 6th and 7th presidential elections and in the 7th and 8th general elections of 1967 and 1971 (Article 82 of Presidential Election Act, Article 92 of Election of National Assembly Members Act). Later, overseas absentee voting was abolished with the establishment of the National Council for Unification Act in 1972. In 1997, Korean citizens living in Japan filed a constitutional complaint against residential requirements for voting rights and the Constitutional Court decided that not guaranteeing voting rights to overseas Koreans was not in violation of the Constitution.⁵ The Constitutional Court regarded the restriction of overseas voting rights as a legitimate and constitutional ruling. In particular, it cited compelling reasons, such as the divided state of Korea, the fairness of elections, technical problems relating to election period and election expenses, and how duties of citizens, including tax obligations, are related to the right to vote.

In 2004, another constitutional complaint was lodged by Koreans living in Japan, the United States, and Canada. In 2007, the Constitutional Court declared that it was incompatible with the Constitution to restrict voting rights and introduced overseas voting through the amended POEA in February 2009.⁶ As previously mentioned, the majority opinion of the Constitutional Court was that overseas Koreans deserve voting rights based on the principles of democracy and protection of fundamental rights outlined in the Constitution. The majority opinion also stated that

5. Constitutional Court Decision 97Hun-Ma253, 97Hun-Ma270 (consolidated), delivered on January 28, 1999; 97Hun-Ma99, delivered on March 25, 1999.

6. Constitutional Court Decision 2004Hun-Ma644, 2005Hun-Ma360, delivered on June 28, 2007.

a constitutional restriction of voting rights may be possible if supported by compelling reasons. However, compelling reasons that have enabled the constitutional restrictions of overseas voting rights in past constitutional rulings were regarded by the majority as non-justifiable now because they were “ambiguous and abstract dangers or technical difficulties or obstacles that can be overcome through efforts on the part of the state.” This attitude, reflected in the constitutional ruling, can be seen as a declaration that overseas residency, which was the main issue in the granting of voting rights to overseas citizens, cannot be a justifiable reason for restricting voting rights. The Court stated that it was “a constitutional request to grant voting rights to overseas citizens,” and that overseas voting rights are basic rights that must be upheld in principle, stemming from democratic principles and the fundamental rights theory.

However, one of the justices commented on the Constitutional Court’s ruling in 2007, expressing skepticism toward the belief that it is constitutionally unacceptable to impose any form of restriction on overseas voting rights:

Though the right to vote must be realized to the fullest extent possible according to the constitutional principles of popular sovereignty and democracy, the demand for equality regarding participation in elections does not prohibit all kinds of restrictions on the right to vote. Exceptions to the principle of popular election may be constitutionally acceptable when there is reason for justification.⁷

In light of such a dissenting opinion, it can be argued that there is still a need for debate on the decision of incompatibility with the Constitution. In spite of this, academia has been generally favorable toward the implementation of overseas voting, along with the changing position of the Constitutional Court and amendments to the POEA (H. Cho 1996; Bang 2007; Chong 2007; J. Park 2008; Jeong 2009).

Currently, the POEA grants voting rights to overseas Koreans for the

7. A dissenting opinion by Justice Kong-Hyun Lee on the Constitutional Court Decision 2004Hun-Ma644, 2005 Hun-Ma360, delivered on June 28, 2007.

election of the president, the National Assembly members, local council members, and the head of a local government (Article 15). Overseas voting rights are also recognized for national referendums and residents' voting under both the National Referendum Act (Article 7, Article 14) and Residents' Voting Act (Article 5).

Overseas Voting Rights and Democratic Principles

As seen earlier, the Constitutional Court ruling of 2007 stated that realizing the right to vote to the fullest extent possible is "a constitutional commitment stemming from the principles of popular sovereignty and democracy." Democracy is a system of governance by the people and has its normative value in self-ruling, in which the members of a political community govern over themselves. In understanding the principles of popular sovereignty and democracy, we first need to determine who is being governed. Democratic principles that have normative legitimacy in the value of self-ruling must decide the boundaries of *demos*, the members of a political community (B. Kim 2008). The boundaries of *demos*, endowed with political power, have been gradually expanded throughout history. Experience tells us that arbitrary factors, such as gender, race, religion, or socio-economic status, should not be a standard that decides the boundaries of *demos*. Then, what is the criterion for defining *demos*? If a precondition of democracy is to determine the boundaries of political membership, who should be included or excluded from *demos*?

This article will attempt to answer the above questions based on the accounts of Dahl, a prominent democracy theorist. According to Dahl (1989, 1998), the core of democracy, i.e., self-ruling as a normative legitimacy of democracy, lies in the rule of law. Since the people are subject to laws established by themselves (or by their elected representatives), the criterion for defining *demos* is whether one is subject to self-established laws (Dahl 1989, 106-131; 1998, 53-54, 76-78).

The citizen body in a democratically governed state must include all persons subject to the laws of that state except transients and persons

proved to be incapable of caring for themselves (Dahl 1998, 78).

Ultimately, the ideal realization of self-ruling, as a normative basis for democracy, is when political power is granted to the *demos*, who are subject to the laws and binding decisions of the relevant political community.

Dahl's theories on democracy are critical of the guaranteeing of voting rights to overseas citizens, who have a very limited obligation to subject to the laws and binding decisions of the homeland (Lopez-Guerra 2005; Rubio-Marin 2006). For this reason, citizens residing in a foreign country cannot be considered part of the *demos*, and thus, the disfranchisement of homeland voting rights would serve to satisfy the principles of democracy. In other words, "given that permanent expatriates are no longer subject to the laws and binding decisions of their homeland, why should they have the right to decide who will govern those who do live within the country?" (Lopez-Guerra 2005, 216).

Therefore, the granting of voting rights to overseas Koreans may not strictly conform to the principles of democracy and leaves room for debate on the following points. First, nationality does not always guarantee political rights (Lopez-Guerra 2005, 228). The democratic system of modern nations sees *demos* as being comprised of citizens. In other words, all citizens are assumed to have political rights. As ruled by the Constitutional Court in 2007, it is perhaps natural to presume that all citizens should enjoy an equal right to vote, regardless of their place of residence. However, citizens may not necessarily belong to the *demos*. Citizens living in a foreign country, and therefore not subject to the laws and binding decisions of the homeland, may not be entitled to political rights. This implies that citizens may not be provided with full political rights. Likewise, non-citizens living permanently in a particular country, and subject to the laws and binding decisions of that country, may be granted political rights of that country.

Second, the above claim that citizenship does not always guarantee political rights implies that the range of *demos* is flexible. The range of *demos* is not fixed by nationality, but rather, determined based on whether one is subject to the laws and binding decisions of the relevant country.

Here, it is notable that Jürgen Habermas (2001, 132) described *demos* as people who share the same democratic procedures and principles. According to Habermas, the crux of *demos* does not result from racial or linguistic identity, but stems from a “common political culture” that people share based on their “loyalty” to certain democratic principles and procedures. Thus, the *demos* of a country is formed from a common political culture shared by the people, and this common political culture is subject to change through public deliberation (Habermas 1999, 500; 2001, 146).

Third, modern countries have traditionally granted citizenship to people who share a common national identity, consisting of common blood relations, language, culture, or history. The Korean nationality system, in which citizenship is limited to those having common blood relations, depends on this traditional citizenship position that holds a common national identity as a necessary condition for nationals. For democracy to be successful and effective under this definition of citizenship, its political participants must have something in common. It is through national commonality that people are able to build the mutual trust and understanding required for public deliberation, the essence of democracy. While convincing to some extent, national commonality may not always be necessary to foster a shared national identity, or for one to become a member of the national community. Here, David Miller’s (1995) concept of nationality is worth noting. Miller stresses that nationality standards are critical in determining the range of *demos* of a political community. For Miller, however, nationality is not derived from shared common blood relations, language, or history, but rather that nationality is generated from a shared “way of life,” and more importantly, a shared “common public culture” among the people. Namely, Miller (1995, 26-27, 41-42) defines nationality in terms of a common public culture.⁸ If we subscribe to this

8. According to Miller (1995, 27), “These five elements together—a community (1) constituted by shared belief and mutual commitment, (2) extended in history, (3) active in character, (4) connected to a particular territory, and (5) marked off from other communities by its distinct public culture—serve to distinguish nationality from other collective sources of personal identity.” Among these five elements, Miller particularly emphasizes the fifth element, “a distinct public culture,” for characterizing nationality.

concept of nationality, democracies are able to embrace migrants and foreigners. Migrants can become part of the community by accepting the public culture and establishing a new national identity for themselves (Miller 1995, 129-130). With regards to overseas Koreans, they may or may not be included as members of the *demos* in their homeland, depending on their ability to relate to the shared public culture and sense of national identity of the homeland.

Based on the three conditions listed above, we can see that the principles of democracy are still upheld even if overseas Koreans face restrictions in the right to vote and that the democratic value of the rule of law should serve as the basis in determining the scope of subjects to be granted voting rights. The latter view concurs with the dissenting opinion presented by Justice Kong-Hyun Lee in the Constitutional Court ruling of 2007:

In the case of someone residing outside Korea for a long period of time with the intention to stay on a permanent basis, compared with Korean nationals who simply live outside Korea on a temporary basis, their seriousness and attachment to the politics in Korea could be remote. For this reason, above the meaning of citizens as an abstract and ideologically unifying body, the necessity that they should be acknowledged as actual and concrete elements in the nation is minimal.⁹

Surely, it is debatable how to determine the degree of a citizen's sharing of the political culture that should be granted with the political rights of the motherland. Here, a citizen's intent of acquiring permanent residency or his or her period of stay in a foreign country are important indicators.¹⁰

9. A dissenting opinion by Justice Kong-Hyun Lee on the Constitutional Court Decision 2004Hun-Ma644, 2005Hun-Ma360, delivered on June 28, 2007 (available at http://english.court.go.kr/home/att_file/ebook/1272444851018.pdf).

10. England, Canada, and Australia are some countries that grant voting rights to overseas citizens based on the length of stay abroad. Refer to the next section of this article for more details.

Overseas Voting Rights and the Fundamental Rights Theory

Fundamental Rights Related to Overseas Voting Rights

Following the review of overseas voting rights based on the principles of democracy, this article seeks to examine this issue in light of the constitutional guarantees of fundamental rights, which serve as a means of specifying the principles of democracy. In order to do so, the related fundamental rights should first be reviewed, since constitutional reviews may be carried out with different judging criteria depending on the rights involved. Complainants in the past have claimed that residential requirements for voting are an infringement on the following: human worth and dignity, the right to pursue happiness, equal rights, the right to vote, and the principle of universal suffrage. However, the right to vote itself, which intrinsically reflects the principle of universal suffrage, involves as its inherent value the fundamental rights of human worth and dignity,¹¹ the right to pursue happiness,¹² and equality (Breuer 2001, 156; Roth 1998, 214). Thus, the right to vote is the fundamental right directly related to the discussions on the constitutionality of laws granting or restricting overseas voting rights.

As prescribed by Article 24 of the Constitution of the Republic of Korea, all citizens have the right to vote, which means the right to participate in elections to choose their representatives. However, the protection of voting rights depends on how the voting system is specified. In the case of the Constitution of Korea, legislators are required to decide the specific contents of the voting system with an enactment.

Meanwhile, the establishment of a voting system through the enactment of legislations is not always recognized as constitutionally legitimate. The importance attached to the right to vote in democratic countries has necessitated constitutional reviews of the decisions of lawmakers that impose restrictions on citizens' voting rights. The key to such consti-

11. Constitutional Court Decision 91Hun-Ma31, delivered on October 1, 1991; 89Hun-Ma82, delivered on September 10, 1990.

12. Constitutional Court Decision 2005Hun-Ma598, delivered on March 30, 2006.

tutional reviews is whether the decisions adhere to the constitutional principles of democracy and whether it is legitimate to restrict one's fundamental right to vote. This is in line with the questions asked in the previous section, such as those addressing the questions of who is to be included in or excluded from the *demos* and to whom we should grant or deny the right to vote. When discussing fundamental rights, these questions are related to the principle of universal suffrage.

In the following, we will look at the right to vote in Korea, Germany, and the United States, and draw conclusions from differences in constitutional reviews of restrictions on voting rights for overseas citizens.

Korea's Constitutional Review Standards regarding Restrictions on Overseas Voting Rights

Equality is embodied in the principle of universal suffrage, but the right to vote has rarely been granted to all citizens throughout history. Even if we acknowledge that universal suffrage may not be fully realized, restrictions on universal suffrage that obstruct democratic elections should be carefully and strictly reviewed for legitimacy. In relation to restrictions on universal suffrage, the limiting of voting rights for overseas citizens falls under issues requiring constitutional review.

The Constitutional Court of Korea employs the principle of proportionality for constitutional reviews of cases on the limited voting rights of overseas Koreans.¹³ Despite the importance attached to the principle of proportionality in the constitutional review, it is difficult to derive practical standards for the constitutional review. The principle of proportionality can be broken down into the legitimacy of end, the principle of appropriateness, the principle of necessity, and the principle of proportionality in a narrow sense. However, it can be shown that these standards are abstract and indefinite. First, in order to satisfy the legitimacy of end, the Constitution has introduced three justifiable reasons for restriction on

13. Constitutional Court Decision 97Hun-Ma253, 97Hun-Ma270, delivered on January 28, 1999; Constitutional Court Decision 2004Hun-Ma644, 2005Hun-Ma360, delivered on June 28, 2007.

fundamental rights through legislation: national security, maintenance of law and order, and public welfare. However, these concepts are too abstract and general to justify the legislative restriction of fundamental rights. Next, the principle of appropriateness examines whether appropriate restrictions have been imposed in order to achieve the legislative purpose, while the principle of necessity determines whether the method of restriction, of all available methods, causes the minimum infringement of fundamental rights. Lastly, the principle of proportionality in a narrow sense prohibits excessive restriction of fundamental rights even when in accordance with the aforementioned principles. This principle seeks a balance between the infringement of basic rights and the fulfillment of public interest. It is specified in the Constitution as an “essential aspect of freedom or rights,” which is yet another abstract and indefinite expression. In conclusion, the ambiguity of the principle of proportionality, different standards have been applied in similar cases.

The Constitutional Court of the Republic of Korea applied the same principle of proportionality to court decisions in 1999 and 2007, but made their decisions by applying a different standard and extent of strictness. Both decisions followed strict scrutiny, since the restrictive legislations on overseas voting rights were a restriction on the principle of universal suffrage, but they showed a difference in the extent of strictness with regard to permitting constitutional restrictions on the grounds of compelling reasons. The 1999 ruling stated:

Article 37 Section 1 of the Act on the Election of Public Officials and the Prevention of Election Malpractices specifies certain residential requirements for voting and thereby denies Korean citizens living overseas the right to vote. When we consider the divided state of our nation, technical concerns or the fairness of elections, and the issue of election expenses, the restriction on overseas residents' voting rights not only is legitimate in terms of legislative purpose but also balances well between the public interest served and the basic rights infringed by the legislation. It is also an appropriate means to accomplish the end.¹⁴

14. Constitutional Court Decision 97Hun-Ma253, 97Hun-Ma270, delivered on January 28, 1999.

However, that ruling was later overturned with the 2007 ruling, which stated:

Moreover, as the principle of universal election disregards all actual factors such as the competence, wealth, or social status of the voter, and demands that anyone of age is given the right to vote, the requirements and limits laid out in Article 37, Section 2 of the Constitution should be abided by even more strictly when enacting legislation that restricts the right to vote in violation of the principle of universal election. Article 37, Section 1, which denies the right to vote to Korean nationals abroad, who are not allowed to register as residents even though they are undeniably citizens of the Republic of Korea, has no justified legislative purpose. It thus infringes on the right of overseas residents to vote and to be equal, which is in violation of Article 37, Section 2 of the Constitution and is also in violation of the principle of universal election.¹⁵

Although the Constitutional Court's decisions have changed over the years, most scholars have continued to object to the condition of residence registration for overseas citizens to exercise their right to vote. They are also critical toward the requirements of the domestic domicile report for the election of the National Assembly members of local constituency, included in the amended POEA following the Constitutional Court ruling of 2007. Judging from the Constitutional Court's decision in 2007 and the continued criticism from academia, we can see that restrictions on overseas voting rights are being very strictly reviewed according to the principle of proportionality.

Implications of German and U.S. Constitutional Review Standards on Restrictions of Overseas Voting Rights

For an examination of the constitutionality of restrictions on overseas voting rights, it is of great significance to study the constitutional review stan-

15. Constitutional Court Decision 2004Hun-Ma644, delivered on June 28, 2007 (available at http://english.court.go.kr/home/att_file/ebook/1272444851018.pdf).

dards of Germany and the United States with regard to restrictions on universal suffrage, which include the problem of overseas voting rights. This is due to the fact that the constitutional review standards of the Federal Constitutional Court of Germany and the Supreme Court of the United States have had a strong influence on Korea's precedents and academia.

Similarly, Germany determines the constitutionality of restrictions on universal suffrage based on the principle of proportionality and allows such restrictions only for particularly compelling reasons (Mahrenholz 1998, 69).¹⁶ Concerning the right of overseas citizens to vote, the Constitutional Court of Germany ruled in July 2013 that it was unconstitutional to impose the condition of three months of residence in Germany before leaving the country, and declared that restrictions on universal suffrage are permitted only for reasons specified in the Constitution, or as equally important as universal suffrage.¹⁷

In relation to the right to vote of Germans living abroad, there is a need to examine the decision of the Constitutional Court of Germany as well as changes to the Federal Electoral Law. According to the former Federal Electoral Law, Germans living abroad were granted the right to vote provided that (1) they were German citizens, (2) they were at least 18 years old, (3) they had had a domicile or had been a resident in the Federal Republic of Germany for a minimum of three months, and (4) they were not denied the right to vote. The right to vote of overseas citizens began to be acknowledged following amendments to the Federal Electoral Law in 1985. Before such amendments, questions had been raised regarding the constitutionality of residential requirements in restricting the right of overseas citizens to vote.

In 1973, Germans living abroad challenged the constitutionality of residential requirements in the Federal Electoral Law.¹⁸ In 1981, the constitutionality of the residential requirements was challenged by a public official of the European Community who had been living in Belgium

16. German Federal Constitutional Court Decision, delivered on October 4, 1997.

17. German Federal Constitutional Court Decision, delivered on April 7, 2012 (available at <http://www.bundesverfassungsgericht.de/en/index.html>).

18. German Federal Constitutional Court Decision, delivered on October 23, 1973.

since 1964 and had had no domicile in Germany since 1971.¹⁹ The Federal Constitutional Court declared all restrictions to be constitutional. Reasons for the constitutionality of residential requirements were: (1) that the Federal Assembly is a representative institution of citizens living in areas governed by the Basic Law, which means that citizens represented by the Assembly must exist as members of the nation instead of an abstract unified body; (2) that residential requirements are conventional restrictions on universal suffrage, and voters must reside in the country to participate in politics; and (3) that the right to vote must be granted only to persons living in the country, as voting is related to tax and military service obligations. Nevertheless, the Constitution does not prohibit the granting of voting rights to overseas citizens, leaving it to the discretion of legislators.²⁰

Despite the Federal Constitutional Court's ruling of the above restrictions as constitutional, the right to vote of overseas citizens began to be recognized with amendments to the Federal Electoral Law of Germany. The revised Federal Electoral Law in 1985 divided places of foreign residence into two distinct parts, acknowledging the right to vote of German citizens living in member states of the Council of Europe, without any restriction on the time passed after leaving Germany, and of those living in other countries provided that they had not lived outside of Germany for more than ten years. With further revisions in 1998, the right to vote was expanded to those who had not lived outside of Germany for more than 25 years. The amendment in 2009 imposed the condition of having a domicile in or having lived in Germany for a minimum of three consecutive months before leaving the country, but placed no restrictions on the time passed after departure. However, legislative changes are expected as the Federal Constitutional Court declared in July 2012 that it was unconstitutional to impose the condition of three months of residence.

As seen earlier in the case of Germany, voting rights were granted to overseas citizens despite such restrictions being declared as constitutional,

19. German Federal Constitutional Court Decision, delivered on October 7, 1981.

20. German Federal Constitutional Court Decision, delivered on October 23, 1973; German Federal Constitutional Court Decision, delivered on October 7, 1981.

unlike in Korea, where overseas voting was introduced after the Court deemed the exclusion of overseas citizens to be a violation of the constitution. The German Federal Constitutional Court's declaration of restrictions on voting rights as unconstitutional in 2012 was not a criticism of past rulings that upheld constitutionality, but rather an emphasis that the requirement of living in Germany for three months before leaving the country did not bear any significance on its own. This is also reflected in Germany's internal evaluation, which found that the 2012 ruling by the Federal Constitutional Court on the unconstitutionality of the Federal Electoral Law had no influence over the electoral law of each state. As such, it can be said that the decisions made in 1973 and 1981 have had a more direct connection to discussions on the constitutionality of restrictions on overseas voting rights.

In the case of the United States, the right to vote is regarded as an essential fundamental right under the 14th amendment to the Constitution (S. Cho 2010, 339).²¹ This recognition implies that voting right restrictions will be subject to strict scrutiny and that such restrictions will be difficult to justify on constitutional grounds. In applying strict scrutiny, restrictions are regarded as constitutional if the government is able to prove that such measures are necessary in the name of national interest.²²

The United States has long granted voting rights to overseas citizens on a federal level. The Soldier Voting Act of 1942 was enacted to allow postal voting for soldiers and the Federal Voting Assistance Act was subsequently enacted in 1955, in recognition of the right to vote for soldiers, crewmen, public officials, and their families living outside the United States. The law was amended in 1968 to include citizens temporarily residing outside the United States. The Overseas Citizens Voting Rights Act of 1975 guaranteed the right to vote for all citizens outside the United States, without any residential requirement or condition of returning to the country. The Uniformed and Overseas Citizens Absentee Voting Act,

21. *Kramer v. Union Free School District No. 15*, 395 U.S. 621, 626 (1969); *Reynolds v. Sims*, 377 U.S. 533, 561-562 (1964).

22. *Lucas v. Forty-Fourth Gen. Assembly of Colo.*, 377 U.S. 713 (1964); *Dunn v. Blumstein*, 405 U.S. 330, 331-332 (1972); *Bd. of Estimate v. Morris*, 489 U.S. 688, 690 (1989).

established in 1986 and still in effect today, improved conditions and procedures for overseas voting. The right to vote of overseas citizens is recognized to a different extent in elections in each state. Depending on the state, voting rights may be extended to overseas citizens, denied to U.S. citizens living outside the country with the exception of uniformed service voters, or denied to citizens who have acquired permanent residence outside the United States. Due to these different legislative perspectives, the granting of overseas voting rights in the United States is discussed on a state level rather than a federal one in this article.

While it does not directly concern the right of overseas citizens to vote, it is worthwhile to review the ruling by the Supreme Court of the United States on the unconstitutionality of restrictions on universal suffrage. In a constitutional review of Tennessee's voting requirement of residence in the state for one year and in a particular county for 30 days, the Supreme Court stated that the equal right to vote is not absolute, and states have the power to impose voter qualifications and to regulate access in other ways. However, before that right can be restricted, the purpose of the restriction and the overriding interests served by it should be subject to strict constitutional scrutiny. The Supreme Court found it acceptable to set a residential requirement of 30 to 50 days before the date of an election, but found a requirement exceeding this period as a violation of the Equal Protection Clause of the Fourteenth Amendment.²³ In other words, the Supreme Court did not regard the residential requirement of one year as bearing a relationship to compelling state interests, but residential requirements of a reasonable period were not seen as unconstitutional. This precedent reveals that restrictions on universal suffrage are subject to strict scrutiny, but voting eligibility may be restricted for compelling reasons.

Thus, we can see that strict scrutiny is applied to restrictions of universal suffrage in Germany and the United States, where the right to vote is seen as essential for democracy. However, Germany and the United States do not necessarily declare legislations restricting the principle of

23. *Dunn v. Blumstein*, 405 U.S. 330, 331-332 (1972).

universal suffrage to be unconstitutional and permit such restrictions on the grounds of compelling reasons. A flexible approach is adopted in determining whether a case is indeed compelling, allowing leeway to apply less stringent standards in constitutional reviews of legislations restricting the right to vote. Such possibility of a reasonable relaxation of review standards, and the gradual expansion of overseas voting rights, indicates that the granting of the right to vote to overseas citizens is not so much an inevitable result of the constitutional principle as a reflection of relevant political values.

Restrictions on Overseas Voting Rights according to Length of Stay Abroad

According to a study by the International Institute for Democracy and Electoral Assistance (hereafter, IDEA), 115 out of 214 countries and related territories had legal provisions for overseas voting as of 2007 (IDEA 2007, 11). The adoption of overseas voting can be regarded as a general global tendency, but doubts remain as to whether the right of overseas citizens to vote must be necessarily acknowledged in accordance with the principle of democracy and basic laws. Even if overseas voting is introduced, not all citizens living abroad are granted voting rights, as the requirements of overseas voter eligibility vary from country to country. One of the general criteria for restricting or granting overseas voting rights is the duration of time living abroad.

Countries that restrict overseas voting rights based on the length of stay abroad specify an upper limit to the length of time that voters can stay abroad before losing their voting rights. In Australia, failure to return to the country within six years results in the loss of the right to vote, but extensions may be granted. The limit for Canada and England are five years and fifteen years, respectively (IDEA 2007, 20). As seen earlier, Germany imposed conditions of the length of stay abroad in its granting of overseas voting rights until amendments were made in 2009.

These various forms of overseas voting rights show that there is no absolute answer in determining who has the right to vote from abroad (IDEA 2007, 101; C. Lee 2008, 280). The extent of democratic develop-

ment may not necessarily correspond to the scope of overseas voting rights. In fact, from the existence of restrictions on voting rights based on the length of stay, we can derive that citizens under a democracy are expected to have a legal and political connection to the country. Furthermore, the various forms of voting rights indicate that overseas voting rights are not entirely free from restrictions, and that such basic rights can be constitutionally restricted on reasonable grounds.

Conclusion and Implications

This article examined whether the right to vote should be granted to overseas Koreans in accordance with the constitutional principles of democracy and fundamental rights, as was ruled by the Constitutional Court in 2007. With regard to the principles of democracy, we argue that overseas Koreans may be constitutionally deprived of or denied their voting rights if the range of *demos* is determined based on the democratic value of the rule of law. In terms of fundamental rights, the limitation of suffrage is generally subject to a strict constitutional review, but a less stringent process may be involved in restrictions on voting by overseas Koreans because restrictions are generally reflected in the political values between countries.

Finally, we take a brief look at how the debate on the right to vote among overseas Koreans affects that of foreign residents in Korea. The issue of overseas voting rights is highly related to the voting rights of foreigners who have acquired permanent residency in Korea. By questioning the constitutional appropriateness of granting voting rights to overseas Koreans, we suggest that foreign residents living in Korea should not be denied the right to vote. Recently, Korea has seen a rapid increase in the number of foreign migrants, including marriage migrants and foreign workers, resulting in more foreigners seeking long-term stay in the country. Many countries have independently extended suffrage to foreigners. Since the 2000s, Korea has also allowed permanent foreign residents to vote in local elections, local referendums (residents' voting), and recall elections.

However, the political participation of foreign residents is limited to the aforementioned elections. This arises from the distinction between “citizens” and “residents,” with the former having the right to participate in both local and national elections and the latter having the right to participate only in local elections (Choi 2003, 316; B. Kim 2008, 178). If, as we argued in this study, voting rights need not be immediately granted to overseas citizens, the distinction between “residents” and “citizens” must be critically examined, considering in particular why foreign residents are granted the rights of “residents” but not the rights of “citizens.”

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