

Constitutional Court of Korea

Decision

Case Number: 2010 Heon Ma 47, 252 (consolidated)

Re: Confirmation of unconstitutionality of Article 44-5, Paragraph 1, Sub-paragraph 2 etc. of the Act to Promote the Use of Communications Network and to Protect Information

Applicants:

1. Mr Sohn ---
2. Mr Chun ---
3. Ms Lee ---

Legal Representative for Applicants 1, 2 and 3 :

Jeong Ryul, LLP

Attn: Cheon Jong Won, Esq

4. Media Today, Inc. (Case Number 2010 Heon Ma 252)

Legal Representative for Applicant 4:

Dong Suh Partners, LLP

Attn: Kim Key Joong, Esq.

ORDER

It is hereby declared that Article 44-5, Paragraph 1, Sub-paragraph 2 of the Act to Promote Use of Communications Network and to Protect Information (as amended by Act No. 9119 of 13 June 2008) and Article 29 and Article 30, Paragraph 1 of the Enforcement Decree of the said Act (as amended by the Presidential Decree No 21278 of 28 January 2009) are unconstitutional.

JUDGMENT

1. Outline of the case and subject matter of the decision

A. Outline

(1) 2010 Heon Ma 47

(a) On 30 December 2009 and on 17 January 2010, Applicants Mr Sohn, Mr Cheon and Ms Lee (“**Applicant Sohn et al.**”) attempted to post replies to websites whose URL are, respectively, <http://kr.youtube.com>, <http://ohmynews.com> and <http://ytn.co.kr> as an anonymous user. But the site operator of these websites had taken measures whereby replies can only be posted after the user goes through verification of user identity. As a result the applicants could not post replies to these websites.

(b) On 25 January 2010, Applicant Sohn et al. brought this Application to this Court alleging that Article 44-5, Paragraph 1, Sub-paragraph 2 of the Act to Promote Use of Communications Network and to Protect Information (“**Communications Network Act**” or “**CNA**”) and Article 30, Paragraph 1 of the Enforcement Decree of the said Act infringe upon their freedom of expression etc. as these provisions impose upon an information or communication service provider who operates an internet bulletin board (“**BBS**” or “**internet bulletin**”) a duty to take measures to verify the identity of the user of the internet bulletin (“**duty to verify user identity**”).

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(a) Media Today, Inc. (“**Applicant Company**”) has been operating an internet news website, <http://www.mediatoday.co.kr> since 7 November 2005. On 2 February 2010, Korea Communications Commission issued a public notice that the Applicant Company is included in the list of website operators who have the duty to verify user identity for the year 2010. The Applicant Company accordingly began to have the duty to verify user identity as from 1 April 2010.

(b) On 20 April 2010, the Applicant Company brought this Application to this Court alleging that Article 44-5, Paragraph 1, Sub-paragraph 2, Paragraph 2, Article 76, Paragraph 1, Sub-paragraph 6 of the Communications Network Act and Article 29 and Article 30, Paragraph 1 of the Enforcement Decree of the said Act infringe upon its basic rights as these provisions impose upon an information or communication service provider a duty to verify user identity and impose sanction in the event of non-compliance.

B. Subject matter of the decision

Applicant Company alleges unconstitutionality of Article 44-5, Paragraph 2 and Article 76, Paragraph 1, Sub-paragraph 6 of the Communications Network Act as well as arguing that Article 44-5, Paragraph 1, Sub-paragraph 2 of the Act and Article 29 and Article 30, Paragraph 1 of the Enforcement Decree of the said Act are unconstitutional. But Article 44-5, Paragraph 2 and Article 76, Paragraph 1, Sub-paragraph 6 of the Act merely stipulate sanctions in the event of non-compliance of the duty to verify user identity. As the Applicant Company has not been subjected to any sanctions under these provisions, we find it unnecessary to rule upon Article 44-5, Paragraph 2 and Article 76, Paragraph 1, Sub-paragraph 6 of the Act. The Applicant Company does not put forward an argument that these provisions are inherently unconstitutional and must therefore be declared unconstitutional without waiting for them to be applied. The scope of the present decision is thus limited to whether Article 44-5, Paragraph 1, Sub-paragraph 2 of the Communications Network Act and Article 29 and Article 30, Paragraph 1 of the Enforcement Decree of the said Act (“**provisions under review**”) are infringing upon basic rights of the Applicants.

The following is the full text of the provisions under review and related provisions:

[Provisions under review]

The Communications Network Act

Article 44-5 (Verification of bulletin board user’s identity), Paragraph 1

If one of the following persons intends to set up or operate a bulletin board, the person shall take the necessary measures as stipulated in the Presidential Decree in order to verify the identity of the bulletin board users (“**user identity verification measures**”)

Sub-paragraph (2)

Information or communication service provider whose number of users per each type of its services is more than 100,000 per day provided that the service provider meets the criteria stipulated in the Presidential Decree.

The Enforcement Decree of the CNA

Article 29 (User identity verification measures) The “necessary measures as stipulated in the Presidential Decree” as referred to in Article 44-5, Paragraph 1 of the Act shall mean all of the following without omitting any of them:

1. The website operator must implement the means of verifying user's identity either by relying on Government Approved Certificate Authority as provided under Article 2, Sub-paragraph 10 of the Electronic Signature Act, or by other third party who provides user identity verification service, or by requesting an administrative body or through fax or face-to-face verification.
2. The website operator must ensure that the information relating to user identity verification is not compromised or divulged during the user identity verification or while the information is being stored.
3. The website operator must retain the information relating to user identity verification from the moment the user's posting is published in the bulletin board until the lapse of 6 months after the the user's posting is no longer published.

Article 30 (Information or communication service providers who have the duty to verify user identity), Paragraph 1

The service providers who "meet the criteria stipulated in the Presidential Decree" as referred to in Article 44-5, Paragraph 1, Sub-paragraph 2 of the Act shall mean those information or communication service providers whose number of users is more than 100,000 per day during the last three months counting from the end of the previous year.

[Related provisions]

[Translator's note: Various terms such as "Communications network", "Information or communication service", "User", "Personal information", "Bulletin board" are defined in Article 2, Paragraph 1 of CNA. The Judgment reproduces these definitions, which I omit to translate except for "Bulletin board". The judgment also reproduces Article 44-5, Paragraph 1, Sub-paragraph 1, Article 44-5, Paragraphs 2, 3 and 4, Article 76 of the CNA, which I omit to translate.]

Article 2, Paragraph 1, Sub-paragraph 9 of CNA

"Bulletin board" shall mean, regardless of its name, any computer program or technical device which enables a user to use the communications network to publish information such as signs, text, voice, sound, image, or movie.

2. Outline of Applicants' argument and Interested Party's Opinion

A. Applicants' argument

(1) 2010 Heon Ma 47

(a) Provisions under review impose the duty to verify user identity on information or communication service providers who set up or operate internet bulletin board so that users may use bulletin board only after going through the process of user identity verification (“**mandatory verification of user identity**”). This is, in effect, to restrict free expression of opinions on the internet by means of a prior censorship mechanism. Applicant Sohn et al. assert that their basic right to anonymous expression of opinions is infringed upon through an excessive regulatory measure. The provisions under review also require users to disclose their personal information such as their name, resident’s registration number. According to Applicant Sohn et al., this is an impermissible invasion of right to privacy and the right to control one’s own personal information.

(b) Provisions under review discriminate against those wishing to publish postings on an internet bulletin compared to those who use other medium to publish their opinion. Applicant Sohn et al. thus assert that their basic right to equal treatment is infringed upon.

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(a) Applicant Company asserts that the mandatory verification of user identity is an excessive regulatory measure which infringes upon bulletin board users’ right to anonymous expression. As a result, internet news providers such as the Applicant Company have their freedom of press undermined because they rely on bulletin board users’ free and uninhibited expression of views in their formulation and dissemination of opinions.

(b) Mandatory verification of user identity requires information or communication service providers to incur excessive costs to set up procedures to verify the user identity. Due to inconveniences of the user identity verification procedure, the number of bulletin board users have decreased, which leads to reduced earning. This would, according to the Applicant Company, be infringing upon the Applicant Company’s freedom to choose profession or line of business for oneself.

B. Outline of the opinion of Korea Communications Commission (“KCC”)

(1) Provisions under review aim to guide internet users to build a more responsible forum for public debate and to create a healthier internet culture through safe and healthy use of bulletin boards. Provisions under review do not require a user’s real name to be disclosed to the public. They are not excessive measures. Nor do they infringe upon the user’s right to anonymous expression.

(2) Mandatory verification of user identity takes place only when the user chooses to

publish a posting on the publicly accessible bulletin board. It is therefore not an area which requires protection of privacy. Provisions under review are for the purpose of verifying user identity. They are not for the purpose of collecting personal information. KCC thus asserts that the provisions under review do not abridge the right to control one's own personal information.

3. Decision

A. Mandatory verification of user identity: why it was introduced and how it operated

(1) Introduction of mandatory verification of user identity

Internet technology began to be widely used in South Korea in the late 1990. The number of internet users has since grown very rapidly. South Korea is now among the countries where the proportion of the population who has internet access is the highest. Undesirable effect of the internet such as use of violent language, defamation, or dissemination of illegal information was also on the increase. It was perceived that the undesirable effect of the internet was mainly due to a lack of self scrutiny or sense of responsibility occasioned by anonymity. In particular, there were a series of incidents around 2005 where certain persons have suffered damage caused by anonymous posting which reveal their identity (“outing”) and by vicious verbal attack against them. These incidents triggered the debate as to the need for a system to verify user's identity. The mandatory verification of user identity was introduced by the revised Communications Network Act (Law No. 8289) on 26 January 2007.

(2) Outline of the System and Scope of its Application

(a) Outline of the Mandatory Verification of User Identity

Mandatory verification of user identity imposes a duty on information or communication service providers who set up or operate internet bulletin board so that users may use bulletin board only after going through the process of user identity verification. If the service provider fails to discharge the duty to verify user identity, Korea Communications Commission may order the service provider to take steps to verify user identity (Article 44-5, Paragraph 2 of CNA). If a service provider does not comply with this order, the service provider shall be subject to an administrative fine of up to 30 million Korean Won (Article 76, Paragraph 1, Sub-paragraph 6 of CNA). Information or communication service providers are thus obliged to verify their user's identity.

Article 29 of the Enforcement Decree of CNA stipulates the steps to verify user identity in more detail. Service providers must have at their disposal a system which relies on Government Approved

Certificate Authority, other third parties who provide user identity verification service, or an administrative body to verify the user identity, or else the service providers must themselves verify the user identity by fax or face-to-face verification (Sub-paragraph 1). Service providers must take technical measures to protect the information relating to user identity verification from being compromised or divulged (Sub-paragraph 2). Service providers must retain the information relating to user identity verification for 6 months (Sub-paragraph 3).

However, of the user identity verification methods stipulated in the said clause, face-to-face verification, verification by fax, verification through Government Approved Certificate Authority are seldom used because of numerous practical difficulties of those methods. At the moment, service providers mainly rely on third parties who provide user identity verification service. Personal credit rating agencies offer user identity verification service. Service providers use them to verify the identity of bulletin board users by means of the person's name, resident's registration number, mobile phone number or credit card number, etc.

(b) Scope of Application of Mandatory Verification of User Identity

The scope of application of mandatory verification of user identity changed as the internet usage underwent changes. First of all, the duty to verify user identity was initially applicable to i) internet portals who serve on average 300,000 or more of users per day, ii) professional intermediaries of user-created content who serve on average 300,000 or more users per day, and iii) internet news media who serve on average 200,000 or more of users per day. On 28 January 2009, Article 30, Paragraph 1 of the Enforcement Decree of CNA was revised so that the duty to verify user identity is extended to any service provider who serves on average 100,000 or more users per day regardless of the type of service it provides. As a result, the list of information or communication service providers who are, according to KCC, subject to the duty to verify user identity sharply increased in 2009. In 2007 and 2008, 35 websites and 37 websites were under the duty to verify user identity. But in 2009, 153 websites were under the duty. In 2010 and in 2011, respectively, 167 websites and 146 websites were obliged to verify their user identity.

Turning now to the concept of 'bulletin board' service which is subject to the user identity verification requirement, Article 2, Paragraph 1, Sub-paragraph 9 of the CNA defines it as any computer program or technical device, regardless of its name, which enables a user to use the communications network to publish information such as signs, text, voice, sound, image, or movie. KCC considers that blogs, personal homepages, members-only sites, social network services are not a platform for postings

intended for the general public. KCC treats them as a private realm for communication. They are not regarded as ‘bulletin board’. They are accordingly excluded from the scope of application of the duty to verify user identity.

B. Issues of this case

(1) Freedom of expression as guaranteed by Article 21, Paragraph 1 of the Constitution includes the right freely to express ideas or opinions (freedom to express) and the right to propagate those ideas or opinions (freedom to transmit). The right ‘freely’ to express or to propagate one’s thought also includes the freedom of anonymous expression, that is, everyone is entitled to express or to propagate one’s thought or opinions anonymously or under a pseudonym without disclosing one’s identity to anyone (See, for example, Constitutional Court Case 2008 Heon Ma 324, dated 25 February 2010. Case Report Vol. 22-1A, pp. 347, 363).

Also, the freedom of expression does not impose any restriction on the medium of expression or propagation of ideas. Any medium can be used for this purpose. Internet bulletin board is carrying out the role of a medium for forming and propagating ideas and opinions in the internet. We have recognised it as a method of forming and propagating ideas (See, for example, Constitutional Court Case 2008 Heon Ma 324, dated 25 February 2010. Case Report Vol. 22-1A, pp. 347, 362).

In this regard, since the mandatory verification of user identity obliges bulletin board users to disclose their identity to the website operator before any information is posted on the bulletin, it restricts the freedom of anonymous expression. At the same time, as the users’ freedom to post ideas or opinions without disclosing their identity is restricted, the information or communication service provider’s freedom of press – which is premised upon user’s freedom of expression – is also restricted as a result (See, for example, Constitutional Court Case 2008 Heon Ma 324, dated 25 February 2010. Case Report Vol. 22-1A, pp. 347, 362).

On the other hand, as the mandatory verification of user identity imposes the duty to verify user identity on the information or communication service provider who wishes to operate internet bulletin board, it restricts the service provider’s freedom to carry out business activities. However, in view of the Applicant Company’s arguments and considering the circumstances under which the mandatory verification of user identity was introduced, it is the freedom of press which is most germane to this case and whose infringement is most serious. The restriction of bulletin board operator’s freedom of press is, in turn, a result of the restriction of bulletin board user’s freedom of expression. The discussion that follows is therefore focused on the infringement of bulletin board user’s freedom of

expression. The infringement of bulletin board operator's freedom of press, etc. shall also be dealt with alongside.

(2) Moreover, the mandatory verification of user identity imposes upon an information or communication service provider the duty to collect and to retain bulletin board user identity verification information. User identity verification information means the information which enables user's identity to be recognisable. It forms part of user's personal data with regard to which the user is entitled to have autonomous control. Any act of examination, collection, retention, processing or use of personal data would, in principle, constitute a restriction of an individual's right to autonomous control of personal data (Constitutional Court Case 2008 Heon Ma 663, dated 27 May 2010. Case Report Vol. 22-1B, pp. 323, 333). Mandatory verification of user identity thus restricts the user's right to autonomous control of personal data, especially as to the use and the retention of the personal data.

(3) Applicant Sohn et al. further assert that the mandatory verification of user identity restricts bulletin board user's right to privacy as it obliges the user to disclose the personal data such as name, resident's registration number, etc. However, we have already explained that the mandatory verification of user identity restricts user's right to autonomous control of personal data, which is a concrete manifestation of the right to privacy. As we shall decide whether the restriction of user's right to autonomous control of personal data amounts to infringement, there is no need for us to rule upon the alleged infringement of the right to privacy.

(4) Applicant Sohn et al. also assert that the mandatory verification of user identity unreasonably discriminates those intending to use the internet to publish their writings compared to those intending to use other media to publish their writings. Unlike the latter, only the internet users are required to go through the verification of user identity. According to Applicant Sohn et al., this is an infringement of the internet users' right to equal treatment. However, the alleged discrimination as asserted by Applicant Sohn et al. is an incidental result which necessarily follows from the mandatory verification of user identity which restricts the user's freedom of anonymous expression in the internet. As the determination regarding the alleged discrimination is identical to the determination as to whether the user's freedom of anonymous expression is infringed upon, we do not deal with the alleged discrimination separately.

(5) Applicant Sohn et al. assert that the mandatory verification of user identity constitutes in effect prior censorship which restricts free expression of views on the internet before such views are published. However, the mandatory verification of user identity does not regulate the publication

depending on its content. It does not require the information or communication service provider to remove the posting. Mandatory verification of user identity may not therefore be viewed as prior censorship where an agent of state examine, select and prevent expression of certain ideas.

(6) It follows that the focal issues of this case are whether the restrictions imposed by the mandatory verification of user identity are disproportionate and excessive, thus infringing upon bulletin board user's freedom of anonymous expression or upon service provider's freedom of press, or upon bulletin board user's right to autonomous control of personal data.

C. Whether the restrictions are excessive

(1) Legitimacy of the legislative aim and pertinence of the means

Due to the growth of the internet and the rapid increase of the number of internet users, the information circulated on the internet is very rapidly propagated and has a great deal of influence. At the same time, as we pointed out earlier, undesirable effect of the internet such as use of violent language, defamation, or dissemination of illegal information has also been on the increase making use of the anonymous feature of the internet.

The mandatory verification of user identity introduced by the provisions under review aims to prevent violent language, defamation and dissemination of illegal information on the internet. In order to achieve this goal, the mandatory verification reminds the user that if such information is posted, the user may be identified and be subjected to a criminal sanction or a civil duty of compensation. As a result, the user would be more careful in the expression and desist from posting illegal information. Also, if an actual loss occurs as result of a bulletin board user's wrongful conduct, the basic information regarding the identity of the aggressor can be secured in advance to facilitate redress of the victim. This is intended to achieve a healthier internet culture steering the bulletin board in the direction of a more responsible forum for public debate. The legislative aim is therefore legitimate and the means adopted to achieve the aim is pertinent.

(2) Least invasive means

(a) However, the professed aim of the provisions under review such as promoting a healthier internet culture can sufficiently be achieved by other means which do not restrict user's freedom of expression or the user's right to autonomous control of personal data.

First of all, where posting of illegal information causes loss to others, the aggressor can be identified with the help of IP address or other traces. Of course, if the aggressor uses other person's

computer or user ID, it may not be possible to identify the aggressor in the above-mentioned manner. But the mandatory verification of user identity would have the same difficulty of identifying the aggressor if the aggressor uses other person's name and resident's registration number. The aggressor's attempt to hide or disguise the identity and the resultant difficulty of identifying the aggressor are problems common to wrongful conducts in general and they may be dealt with by usual investigation techniques.

Next, redress of victims whose rights are violated by information posted on the bulletin board can be done by service provider's removal or temporary blocking of the posting (as provided by Article 44-2, Paragraphs 1 and 2 of CNA) or by an order issued to the service provider to refuse, discontinue or restrict processing of illegal information (as provided by Article 44-7, Paragraphs 2 and 3 of CNA). These measures will stop transmission or propagation of illegal information. Additionally, civil compensation or criminal punishment after the posting can also provide sufficient redress for the victims.

In other words, the existing criminal statutes and CNA already provide means of sanctioning illegal postings. Moreover, it is not impossible at the present level of technology to identify the user after an illegal posting is done. If illegal postings are effectively policed and punished by proper application of these existing provisions, it would provide more effective deterrence than the mandatory verification of user identity.

This point becomes even more clearer when one compares foreign countries' regulatory stance regarding illegal or harmful information in the internet. In the United States or in Great Britain, policing of harmful information on the internet is, in principle, left to voluntary measures of the internet industry. Many European countries including Germany also rely on non-governmental, voluntary policing. Their law proposes limitation of liability or immunity for the internet service provider on the basis of such voluntary policing measures. In Japan too, illegal or harmful postings are dealt with through a partnership between public and private sector after the postings are found. None of these countries have a strong regulatory stance regarding the use of bulletin board such as the mandatory verification of user identity in Korea.

(b) Mandatory verification of user identity stipulated by the provisions under review constitutes excessive regulation which goes beyond what is necessary to achieve the legislative aim.

1) First of all, Article 44-5, Paragraph 1 of CNA requires that the identity of "bulletin board user" must be verified. Article 2, Paragraph 1, Sub-paragraph 4 defines "user" as "a person who

uses information or communication service provided by an information or communication service provider”. Therefore, “bulletin board user” would include not only those who post information but also those who read information. But users who merely read information on the internet are not in a position to commit wrongful act of infringing upon other’s rights. Such users’ identity need not be verified.

For this reason, KCC narrowly interprets “bulletin board user” so that only those who post information are required to go through verification of user identity. But this only goes to show that the scope of application of the provisions under review is too broad.

2) Each year, KCC requests three research agencies to conduct estimation of the number of users of various websites. Based on these estimates, KCC selects those bulletin board operators who would have the duty to verify user identity. However, as the geographical location poses no barrier to the use of the internet, non-Koreans or overseas Koreans may also use websites operated by service providers located in Korea. Whether these users are also included in estimating the “number of users” is far from clear. Where the same user has used the same bulletin board a number of times in a day, there is no clear method of estimating the number of users. Moreover, there is a fundamental question as to whether it is technically possible in the first place to calculate accurately the number of users of a website.

The fact that whether or not an information or communication service provider will have the duty to verify user identity is determined by estimation of the number of users whose accuracy and methodology are far from clear, demonstrates that the provisions under review fail to take account of the characteristics of the internet and stipulate the scope of their application in such a broad manner as to allow a room for arbitrary enforcement of the provisions.

On the other hand, KCC gave a public notice that, for the year 2011, 146 major websites operated by information or communication service providers shall be subject to mandatory verification of user identity. This is approaching a near universal application of mandatory verification of user identity.

3) According to the requirements of mandatory verification of user identity, website operator must retain information relating to user identity verification from the moment the user’s posting is published in the bulletin board until the lapse of 6 months after the user’s posting is no longer published. Where the posting is not deleted, the information regarding the user identity may end up being retained by the service provider indefinitely.

(c) In view of the foregoing, the mandatory verification of user identity ignores that there are

other less invasive means of achieving the legislative aim. It instead obliges service providers to collect information regarding user identity and to retain it for a long time thus increasing the risk of leak or misuse of personal data, quite regardless of the legislative aim. It also places too much weight on investigative convenience and treats citizens as if they are all potential wrongdoers. It imposes excessive restrictions which go beyond what is necessary to achieve the legislative aim. We rule that the mandatory verification of user identity is not the least invasive means of achieving the legislative aim.

(3) Balancing of interests

(a) Freedom of expression carries an important constitutional value which is at the heart of democracy. Any attempt at prior restraint of freedom of expression must be backed up by a clear showing of public interest served by such a restraint. The provisions under review, however, resort to an unusual means such as mandatory verification of user identity, which is hard to find in other countries. The internet is made up of networks, all of which are not under the effective regulatory control stipulated by the Korean law. As users can freely access those networks, the unusual regulation of mandatory verification of user identity causes domestic users to escape to overseas websites. Service providers in Korea are also adversely affected compared to their foreign competitors who are not subject to such regulation. The enforcement of the regulation is also accused of being arbitrary or discriminatory. The difficulty of enforcement is considerable. As a result, it can hardly be said that mandatory verification of user identity actually serves the public interest it professes to serve. The internet is the aggregate whole of computer networks reaching all parts of the globe and openness is its important characteristic. Regarding the internet, if a country adopts a regulatory scheme which is very different from the rest of the world, it can easily be avoided. The public interest which our law and our regulation profess to serve will, in such a case, be reduced to an empty slogan which may look good but fails to achieve the aim. The legislator who enacted the mandatory verification of user identity overlooked this. Furthermore, according to research findings submitted by KCC itself, there is no evidence showing that defamatory, insulting or libellous postings have diminished significantly after the introduction of mandatory verification of user identity. The prior restriction of free expression cannot be justified under these circumstances.

(b) On the other hand, the mandatory verification of user identity introduced by the provisions under review constitutes an important restriction of the freedom of anonymous expression.

Freedom of expression is, on an individual's level, a means of freely expressing one's personality and

also a means of forming rational and constructive viewpoints and of discovering the truth. On the level of society and the state, freedom of expression is an indispensable basic right essential to the survival and development of the society and the state. In particular, anonymous expressions allow free expression and propagation of ideas in spite of explicit or implicit pressure to suppress such ideas. They enable criticism of the majority opinions of the society and of the state. In this manner, those who do not have the social or political power can have their views reflected in the policy decisions of the state. For this reason, the freedom of anonymous expression is an integral and indispensable part of the freedom of expression. Also, anonymous expression on the internet can, when coupled with the speed of the propagation and the interactive nature of processing of the information, overcome the hierarchical structure of the offline world which is based on the economic or political power. Anonymous expression on the internet thus helps formation of the public opinion which is free from biases of the class, status, age or gender. The democracy will enjoy further development when opinions of citizens from various strata of the society are reflected in the formation of the public opinion equally. Although there are concerns that anonymous expressions in the internet may have undesirable effect, freedom of anonymous expression must enjoy robust protection because it has an important constitutional value.

However, the mandatory verification of user identity requires user's identity to be verified throughout the year, regardless of the content of the posting, and in the bulletin board of most major websites. As users do not have a clear conviction as to precisely what is prohibited, if they are required to supply name and resident's registration number, there is a high probability that they would rather choose not to post replies fearing adverse regulatory consequences or punishment. There are a few users who abuse the internet. But their existence does not justify restricting the legitimate expressions of the predominant majority of citizens. Mandatory verification of user identity is excessively restricting the freedom of anonymous expression.

Moreover, credit bureaus currently provide the most widely used user verification service which relies on the user's name and resident's registration number. Foreigners or overseas Koreans who do not have resident's registration number are thus prevented from posting. Their freedom of expression is, in effect, wholly denied and deprived as result.

(c) As the internet technology evolves, user environment undergoes changes as well. Users now prefer mobile websites using social networking services which are not subject to the duty to verify user identity.

As a result, the mandatory verification of user identity is applied only in a very limited user environment with the professed aim of achieving a healthier internet culture. Service providers in Korea who have to compete with new services of communication such as social networking services are burdened with the regulation. The mandatory verification of user identity thus imposes serious restriction on information or communication service provider's freedom of press which relies on internet as a medium of formation and propagation of opinions.

(d) Additionally, as the mandatory verification of user identity requires service providers to retain information regarding user identity, the risk of breach or misuse of personal data is increased. Also when law enforcement agencies request service providers to hand over a particular user's personal data (See Article 83, Paragraph 3 of Electronic Communications Act), there is a significant risk that the personal data are used for purposes other than the purpose for which they were collected and retained. In view of these disadvantages to the user, it cannot be denied that the mandatory verification of user identity imposes important restriction on individual's autonomous control over personal data.

(e) We conclude that the disadvantage to users and service providers resulting from mandatory verification of user identity and the restrictions on basic rights are not smaller than the public interest supposedly achieved by the mandatory verification of user identity. The legislation therefore fails the balancing test.

(4) Findings

We find that the mandatory verification of user identity stipulated in the provisions under review operates as prior restriction of freedom of expression. It discourages expression in general and thus restrains constitutionally protected speech and it hampers free formation of public opinion which is at the heart of democracy. The provisions under review impose excessive restrictions and infringe upon freedom of expression and autonomous control of personal data of Applicant Sohn et al. and upon freedom of press, etc. of Applicant Company.

4. Conclusion

It is held, by unanimity of all Judges who heard the case, that the provisions under review are unconstitutional as they infringe upon freedom of expression and autonomous control of personal data of Applicant Sohn et al. and upon freedom of press of Applicant Company.

So ORDERED.

23 August 2012

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[Unofficial translation by Professor Keechang Kim, Korea University Law School.

All questions regarding translation should be directed to:

http://openweb.or.kr/?page_id=3598]