

Case on Real-Name Verification on Internet During Periods of Election Campaigns

[2018Hun-Ma456, 2020Hun-Ma406, 2018Hun-Ka16 (consolidated), January 28, 2021]

* First Draft

In this case, the Court declared that the following provisions of the Public Official Election Acts violate the anonymous free speech and the right to informational self-determination of users on bulletin boards, etc. and the freedom of press of internet news sites: the provisions requiring internet news sites to take technical measures to verify that a person, who posts information concerning his/her support for or opposition to political parties or candidates on the bulletin board, etc. of an internet news site, is using his/her real name; the provisions requiring the Minister of the Interior and Safety and a credit information business operator to manage the data on real-name verification results and, if requested by the National Election Commission, to immediately furnish it with the requested data; and the provisions imposing an administrative fine for failing to take technical measures for the real-name verification or for failing to delete the information which does not carry the real name verification mark.

Background of the Case

Petitioner of Case No. 2018Hun-Ka16, who is a legal person running an internet news site, was imposed with a fine for failing to take technical measures to have a user's real name verified in the methods provided by the Minister of the Interior and Safety or a credit information business operator in case where it allows him/her to post, during the periods of parliamentary and presidential election campaigns, information concerning his/her support for or opposition to political parties or candidates on the bulletin board, etc. of its website. Thereafter, Petitioner appealed the decision and lodged a motion to request a constitutional review of the provisions of the Public Official Election Act under which the fine was imposed while the case was pending. The requesting court, accepting the motion, requested a constitutional review.

Complainants of Cases No.2018Hun-Ma456 and No.2020Hun-Ma406, who are voters and a legal person operating an internet news site, filed a constitutional complaint, arguing that the provisions of the Public Official Election Act, which require internet news sites to take technical measures to have a user's real name verified if the person posts information

1

expressing support for or opposition to political parties or candidates on the bulletin board, etc. of their websites during election campaign periods and to delete a posting on the bulletin board, chat room, etc., thereof which contains information concerning a person's support for or opposition to political parties or candidates but does not carry the real name verification mark, infringe upon the fundamental rights of Complainants.

Subject Matter of Review

The subject matter of this case is whether the following provisions of the Public Official Election Act infringe upon fundamental rights of Petitioners and Complainants in violation of the Constitution: (1) Article 82-6 Section 1 of former Public Official Election Act (Amended by No. 12844 on November 19,

2014 and before amended by Act No. 14839 on July 26, 2017), Article 82–6 Section 1 of former Public Official Election Act (Amended by No. 14839 on July 26, 2017 and before amended by Act. 16957 on February 4, 2020), Article 82–6 Section 1 of Public Official Election Act (Amended by No. 16957 on February 4, 2020) and Article 82–6 Sections 4, 6, and 7 of Public Official Election Act (Amended by Act No. 9974 on January 25, 2010) (hereinafter referred to as the “Provision on Real –Name Verification”) ; (2) Article 82–6 Section 3 of former Public Official Election Act (Amended by No. 14839 on July 26, 2017 and before amended by Act No.16957 on February 4, 2020) and Article 82–6 Section 3 of Public Official Election Act (Amended by Act No. 16957 on February 4, 2020) (hereinafter referred to as the “Provision on Managing Real–Name Verification Data”); and (3) Article 261 Section 3 Item 3 of former Public Official Election Act (Amended by Act No. 13497 on August 13, 2015 and before amended by Act. 14556 on February 8, 2017), Article 261 Section 3 Item 4 of Public Official Election Act (Amended by Act No. 14556 on February 8, 2017) and Article 261 Section 6 Item 3 of Public Official Election Act (Amended by Act No. 12393 on February 13, 2014) (hereinafter referred to as the “Provision on Fine”)

Summary of the Decision

The Provisions at Issue restrict, among various aspects of freedom of expression, the freedom of anonymous speech under which a user of a bulletin board, etc. can anonymously express and disseminate his/her thoughts and opinions without disclosing his/her identity. This consequently restricts the freedom of press for internet news sites which seek to form and disseminate public opinion based upon users’ free expression of opinion on the bulletin

2

board, etc. of their websites and the right to informational self–determination of the users of the bulletin board, etc. in terms of the data on real–name verification results being collected and managed.

The legislative objective of the Provisions at Issue is to avoid possible social and economic damages and side effects caused by personal attacks and negative propaganda against political parties or candidates and to ensure a fair election. The Court can acknowledge the necessity of regulations to prevent any negative effect that may arise from allowing anonymous expression of opinion.

However, where anonymous political speech expressed on the bulletin board, etc. of a website is restricted as specified in the Provisions at Issue, the general public will self–censor and refrain from expressing criticism out of fear of political retaliation. Even if a person, overcoming such fear, anonymously expresses critical opinions, such expression may be deleted for failing to have his/her real name verified in accordance with the Provisions at Issue. This will suppress the exchange of different opinions in the ‘free market of thoughts’ shaped by the Internet, which may ultimately lead to creating a chilling effect on the people’s expression of opinion itself and hindering the free formation of public opinion on which democracy depends. Aside from anonymity, there are other elements at play, which include the content of the anonymous expression, the relevant system regulating political expression, and other political and social circumstances, to create the negative effects of anonymous political expression during the period of an election campaign. Therefore, preemptive and comprehensive

regulation of all anonymous expressions will excessively restrict the freedom of anonymous expression and the right to informational self-determination by prioritizing administrative and regulatory convenience over freedom of expression.

Considering the fact that the restrictions on anonymous freedom of expression during an election campaign period when free political expressions are most critical are not based on concrete risks but on abstract possibilities that the Provisions at Issue may lead to a decline in unlawful expression; and the broad definition of an “internet news site” which is subject to the Provisions at Issue, the restrictions on fundamental rights that may be imposed by the Provisions at Issue cannot be considered as less important than the public interest that the Provisions at Issue seeks to achieve.

The fairness of election, an objective of the real-name verification system, can be sufficiently achieved by other means that do not restrict internet users’ freedom of expression or the right to informational self-determination. The Public Official Election Act prohibits the

3

distribution of information in violation of the Act by regulating election campaigns which utilize information and communications networks; persons whose privacy was intruded upon or who were defamed may make use of means or temporary measures stipulated in the Act on Promotion of Information and Communication Network Utilization and Information Protection, Etc. including request for deletion of information; and new measures which do not obstruct internet users’ freedom of expression and the right to informational self-determination while at the same time preventing the distortion of public opinion brought about by disinformation can be introduced to secure a fair election.

Above all, various reactive sanctions including prohibition of defamation and slander against candidates are already in effect against election crimes using the internet. At the current level of technology, measures specified in the Public Official Election are sufficient enough to identify the personal information of persons who acted in violation of the Act, thereby ensuring a fair election. Despite the reactive sanctions already in place, preemptive and comprehensive restriction of all anonymous expressions through proactive and preventative regulations primarily for the convenience of investigation and technological expediency to ensure an effective management of elections is tantamount to treating a vast majority of the people who want to express themselves anonymously as a potential criminal.

The Provisions at Issue restrict the freedom of anonymous expression and the freedom of the press by forcing users to verify their names on the bulletin board, etc. of an internet news site during an election campaign period when political expressions are most crucial; and broadly limit the general public’s right to informational self-determination by regulating all anonymous expressions to prevent their negative effects. Such disadvantage can never be underestimated as opposed to the public interest of maintaining fairness in elections.

Therefore, the Provisions at Issue violate the rule against excessive restriction, consequently infringing upon the freedom of anonymous expression, the freedom of the press and the right to informational self-determination, etc.

Summary of Dissenting Opinions of Three Justices

The Provisions at Issue restrict anonymous expression by taking measures such as verifying the real name of a user who posts information only when such information contains ‘his/her support for or opposition to candidates or political parties’ and is posted ‘on the bulletin board, chat room, etc. of an internet news site’ ‘during an election campaign period.’ ‘During an election campaign period’ political parties and candidates compete with each other for the concrete goal of winning an election and voters competitively express their

4

political opinions regarding the election. Such intense competition may lead to negative propaganda or attempts to manipulate public opinion. As an ‘internet news site’ is part of the mass media wielding influence in forming public opinion, it has greater public responsibility in ensuring a fair election during an election campaign period. The broad definition of an internet news site has to do with the low entry barrier in its establishment and operation. If an internet news site serves the role of the press, it has responsibility to maintain objectivity and impartiality commensurate with its status. ‘A person’s support for or opposition to candidates or political parties’ is his/her political expression which is directly related to the election results and fiercely competes with each other during election campaign periods. Under such distinctive features and circumstances, where false or distorted information expressing a person’s support for or opposition to political parties and candidates is irresponsibly posted on the bulletin board, etc. of a renowned internet news site, it can be compounded with the negative consequences that may occur in the internet environment including a rapid and widespread dissemination and reproduction of the posting, the acquisition of biased information and the reinforcement of bias, making it difficult to facilitate autonomous correction of such information through discussion, etc. and thereby undermining a fair election.

Even where a person whose real name has been verified posts information, etc. on the bulletin board, chat room, etc. of an internet news site, the posting does not disclose his/her personal information, but only shows the sign of a verified real name. Therefore the person’s ‘anonymity’ is guaranteed. Data on real-name verification results is separately managed to provide the information requested by the National Election Commission responsible for ensuring a fair election process, which creates a chilling effect only to this extent. It can be considered as a preventive measure which allows a person who wishes to post information anonymously to be aware of the risk of possible unlawful acts.

Therefore, the restrictions on the freedom of anonymous expression imposed by the Provisions at Issue are indispensable in terms of their scope and extent, and it is difficult to come up with alternatives that can ease the restrictions on the right to self-determination over personal information which are inseparable as the means to guarantee such freedom.

In the case of an internet news site characterized by openness and interactivity, the formation and dissemination of public opinion based on information and expression of opinion provided by users on the bulletin board, etc. of a website form an integral part of its press activities. Accordingly, an internet

news site has public responsibility for managing information, etc. freely posted by users on the bulletin boards, etc. in order to secure the fairness of elections. Therefore, it cannot be deemed that the

restrictions on the freedom of the press granted to internet news sites, accompanied by the restrictions on the freedom of anonymous expression of the users of the bulletin boards, etc., violate the principle of the least restriction.

The Provisions at Issue limit their application to the minimum extent necessary to prevent the risk of undermining a fair election in consideration of the influence and responsibility of internet news sites; it is hard to conceive of other means that can achieve the legislative intent to the same extent as the Provisions at Issue; and notably, the provision on imposing a fine cannot be deemed to impose excessive restrictions on the freedom of the press for internet news sites. For the foregoing reasons, the Provisions at Issue do not violate the principle of the least restriction and the balance of interests.

Since the Provisions at Issue do not contravene the rule against excessive restriction, we find that they do not infringe upon the freedom of anonymous expression and the right to self-determination over personal information of users of the bulletin boards, etc. of internet news sites and the freedom of the press of internet news sites.

* This translation is provisional and subject to revision.