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Real-name Identification System During the Election Campaign Period

[2018Hun-ma456, 2018Hun-ga16, 2020Hun-ma406 (consolidated), 28 January, 2021]

The Constitutional Court, on January 28, 2021, held in a 6:3 decision that provisions of the Public Official Elections Act, which stipulate that Internet press agencies must take technical measures to identify the real names of people when posting information such as support for or opposition to political parties or candidates on the bulletin boards of the agencies during the election campaign period; the Minister of Interior and Security and credit information business operators must manage real-name certification data and, if requested by the National Election Commission, submit the data without delay; any person fails to take technical measures for real-name identification or delete information that does not indicate real-name certification are fined, are all in violation of the Constitution, and claims of some of the complainants were declared inappropriate. There is a dissenting opinion of three Justices.

Provisions at Issue

[Article 82-6 \(1\), \(3\), \(4\), \(6\), and \(7\) of the Public Official Election Act](#)

Article 82-6 (Identification of Real Names on Bulletin Boards or Chatting Pages, etc. of Internet Press Agencies)

(1) If any Internet press agency allows anyone to post information (hereafter in this Article referred to as “information, etc.”) including texts, voice, pictures or video clips expressing his/her support for or opposition to candidates or political parties on the bulletin board and chatting page, etc., of its Internet web-site during the election campaign period, it shall take technical measures to have his/her real name identified in the methods of identifying real names that are provided by the Minister of the Interior and Safety or credit information business operator (hereinafter in this Article “credit information business operator”) under subparagraph 4 of Article 2 of the Credit Information Use and Protection Act: Provided, That where the Internet press agency has taken

measures to identify the person himself/herself pursuant to Article 44-5 of the Act on Promotion of Information and Communications Network Utilization and Information Protection, Etc., it shall be deemed that the technical measures to have the real name identified have been taken.

(3) The Minister of the Interior and Safety and the credit information business operator shall manage the real name certification data furnished pursuant to paragraphs (1) and (2) by persons whose real names are identified and by the web-sites and shall comply with a request from the National Election Commission to furnish it with real name certification data, upon receipt of such request.

(4) Where anyone whose real name is identified pursuant to paragraph (1) posts information, etc., the relevant Internet press agency shall take technical measures to have the sign of the “real name identification” appear on the bulletin board and the chatting page, etc. of its Internet homepage.

(6) Where any information, etc. expressing the intention of supporting or opposing any political party or any candidate without the sign of “real name certification” are posted on the bulletin board and the chatting page, etc. of the web-site, the relevant Internet press agency shall delete without delay such letter.

(7) Where any political party, any candidate and the election commission of each level requests the deletion of the information, etc. referred to in paragraph (6), the relevant Internet press agency shall comply with such request without delay.

[Article 261 \(3\) 4 and \(6\) 4 of the Public Official Election Act](#)

Article 261 (Imposition, Collection, etc. of Administrative Fines)

(3) Any of the following persons shall be punished by an administrative fine not exceeding ten million won:

4. Any person who fails to take technical measures, in violation of Article 82-6 (1);

(6) Any of the following persons shall be punished by an administrative fine not exceeding three million won:

3. Any person who fails to delete any information, such as characters, voices, pictures or videos, that does not carry the sign of the real name certification data, in violation of Article 82-6 (6);

Summary of the Decision

1. Violation of the principle of clarity

The question is whether “Internet press agency” and “support for or opposition to” parts of the Provisions at Issue are unclear and thus violate the rule of clarity.

As found in the precedents, ‘Internet press agency’ is not unclear, considering that the Public Official Election Act and related laws specifically define the scope of the ‘Internet press agency’; the Internet Election News Deliberative Committee, established and operated by the National Election Commission, determines and publishes the Internet press agencies subject to the deliberation; and the legislative purpose of the Provisions. Therefore, there will be no case where an Internet press agency is unsure whether it is obliged to take real-name verification measures according to the Provisions at Issue.

In addition, when considering the lexical meaning of ‘support for or opposition to,’ the legal definition of the “election campaign” and its interpretation by the Constitutional Court, the legislative purpose of the Provisions at Issue, and the Public Official Election Act and related laws, any person with sound common sense and ordinary legal sentiment will be able to sufficiently understand whether his/her posting amounts to an act of posting information expressing support for or opposition to political parties or candidates. Therefore, it is not in violation of the principle of clarity (2008Hun-ma324, etc., February 25, 2010; 2012Hun-ma734, etc., July 30, 2015).

2. Violation of the rule against excessive restriction

(1) Issue

The Provisions at Issue restrict the freedom of anonymous expression of users of bulletin boards, etc. to express their ideas or views anonymously without revealing their identity to anyone. At the same time, they also restrict the freedom of the press of Internet press agencies to form and spread public opinion based on free expression of users’ opinions. In addition, users’ right to self-determination of personal information is limited in that real-name certification data is collected and managed. Therefore, the question is whether the Provisions at Issue are in violation of the rule against excessive restriction and thus infringe on the users’ freedom of anonymous

expression, the Internet press agencies' freedom of the press, and the users' right to self-determination of personal information.

(2) Legitimacy of legislative purpose and appropriateness of means

The legislative purpose of the Provisions is to prevent socioeconomic losses and side effects caused by personal attacks and black propaganda against political parties or candidates and to ensure fairness in elections. The need for regulation can be acknowledged in order to prevent the negative effects that may occur if anonymous expressions are allowed.

(3) Least restrictive means

1) If we regulate anonymous political expressions on the bulletin boards of websites according to the Provisions, the general public will refrain from expressing criticism under self-censorship due to concerns over political retaliation. And even if they overcome such concerns and express critical opinions anonymously, the expression may be deleted only because the real name was not identified in accordance with the Provisions. This suppresses the exchange of diverse opinions in the 'free marketplace of ideas' formed by the Internet, which could atrophy the expression of views of the people and hinder the free formation of public opinion on which democracy stands.

The negative effect of anonymous political expressions during the election campaign period is caused not only by anonymity but also by the content of the anonymous expressions as well as related rules that regulate political expressions, and various conditions of political and social situations. 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.

2) Considering that the restriction on anonymous expression during the election campaign period, a key period in which political expression can be freely expressed, is not based on specific danger but on the abstract possibility that illegal expression will be reduced due to the Provisions and that the scope of the "Internet press agency" is too broad even if the term does not violate the principle of clarity, the restriction on basic rights cannot be regarded as small.

3) The purpose of fairness in elections advocated by the real name verification system can be sufficiently achieved by other means that do not restrict the freedom of expression of Internet users or the right to self-determination of personal information.

The Public Officials Election Act restricts the distribution of information in violation of the Public Officials Election Act through the regulation of election campaigns utilizing the information and communication networks (Article 82-4 Paragraph 3, Paragraph 4, and Article 256 Paragraph 3 Item 5), and means such as a request for deletion or temporary takedown measures available to persons who have been injured by privacy infringement or defamation due to information publicly disclosed online may be used under the Act on Promotion of Information and Communication Network Utilization and Information Protection, etc. (Article 44-2 and Article 44-3) It is also possible to introduce new means of securing fairness in elections by preventing distorting public opinion with false information without restricting Internet users' freedom of expression or their right to self-determination of personal information.

4) There are already various ex-post sanctions such as defamation and slander of candidates against election crimes online. Even at the current technology level, it is not impossible to verify a poster's identity afterward by means such as tracking a unique address required for Internet Protocol (IP) communication. Even through the means stipulated in the Public Official Election Act, it is possible to secure the identity of a person who has committed an election crime or an act online that violates the Public Official Election Act and adequately preserve the fairness of the election in the end.

5) Therefore, the Provisions at Issue do not meet the test of least restrictiveness.

(4) Balance of legal interests

The Provisions restrict the freedom of anonymous expression and the freedom of the press by forcing users to verify their real names on the Internet press agency's bulletin boards, etc. during the campaign period when political expressions are most critical. And in order to prevent the negative effects of anonymous expression, all anonymous expressions are being restricted, resulting in the restriction of the right to informational self-determination of a great majority of the people. Such disadvantages can never be underestimated even in comparison to the public interest of maintaining fairness in elections. As such, the Provisions also failed the test of the balance of legal interests concerned.

3. Conclusion

The Provisions at Issue are in violation of the Constitution.