

# Anonymity, Privacy, and Expressive Equality: Name Verification and Korean Constitutional Rights in Cyberspace

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## Abstract

*Korea's introduction of a name verification system for users of certain Korean websites raised a variety of policy- and rights-based concerns. After several years of political, social, and legal debates, the Korean Constitutional Court ruled that this system, as implemented, unconstitutionally restricted certain basic constitutional rights, including freedom of expression. While the Constitutional Court exercised judicial restraint and employed a prudential approach in its decision, it failed to consider the primary constitutional harms imposed by name verification.*

*I propose that the best defense for anonymous expression, and the most compelling argument against legal identification requirements online, is that Korean citizens are entitled to freedom from prejudicial governmental burdens on their expressive opportunities. Expression is central to participation in a free democracy, forming a powerful basis for the advancement of the rights of otherwise marginalized individuals and groups. It is also essential to one's dignity within the society. Imposing an ex ante identification requirement effectively undermines the Internet's unique power for facilitating expression. Mandatory name verification and other similarly burdensome obstacles to online expression disparately impact vulnerable groups, and therefore violate constitutional rights to expression, privacy, and equality. Korea's unique experiences with name verification are instructive for other nations facing the tension between free expression and competing social objectives.*

KEY WORDS: Real Name Verification, Freedom of Expression, Anonymity, Equality, Privacy, Cyber-Defamation, Cyber-Contempt, Internet Law, Cyber Law, Data Security

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## I. Introduction

Few recent promulgations of the Korean National Assembly (the “Assembly”) impacted the daily life of Koreans as directly and intimately as the Internet identity-verification requirement. This real name verification system (the “RNVS” or the “System”),<sup>1)</sup> introduced in 2007<sup>2)</sup> and expanded by executive enforcement decree in 2009<sup>3)</sup> to include a larger number of websites, became an almost ubiquitous feature of Korean cyberspace.<sup>4)</sup> Any person wishing to post content on a popular Internet portal site was required to first verify her identity by providing a valid Korean identification number.

For some affected individuals, the existence of a name-verification requirement seemed minimally intrusive and, on balance, socially desirable.<sup>5)</sup> For others, however, the personal impact and consequences of

1) The “RNVS” was known by several names in the Korean language. In official documents, it was termed “JehanjeokinBoninhwaginje” (“restrictive personal verification”). See Jeongbotongsinmang iyongchokjin mit jeongbobohodeunge kwanhan beopryul [Act on Promotion of Information and Communications Network Utilization and Information Protection], Act No. 8289, Jan. 26, 2007, art. 44-5, available at <http://www.law.go.kr/LSW/lsInfoP.do?lsiSeq=77227&chrClsCd=010202#hongBot>. [hereinafter Information and Communications Network Act]. However, the RNVS was commonly referred to as “Silmyeongje” (literally, the “real name policy”).

2) The RNVS was created by statutory amendment. See *id.*

3) Jeongbotongsinmang iyongchokjin mit jeongbobohodeunge kwanhan beopryul sihaenglyeong [Enforcement Decree of the Act on Promotion of Information and Communications Network Utilization and Information Protection], Presidential Decree No. 21278, Jan. 28, 2009, art. 30 [hereinafter 2009 Enforcement Decree of the Information and Communications Network Act].

4) Under the terms of the original enforcement decree, 37 Internet portal sites were required to comply with RNVS; once the scope of the enforcement decree was expanded in 2009, 180 sites were required to comply. See Jisuk Woo et al., *Internet kaeshipan Shilmyeongjae Jsueuihyokwae daehan siljeungyeongu: Jaehanjukboninhwakinjae sihenge ddaren kaeshipan nae keulsseuki haengui mit bibangkwa yokseului byeonhwareul jungsimeuro* [An Empirical Analysis of the Effect of Real-name System on Internet Bulletin Boards: Focusing on How the Real-name System and Users’ Characteristics Influence the Use of Slandorous Comments and Swear Words], 48(1) HENGEONGNONCHONG [KOREAN JOURNAL OF PUBLIC ADMINISTRATION] 71, 72 (2010).

5) At the time of the original introduction of the RNVS, the measure received widespread support in opinion polls. See ‘Inteonetsilmyeongjedoip’chanseongidaeset...72.1% [Supporting the ‘introduction of Internet real name system’ is the trend...72%], JOY NEWS (Jan. 21, 2007), available at

the RNVS were far more pernicious.<sup>6)</sup> Concerns ranged from questions about effectiveness and data security<sup>7)</sup> to alleged violations of freedom of expression in the online space (including a “right of anonymity”<sup>8)</sup>), the right

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[http://joynews.inews24.com/php/news\\_view.php?g\\_menu=700100&g\\_serial=244304](http://joynews.inews24.com/php/news_view.php?g_menu=700100&g_serial=244304). Polling conducted shortly before the RNVS was expanded in scope revealed that the popularity of the System had declined, but the clear majority of Koreans (more than 60%) still favored it. See Gungmin 63%, *Internet silmyeongjedoipchanseong* [63% of the citizens support the implementation of Internet real name system], ASIATODAY (Oct. 10, 2008), available at <http://www.asiatoday.co.kr/news/view.asp?seq=171982>. The same survey showed that the RNVS garnered support from a majority of the supporters of the five largest political parties, suggesting that the issue may not be as sharply partisan as some might expect. See *id.* Following the Constitutional Court’s 2012 ruling that the System, as implemented, was unconstitutional, 3 out of 10 Internet users disagreed with the repeal of real name verification, while nearly half of respondents expressed the view that they were “neutral” on the issue. Kim Yoon Ha, *Kketnazianuen ‘internet silmyeongjaepaeji’ kongbangjeon* [Continuous Debate on the Repeal of Real Name Verification], DATANEWS (Sept. 6, 2012), available at <http://www.datanews.co.kr/site/datanews/DTWork.asp?itemIDT=1002910&aID=20120906140438443> (stating response to the repeal of the RNVS as follows: neutral-43.2%; support-15% oppose-31%; not sure-10.8%).

6) As argued *infra*, a ramification of a robust notion of equality is that the very inoffensiveness of a government policy or action to a majority of individuals may accentuate the legal implications for the rights of the minority of individuals whom the law offends. The principle of anti-majoritarian protection resonates in Korean law. See, e.g., Constitutional Court [Const. Ct.], 2002Hun-Ka1, Aug. 26, 2004 (Conscientious Objection of Military Service Case, stating that freedom of conscience “is not synonymous to the thoughts and the values of the democratic majority; rather, it is something that is extremely subjective...”) [hereinafter *Conscientious Objection of Military Service Case*].

7) See Constitutional Court [Const. Ct.], 2010Hun-Ma47, Aug. 23, 2012 [hereinafter *RNVS Case*].

8) Whether a specific right to anonymous expression exists under Korean law is debatable and, at most, not clearly established under any authoritative source of law. The National Human Rights Commission of Korea [hereinafter “HRC”], which advocates for the recognition of such a right, asserts that as opposed to the situation under American law, no Korean constitutional precedent has incorporated anonymous expression into the scope of protected expression. See Kugga Inkwon Uiwonhue [National Human Rights Commission of Korea], “*JeongboTongshinmangYiyongchukjinmitJeongbobohodeungekwahanhanbeobryuljeonbukaejung an” jae 115 jo* (kaesipanyiyongjiauiboninhwakin) *jae 1 hang jae 2 ho e daehanuikeyeon* [Opinions on article 115(1)(2) (verification for board users) for the “Amendment of the Act on Promotion of Information and Communications Network Utilization and Information Protection, etc.”] 4 (Nov. 19, 2009).

The HRC suggests that, as an alternative to finding an anonymity entitlement within the right of expression, such a right could be seen to exist under the constitutional right related to communication-related privacy. See DAEHANMINGUKHUNBEOB [CONSTITUTION OF THE REPUBLIC OF KOREA] [hereinafter CONSTITUTION], art. 18 (“The privacy of correspondence of no citizen shall

of individuals to equal treatment by the State, and individual privacy rights.<sup>9)</sup>

Several of these considerations formed the basis for a legal challenge to Article 44-5 of the Information and Communications Network Act, through which the RNVS was introduced into law (the “RNVS Case”). Filed and argued in 2010, the RNVS Case was decided in August of 2012 by the Constitutional Court of Korea (the “Constitutional Court” or the “Court”). The Constitutional Court ruled that, as implemented, the RNVS had excessively restricted certain basic rights, including freedom of expression, self-determination of private information, and freedom of the press.<sup>10)</sup>

In this article,<sup>11)</sup> I first describe certain background information to contextualize the creation and implementation of the System, and then synopsise certain early results and impacts of the System relevant to the RNVS Case. I next provide a survey of the arguments advanced in the RNVS Case, briefly consider relevant precedents, and then describe and analyze the Court’s reasoning. Finally, I propose an analytical framework under which the RNVS is properly understood to have violated the rights of equality, privacy, and freedom of expression.

Arguably, the Constitutional Court’s decision modeled judicial restraint and fits comfortably in the broader tradition of the Constitutional Court. In particular, it appears that the Constitutional Court implicitly applied a prudential approach to constitutional law. In this approach, challenged laws are reviewed in light of contemporary social values and other practical

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be infringed.”).

9) See, e.g., Sung Gi Hwang, *Internet Silmyeongjeekwanhan Heonbeophakjeok Yeongu* [A Constitutional Study on the Mandatory Personal Identification on the Internet], 25 BEOPHAKNONCHONG [HANYANG L. REV.] 7, 36 (2008). See also Yong-suk Hwang, *Internet Kesipan Silmyeongjee daehan Bipanjeok Yeongu* [Critical Approach to the Implementation of Real-Name system on Bulletin Board of the Internet], 15 EONRONKWA SAHWE [PRESS AND SOC’Y] 97, 129 (2007).

10) RNVS Case, 2010Hun-Ma47.

11) This work expands upon an earlier publication that focused on the policy implications of the RNVS. See John Leitner, *Identifying the Problem: Korea’s Initial Experience with Mandatory Real Name Verification on Internet Portals*, 9 J. KOREAN L. 83 (2009). That article provides a more detailed analysis of the social context in which the System was implemented and expanded. This article, on the other hand, considers the full scope of the Constitutional problems presented by the RNVS, brought into sharper focus in light of the Constitutional Court’s decision in the RNVS Case.

factors, and they are struck down when they are found to be imprudent and retained by legislative inertia.<sup>12)</sup> In the RNVS Case, the Constitutional Court deferred to the political branches by delivering a delayed and narrow decision. However, the primary constitutional harms imposed by the RNVS were not addressed in the Constitutional Court's analysis. By rendering a decision that was, on its face, largely based on pragmatic considerations, the Court declined to address these issues. The Constitutional Court acted correctly in striking down the law. However, the Court should have rested its decision on the individual rights issues that would have cast a longer shadow on future law and policy decisions.

To support this contention, I argue that the value of freedom of expression in general, and anonymous<sup>13)</sup> online expression in particular, is properly understood through its relationship to the right of equality and the right of privacy (where the right of privacy includes protections for personal autonomy). Individual opportunity to pursue a free and independent online existence is essential to personal autonomy and identity development.<sup>14)</sup> A government that seeks to protect and advance<sup>15)</sup> these

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12) The considerations that carry weight in this jurisprudential approach can be identified in the work of constitutional scholar Alexander Bickel. See ALEXANDER M. BICKEL, *THE MORALITY OF CONSENT* 23, 137 (1977) (discussing “good practical wisdom” and “balance and judgment” as proper characteristics of judicial reasoning). My use of “prudential” reasoning to describe the *ratio decidendi* of the Court is based, in part, on prior scholarship that seeks to synthesize the strands of Bickel’s political and legal philosophy. See, e.g., Anthony T. Kronman, *Alexander Bickel’s Philosophy of Prudence*, 94 *YALE L.J.* 1567 (1985).

13) As I analyze the idea of anonymity in this article, I intend to refer to a state of affairs wherein no official procedure (whether commanded by law or systematically, if voluntarily, imposed by ISPs) seeks to link individual users to a particular legal identity prior to or during each user’s acts of expressing herself online. My focus is upon measures that systematically force individuals to provide identification information as a precondition to active engagement with online communities. I argue that such measures have the effect of discouraging online expression in general, and by members of particular discrete and already disadvantaged demographic groups in particular.

14) See YOCHAI BENKLER, *WEALTH OF NETWORKS* 133-175 (2006).

15) I argue, *infra*, that as part of the right to an autonomous private life, individuals are entitled to exercise the freedom of expression on a variety of personal issues. The interrelationship between expression and privacy is vital, given the limitations and conditions imposed upon the right of expression in Korea. See Woo-Young Rhee, *Pyohyuenuizayooobeobliwa heonbeobjaepansouuiiheonbeobryulsimsakijun* [Standard of Review over the Constitutionality of the Statute as Applied by the Constitutional Court and the Freedom of Expression Law], 53

individual rights<sup>16)</sup> should not curtail such opportunities. Even worse, the RNVS disparately impacted certain individuals<sup>17)</sup> opportunities for expression, specifically individuals belonging to groups that depend on anonymity to express themselves freely while avoiding social stigma. As I explain *infra* Section VI, such groups include political minorities, sufferers of stigmatized medical conditions such as HIV/AIDS, and persons with non-heterosexual identities, like homosexuals. By depriving the members of these groups of the protections of *ex ante* anonymity, the RNVS potentially chilled their legitimate expressive activities and violated the central constitutional commands that the State respect the equality and privacy of all citizens.<sup>18)</sup>

## II. Creation and Implementation of the RNVS<sup>19)</sup>

The RNVS was introduced into law through an amendment of the Information and Communications Network Act, passed on January 26, 2007.<sup>20)</sup> The law's stated purposes were twofold: first, to deter the posting of illegal content and to more effectively enforce criminal sanctions against

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SEOULDAEHAGGYOBEOBHAK [SEOUL L.J.] 301 (2012).

16) The Constitution addresses the right of equality in Article 11(1): "All citizens shall be equal before the law, and there shall be no discrimination in political, economic, social or cultural life on account of sex, religion or social status." Article 17 identifies the legal right of privacy in even broader terms: "The privacy of no citizen shall be infringed." The language of the Constitution does not elaborate upon the substantive content of the concept of "privacy". I discuss *infra* the possibility of construing an "autonomy" right as part of Korean privacy law.

17) I use the phrase "disparate impact" to describe the disproportionate burdens imposed upon certain individuals and groups. This phrase has particular legal meaning in American constitutional and statutory law. See, e.g., Richard Primus, *The Future of Disparate Impact*, 108 MICH. L. REV. 1341 (2010). I do not suggest that Korea adopt any particular American approach to this issue. Rather, I utilize this phrase because it precisely captures the critical problem with the RNVS that was overlooked in the arguments and decision in the RNVS Case.

18) One pointed reality is that while the RNVS was in place, non-citizens, as a class, were *de facto* prohibited from substantive engagement with and contribution to Korean cyber-culture as it was conducted through major ISPs. This consequence was noted by the Constitutional Court. See *RNVS Case*, 2010Hun-Ma47.

19) For a more detailed discussion of background information related to the RNVS, see Leitner, *supra* note 11, at 91-94.

20) Information and Communications Network Act, *supra* note 1, arts. 44-45.

individuals who nonetheless publicly post illegal content, and second, to promote a sense of responsibility amongst socially influential Internet service providers (“ISPs”).<sup>21)</sup> The ultimate intended result was to cultivate a civilized cyber-culture, where individuals could freely express themselves in a manner that did not violate the law or offend the rights of others, without fear of being so offended themselves.<sup>22)</sup>

The statute empowered the executive branch to order Internet portals with more than 100,000 users per day to confirm the identities of users as a precondition to the posting of content by those users.<sup>23)</sup> This confirmation process required the user to input her Korean national identification number;<sup>24)</sup> the identifying data was then preserved for a minimum period of six months<sup>25)</sup> and could be matched to the associated username of the individual who registered using the number.<sup>26)</sup>

The original executive enforcement decree issued to implement the RNVS required three categories of websites to comply with the RNVS: all websites of a “public nature”, including all government-operated websites;<sup>27)</sup>

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21) *Id.* at art. 1. The statutory intent language focused upon cultivating a culture of responsibility amongst ISPs, rather than directing attention to individual behavior. This is an interesting point of emphasis because, presumably, the ultimate legislative objective was to promote an Internet user culture wherein individual users choose, at the maximum attainable level of frequency, to post content that conforms with legal requirements and is qualitatively consistent with a “sense of responsibility” and civility. The National Assembly’s stated rationale implies that user behaviors can be best influenced by impacting the policies of ISPs.

22) Both supporters and opponents of the RNVS claim to support the same end goal: an optimized quantity and quality of online expression. They differ, however, in whether that result can be better achieved by substantial regulation of the online space or by erring on the side of personal freedom. For discussions of the tension between Internet freedom and prophylactic regulation (with varying prescriptions for how to balance them), compare LAWRENCE LESSIG, *CODE* (2006) with JONATHAN ZITTRAIN, *THE FUTURE OF THE INTERNET* (2008).

23) Information and Communications Network Act, *supra* note 1, art. 44-5(1), (2).

24) *Id.* See also Hyung-eun Kim, *Do new Internet regulations curb free speech?*, JOONGANG DAILY (Aug. 13, 2008), available at <http://joongangdaily.joins.com/article/view.asp?aid=2893577>. An individual lacking a Korean national identification number was effectively prevented from posting content on Internet portals subject to the RNVS, unless such a person used the ID number of another, thus misrepresenting her identity.

25) *RNVS Case*, 2010Hun-Ma47.

26) 2009 Enforcement Decree of the Information and Communications Network Act, *supra* note 3, art. 29.

27) Jeongbotongsinmang iyongchokjin mit jeongbobohodeunge kwanhan beopryul

Internet portals with more than 300,000 users per day for three continuous months and news sites with more than 200,000 viewers per day<sup>28)</sup> for three continuous months;<sup>29)</sup> and providers of user-created content services with more than 300,000 users per day for three continuous months.<sup>30)</sup> In early 2009, the enforcement decree was changed to expand the scope of the decree.<sup>31)</sup> Under the new rule, the RNVS applied to all sites with more than 100,000 users per day<sup>32)</sup> and all “public nature” websites.<sup>33)</sup>

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sihaenglyeong [Enforcement Decree of the Act on Promotion of Information and Communications Network Utilization and Information Protection], Presidential Decree No. 20199, July 27, 2007, art. 22-1 [hereinafter 2007 Enforcement Decree of the Information and Communications Network Act].

28) A lower threshold was established for news-related sites than for Internet portals. This was defended on the basis of the importance of maintaining reliable and civil means of disseminating basic social and political information to the citizenry, a rationale that underlies other limitations on expression in Korea law. *See, e.g.*, Gongjigseongeobeob [Public Official Election Act] Article 93(1) (establishing that no one should, in order to affect the outcome of the public election, distribute materials supporting, recommending or opposing a particular political party or candidate during a specified period prior to the election date). It can be argued in response, however, that news sites are part of the fabric of political discussion and debate, and thus places of social discourse that should be relatively more accessible and less constrained by procedures that might dissuade individuals from posting their expressions, including legitimate and socially valuable expressions. This provision, together with the comprehensive regulation of “public nature” sites, raises a pattern of limited expression on contemporary political and social issues. *See infra* note 33.

29) 2007 Enforcement Decree of the Information and Communications Network Act, *supra* note 27, art. 22-2.

30) *Id.* at art. 22-3.

31) Rationales for the expansion included concerns about competitive advantages for prominent websites that were not originally subject to compelled compliance with the RNVS and questions about the deterrent effectiveness of the System. *See* 2009 Enforcement Decree of the Information and Communications Network Act, *supra* note 3, art. 30.

32) *Id.*

33) The inclusion, in each iteration of the RNVS-related enforcement decrees, of all “public nature” websites is interesting because these sites most directly pertain to the channels through which individuals can interface with, and direct expression towards, public institutions. This includes sites that are administrated by the government in order to provide information to, and collect information from, constituents. Expression through these channels is likely to touch upon subjects of political and social importance. However, Korean law frequently draws a distinction between the substance of political expression, which is vitally important, with the means of communicating, which can be significantly restricted. *Compare* Constitutional Court [Const. Ct.], 98Hun-Ma141, Nov. 25, 1999 (Organizational Campaign Ban Case, upholding a ban on organizational political campaign activities of all groups except



As a further precaution against the existence and continuing public availability of legally infringing (or potentially infringing) content, the Information and Communications Act provides that Internet portals are to respond to complaints of allegedly illegal content<sup>34)</sup> by following certain takedown procedures.<sup>35)</sup> Additionally, government officials, including prosecutors, officials of the Korean tax service, and officials of the Korean central intelligence agency, may seek to obtain information on the identities of particular netizens from website operators.<sup>36)</sup>

### III. Results of the RNVS and Relevance to Its Constitutionality

While much of this article will focus on individual rights principles that, at least arguably, have legal force regardless of whether or not the RNVS

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labor unions) and Constitutional Court [Const. Ct.], 2008Hun-Ma324 & 2009Hun-Ba31 (consol.), Feb. 25, 2010 (Internet News Site Case, upholding name verification requirement for posting comments on news websites during a specified period before elections) *with* Constitutional Court [Const. Ct.], 2007Hun-Ma1001, Dec. 29, 2011 (Prohibition of Internet Use for Public Expression and Election Campaign Case, holding that a broad ban on expression intended to influence political elections was unconstitutional).

In contrast, such expression is highly favored and protected under American theories of democratic expressive freedom. *Cf.* “[S]peech on matters of public concern ... is at the heart of the First Amendment’s protection,” *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 758–59 (1985) (opinion of Powell, J.) (internal quotation marks omitted); “a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open,” *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964); “speech concerning public affairs is more than self-expression; it is the essence of self-government,” *Garrison v. Louisiana*, 379 U.S. 64, 74–75 (1964); “speech on public issues occupies the highest rung of the hierarchy of First Amendment values, and is entitled to special protection,” *Connick v. Myers*, 461 U.S. 138, 145 (1983) (internal quotation marks omitted). For a recent U.S. Supreme Court analysis of the protection of expression related to matters of public concern, *see Snyder v. Phelps*, 131 S. Ct. 1207 (2011).

34) The scope of defamatory materials to be taken down is established in the Information and Communications Network Act, *supra* note 1, art. 44-7(1), (2).

35) The Information and Communications Network Act prescribes that Internet portals delete obviously offensive posts, while taking down posts of ambiguous legality for 30 days during a review period. *Id.* at art. 44-2(4).

36) Jeonkitongsinsaobboep [Electronic Telecommunications Business Act], Act No. 10166, Mar. 22, 2010, art. 83.

was effective at achieving its objectives, it is valuable to consider available evidence on the System's efficacy for several reasons. Firstly, arguments made in the RNVS Case,<sup>37)</sup> and the reasoning of the Constitutional Court in its decision,<sup>38)</sup> relied heavily upon evidence that the System was ineffective and had socially deleterious effects, such as a chilling effect on expression<sup>39)</sup> and an increased risk of data security breaches.<sup>40)</sup> A full understanding of the ruling in the RNVS Case requires some familiarity with the body of empirical evidence examining the cyber-expression effects of the System. Secondly, the empirical evidence provides a basis for the conclusion that the amount of total online expression has been reduced due to the implementation of the RNVS, leaving behind a constrained Korean cyberspace. For these reasons, I focus on two disputed issues in this section: the effectiveness of the RNVS at reducing malign expressions on Korean Internet portals while promoting free and open sharing of lawful content, and the related matter of the ease with which individuals were able to circumvent the RNVS.

Private academic research conducted following the implementation of the RNVS found little evidence that its introduction correlated to a reduction in the malign expressions that the System was intended to target. A general survey of Korean online behaviors concluded that the rate at which netizen behavior deviates from a particular social norm does not

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37) For a description of the emphasis upon System effectiveness during the oral arguments, see, e.g., Kim Seong Kyun, *Internet Shilmyeongjae, Kae Ddongnue, Choi Jin Sil Sakun Makuelssoo Issuelka* [Can Internet Real Name Verification Prevent Kae Ddongnue and Choi Jin Sil Case], MEDIAONEUL, July 15, 2010, available at [www.mediatoday.co.kr/news/articleView.html?idxno=89633](http://www.mediatoday.co.kr/news/articleView.html?idxno=89633); Lee Kyung Kee, *Hunjae, Internet Shilmyungjae uihuen gongbang* [Constitutionality Argument Concerning Internet Real Name Verification in the Constitutional Court], NAEIL.COM, July 9, 2010, available at [naeil.com/News/politics/Viewnews.asp?nnum=555868&sid=E&tid=0](http://naeil.com/News/politics/Viewnews.asp?nnum=555868&sid=E&tid=0); Kim Do Won, 'Internet Shilmyungjae uihoen' Hoenjae Kongkaebyunron [Constitutionality Argument on Internet Real Name Verification], YTN, July 8, 2010, available at [www.ytn.co.kr/\\_ln/0103\\_201007081431160515](http://www.ytn.co.kr/_ln/0103_201007081431160515).

38) RNVS Case, 2010Hun-Ma47.

39) See materials cited *supra* note 37.

40) Significant social concerns about data security have resulted in frequent government responses to seek to minimize and damage such risks. For a recent example, see, e.g., Cynthia O'Donoghue, *South Korea Strengthens Security Measures for Personal Information*, JDSUPRA BUSINESS ADVISOR, Apr. 9, 2015, available at <http://www.jdsupra.com/legalnews/south-korea-strengthens-security-measure-64760/>.

increase when netizens act anonymously,<sup>41)</sup> calling into question the value of a policy that compels individuals to identify themselves. This survey suggested that online behaviors that are viewed as socially undesirable are unlikely to be selectively deterred through a compelled identification policy.<sup>42)</sup>

This finding is supported by a subsequent and more detailed study of the RNVS (the “SNUKAI Study”).<sup>43)</sup> The SNUKAI Study indicated that the proportion of posts made through Internet portals subject to the RNVS that contained malign content had not decreased; however, the total number of comments made by Internet portal users had decreased.<sup>44)</sup> These results led to the troubling conclusion that the RNVS had been ineffective at reducing the rate of illegal (or legal but uncivil) comments, but had a “chilling effect” on expression generally.<sup>45)</sup> For opponents of the RNVS, this result strengthened the argument that the Internet best accommodates free expression when individuals have the ability to remain anonymous.

Government research presented a differing perspective. The Korea Communications Commission conducted a study (the “KCC Study”)<sup>46)</sup> of

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41) Hwang, *supra* note 9, at 97, 108.

42) This study also provocatively suggests that common assumptions about Korean expressive culture (such as the force of public “shame” when identified as violating social norms) should be revisited. *See id.*

43) Woo et al., *supra* note 4, at 20-21.

44) *Id.*

45) For the purposes of this analysis, the “chilling effect” of a policy is the reduction in the total amount of expression that results from the policy. While under this definition the obstruction of any expression could be described as “chilling”, of particular concern is a chilling effect on legally permissible expressions, especially of a kind or character that broadens the topics and substance of social and political discourse, as well as a chilling effect on civil disobedience undertaken with sincere belief in the legal impermissibility of the law limiting the expression. For an analysis of the relationship between civil disobedience and individual liberties, see RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 249-268 (1977).

46) This study evaluated the rate of malign replies; sought to gauge the “chilling effect” of the law; and attempted to measure the “balloon effect,” or the degree, if any, to which the law caused netizens to switch from using large Internet portals subject to the RNVS to smaller ones not subject to the requirement. Bangsongtongsinwiwonhoe [Korea Communications Commission], *Jaehanjeokboninhwakinjae hyogwabunseoekul wihan josabogoseo* [Analysis of the Effect of Limited Real Name Verification] 1-2 (2007) [hereinafter *KCC Study*]. The study asserted that the consistent number of Internet posts and the continuing popularity of large Internet portals demonstrated a lack of chilling effect or balloon effect. *KCC Study, id.* at 18-20.

post-RNVS Internet portal use that found that the rate of malign Internet posts<sup>47)</sup> had decreased from 15.8% of all posts to 13.9% of all posts.<sup>48)</sup> The government cited this result in its RNVS Case arguments as evidence that the legislative intent behind the RNVS was, in fact, being advanced. While the KCC Study reached a more favorable conclusion regarding the RNVS's effectiveness than the independent studies, it supports, at best, a marginal reduction in the rate of malign reply.

Furthermore, the KCC Study concluded that the RNVS had not had a "chilling effect"<sup>49)</sup> on online expression because, according to its results, the number of Internet posts on Korean Internet portals remained consistent following the System's implementation.<sup>50)</sup> How can this discrepancy with other research, in particular the SNUKAI Study, be explained? It may be that the contradictory results reached by third parties are more reliable.<sup>51)</sup> It is also possible that the KCC Study drew the wrong conclusion from its data set. Even if the total number of expressions on Internet portals appeared to be stable since the System's implementation, the increase in overall Internet use suggests that the number of posted expressions should have similarly increased, in the absence of a chilling effect.<sup>52)</sup> Such a chilling effect would implicitly include a reduction in legal and non-malign expressions, which account for a significant majority of online contributions.<sup>53)</sup>

In addition to the objection that the RNVS was ineffective and chilled

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47) The Korean term used to describe these messages in the study is "Akseongdaetgeul," translated here in English as "malign". The study defines the term to include libel, sexual harassment, invasion of privacy, and contempt. *Id.* at 9.

48) *Id.*

49) The KCC Report does not explicitly define the term "chilling effect".

50) KCC Study, *supra* note 46, at 18.

51) These studies represent the majority results of examinations done into the effects of the RNVS. While I do not mean to challenge the objectivity of the KCC Study, it also bears mentioning that this, the only study with conclusions favorable for the government policy, was conducted by the same government agency that argued in favor of the System in the RNVS Case.

52) One plausible counterargument in favor the KCC Study's conclusion is that posts on Korean Internet portals may have become a less favored channel of expression for reasons unrelated to the RNVS.

53) Utilizing statistics from the KCC Study, approximately 85% of online replies are not "malign", and not all replies categorized as malign are necessarily illegal. See KCC Study, *supra* note 46.

legally permissible expression, the System was also susceptible to the criticism that it was easily circumvented.<sup>54)</sup> In other words, some Internet users were able to take intentional action to avoid participating in the RNVS while still posting content online. This criticism is, in many ways, related to the general concern that the RNVS was ineffective; circumvention was one means by which its effectiveness was undermined. But this specific issue warrants a short discussion because of two collateral consequences of certain circumventions: economic costs to large Korean Internet portals, and threats to data security.

One means of RNVS avoidance was the use of foreign-based Internet portals<sup>55)</sup> or Korea-based portals that effectively defied the law.<sup>56)</sup> Both of these cases might plausibly have resulted in a reduction in the popularity of complying portals, which were generally large, Korea-based business

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54) The ease of circumvention of the RNVS may be argued to counsel in favor of a more onerous method of channeling (and perhaps directly limiting) online expression. If the RNVS served legitimate government objectives, but its measures were insufficient to significantly advance those objectives, then the least expression-restrictive means necessary to promote the objectives may be a procedure or set of procedures much more burdensome and chilling than the RNVS in its original form. This possible legislative response to the decision in the RNVS Case, which found the RNVS to be “non-conforming” with constitutional requirements rather than categorically unconstitutional, *see RNVS Case, 2010Hun-Ma47*, has not occurred thus far.

55) The use of any number of foreign-based web services might have been adequate for the purposes of a Korean wishing to post content online without participating in the RNVS, a consideration not overlooked by the Constitutional Court. *See RNVS Case, 2010Hun-Ma47*.

56) The Google-owned website YouTube permits registered users to upload videos that can then be streamed by anyone who accesses the website. Registered users can also post comments about a particular video, which are displayed below the video box on the computer screen. Google maintains a Korea-based subsidiary that administrates, amongst other properties, the Korean version of the YouTube site, [www.youtube.co.kr](http://www.youtube.co.kr). Google interpreted the law to only apply to the Korean version of YouTube and, determined to refuse to participate in the RNVS, Google deactivated all uploads and commenting by individuals whose country preference was set to “South Korea” in order to avoid (or attempt to avoid, depending upon one’s reading of the law and one’s view of its applications) a legal obligation to participate in the RNVS. *See Google refuses South Korean government’s real-name system, HANKYOREH*, Apr. 10, 2009, available at [http://english.hani.co.kr/arti/english\\_edition/e\\_international/349076.html](http://english.hani.co.kr/arti/english_edition/e_international/349076.html). When YouTube was accessed from a Korea-based IP address, the front-page contained a message explaining the limited functionality of the Korean page and offering a “one-click” conversion of the user’s preference to the U.S. site. *See YOUTUBE KOREA BLOG*, [http://youtubekrblog.blogspot.com/2009/04/blog-post\\_08.html](http://youtubekrblog.blogspot.com/2009/04/blog-post_08.html).

entities.<sup>57)</sup> Another means of avoiding revealing one's identity was the use of someone else's identification number, a fraudulent alternative that might only require a quick Internet search.<sup>58)</sup> Given such easily available circumventions, premeditating posters of illegal content could deliberately avoid participation in the RNVS and, by their premeditation, were unlikely to be either deterred or identified and punished.<sup>59)</sup>

Both the System's ineffectiveness and its secondary harms proved significant to the Court; I argue *infra* Section VI that the Court should have also considered the RNVS's primary harms.<sup>60)</sup>

## IV. Constitutional Court Challenge

### 1. Background of the Case and Relevant Law

On January 25, 2010, three Korean individuals filed a constitutional complaint, arguing that the RNVS violates several of their constitutional rights.<sup>61)</sup> The complainants asserted that they desired to post expressions on

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57) The Constitutional Court explicitly considered costs to these entities in its analysis in the RNVS Case, although such entities were not parties to the litigation. See *RNVS Case*, 2010Hun-Ma47. As discussed *infra*, these considerations signal the Court's prudential approach in the RNVS Case.

58) A google.com search conducted by the Korean Information Security Agency produced well over a hundred thousand Korean ID numbers that could be obtained for free online. *Google Exposing Thousands of Korean ID Numbers*, CHOSUNILBO, Sept. 22, 2008, available at <http://english.chosun.com/w21data/html/news/200809/200809220010.html>.

59) I imagine, in making this contention, a hypothetical rational actor who knows her planned expression is or may be illegal, desires to nonetheless publicly make the expression, and prefers to avoid revealing her identity. Such a person would have both incentive and abundant means to circumvent the RNVS. Other individuals, such as those who do not imagine their content is legally objectionable or who express themselves spontaneously, seem less likely to circumvent the RNVS. While individuals in the latter categories may still be violating various laws, the System's inability to punish the former and arguably more blameworthy case of the "premeditator" was a glaring flaw.

60) Economic costs to non-litigants and the indirect incentivization of identity theft are real (if not particularly constitutional) problems. These are the secondary harms. However, the RNVS infringed directly upon individual constitutional rights, and those infringements are the primary harms.

61) *RNVS Case*, 2010Hun-Ma47. For general information about the arguments advanced

a number of Korea-based websites, but were unable to do so because of their refusal to comply with the RNVS. The Korea Broadcasting Commission (the “KBC”),<sup>62)</sup> responding to the complaint, argued that the RNVS is constitutionally permissible. Oral arguments took place in the Constitutional Court on July 8, 2010.<sup>63)</sup>

As argued by the complainants, the case raises several questions of “fundamental rights”.<sup>64)</sup> Under Korean law, the phrase “fundamental rights” refers to the constitutional rights that are possessed by Korean citizens under the text and provisions of the Constitution and can be enforced through constitutional adjudication.<sup>65)</sup> As a general matter, to limit an individual right, the Court must guard against excessive limitation, or “over-restriction”, of the right.<sup>66)</sup> This standard calls for a court to consider the law’s purpose and justifiability, the effectiveness of the method of advancing the purpose, the amount of restriction and the availability of a less restrictive means of advancing the purpose, and a balancing<sup>67)</sup> of legal rights.<sup>68)</sup> Limitations on rights generally cannot infringe upon the “essential aspect” of the right.<sup>69)</sup> The “essential aspect” is the component of the

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by the complainants and the respondent, *see* Press Release, Public Relations Department of the Constitutional Court (July 8, 2010), *available at* [http://www.court.go.kr/home/storybook/storybook.jsp?seq=30&eventNo=2010헌마47&sch\\_code=BYUNRON&sch\\_sel=&sch\\_txt=&nScale=10&sch\\_category=&list\\_type=01](http://www.court.go.kr/home/storybook/storybook.jsp?seq=30&eventNo=2010헌마47&sch_code=BYUNRON&sch_sel=&sch_txt=&nScale=10&sch_category=&list_type=01).

62) The KBC is a sub-organization of the KCC, with the latter having been formed in 2008 in a bureaucratic merger of the KBC and the former Ministry of Information and Communication. *See* [http://asci.researchhub.ssrc.org/korea-communication-commission/institution\\_view](http://asci.researchhub.ssrc.org/korea-communication-commission/institution_view).

63) *See* Public Relations Department of the Constitutional Court, *supra* note 61.

64) *See* CONSTITUTION, art. 10.

65) *See* James M. West and Dae-Kyu Yoon, *The Constitutional Court of the Republic of Korea: Transforming the Jurisprudence of the Vortex?*, 40 AM. J. COMP. L. 73, 75 (1992).

66) *See* Jongcheol Kim, *Constitutional Law*, in INTRODUCTION TO KOREAN LAW 64-65 (2013).

67) While a “reasonableness” test is generally applied, *see* Kyong Whan Ahn, *The Influence of American Constitutionalism on South Korea*, 22 S. ILL. U. L.J. 71, 101 (1997), the “balancing” test is applied where a fundamental right is being limited. *See* Constitutional Court [Const. Ct.], 98Hun-Ma363, Dec. 23, 1999 (Extra Points Conferred on Veterans Case, finding that the requirement of “proportionality in differential treatments” was missing from the challenged law).

68) SUNG NAK-IN, HEONBOEBHAK [CONSTITUTIONAL LAW] 956-63 (2015). *See also* YOUNG-SUNG KWON, HUN-BUB-HAHK-WON-ROHN [CONSTITUTIONAL LAW: A TEXTBOOK] 338-40 (2001).

69) CONSTITUTION, art. 37(2).

fundamental right that cannot be compromised even to advance the constitutionally specified public objectives of “national security, the maintenance of law and order, or [] public welfare”.<sup>70)</sup>

Where multiple fundamental rights are implicated by the facts of a particular case and conflict with each other, the Court considers if one right is superior to the other, and then proceeds to balance the rights against each other while weighing the relative strengths of the rights.<sup>71)</sup> In balancing fundamental rights, a relevant example may be illustrative: in order to balance personal reputation against freedom of expression,<sup>72)</sup> the Court compares social interests underpinning each right, and the various means available of achieving each social interest.<sup>73)</sup> However, the Court does not always clearly distinguish the relative weight of separate competing rights and countervailing factors.<sup>74)</sup>

Both sides of the RNVS Case cited a recent Constitutional Court precedent, the Real Name Verification Internet News Site Case (the “News Site Case”),<sup>75)</sup> in which several complainants challenged a law that requires “Internet news sites”<sup>76)</sup> to verify the names of individuals posting politically relevant content during a several week period preceding elections.<sup>77)</sup> The sites are required to delete posts where the author has not verified her real

70) CONSTITUTION, art. 37(2). *See also* SUNG, *supra* note 68, at 963-65.

71) SUNG, *supra* note 68, at 962-63.

72) The Constitutional Court has recognized the distinctive social value of online expression in particular. *See* Constitutional Court [Const. Ct.], 2007Hun-Ma1001, Dec. 29, 2011 (Prohibition of Internet Use for Public Expression and Election Campaign Case, describing the Internet as “a medium easily accessible to anybody [that] incurs no or a relatively very low cost for its use...”).

73) *See, e.g.*, Constitutional Court [Const. Ct.], 89Hun-Ma160, Apr. 1, 1991 (Notice of Apology Case); *see also* Constitutional Court [Const. Ct.], 97Hun-Ma265, June 24, 1999 (Letter of Condolence for Kim Il-sung Case, balancing freedom of expression and personal reputation interests).

74) *See* Ahn, *supra* note 67, at 102 (“ambiguities arise from the new judicial fashion of incorporating several constitutional provisions without sorting out the core ingredients of each provision”).

75) Constitutional Court [Const. Ct.], 2008Hun-Ma324 & 2009Hun-Ba31 (consol.), Feb. 25, 2010.

76) *Id.*

77) *Id.*



name.<sup>78)</sup> The Constitutional Court, after considering claims that the law was void for vagueness, constituted prior censorship, violated the least restrictive means principle, and compromised privacy, ruled for the government.<sup>79)</sup>

## 2. Principal Arguments

The complainants in the RNVS Case advanced expression, privacy, and equality arguments. First, they argued that their freedom of expression<sup>80)</sup> was violated by the RNVS. They alleged, specifically, that Koreans enjoy a right to anonymity while participating in expressive forums.<sup>81)</sup> While

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78) *Id.*

79) *Id.*

80) Citizens have a right to freedom of speech, but such speech “shall not violate the honor or rights of other persons or undermine public morals or social ethics.” CONSTITUTION, art. 21.

81) The Constitutional Court has not directly ruled on whether individuals have a right to conceal their identities while making a public expression, although it has recognized the value of anonymity, including in the RNVS Case. *See RNVS Case*, 2010Hun-Ma47 (“Expression done anonymously, or expression done using a pseudonym, allows the people to criticize the majority or state authority, by freely expressing and sharing their thoughts and ideologies, without being subject to explicit or implicit external pressure.”). In statements related to online anonymity, the HRC points to American Supreme Court decisions as persuasive interpretations on this question, *see* National Human Rights Commission of Korea, *supra* note 8, in particular that more discourse is generally healthy for society, and that what may seem subversive or socially detrimental today may appear, with the benefit of hindsight, to have been prescient and insightful. *See, e.g.*, *Talley v. California*, 362 U.S. 60, 65-66 (1960) (asserting that “Persecuted groups and sects from time to time throughout history have been able to criticize the oppressive practices and laws either anonymously or not at all... It is plain that anonymity has sometimes been assumed for the most constructive purposes.”); *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334 (1995) (holding that a law that required all anonymous handbill authors to identify themselves was a violation of freedom of expression because it did not apply only to the authors of libelous or otherwise false and misleading information).

Although less determinative in American law, expressive freedom might also be supported by a libertarian “market” perspective; permitting as much expression as possible, including the additional expression that is made when anonymity is permitted, facilitates a “marketplace of ideas”, and if one trusts that the ideas with the greatest value to the greatest number of members of the society will be those that gain influence, and one also trusts that individual judgments yield a collective wisdom that can and should inform and guide policymakers, then society has nothing to fear from anonymous expression. *See, e.g.*, *Dennis v. United States*, 341 U.S. 494, 584 (1951) (Douglas, J., dissenting) (“When ideas compete in the

maintaining that the right of expression was violated in any case (to wit, by imposing a prior restraint that violated the constitutional prohibition on censorship<sup>82</sup>), the complainants contended that anonymous expression should receive particular protection because of its importance to the development of a democratic society.<sup>83</sup> The complainants claimed that the RNVS had chilled expression by compromising this essential characteristic of an open and free Internet.

According to the complainants, the RNVS's ineffectiveness was relevant to the privacy analysis. The complainants presented their view of the balance between the private interest in privacy and the public interest in national security, maintenance of law and order and public welfare in general.<sup>84</sup> The complainants argued that the public interest in RNVS was limited because it had proven ineffective at deterring malign expressions. Weighed against the limited benefits, the complainants asserted that the high risk of information leakage<sup>85</sup> posed a threat to privacy, and that the RNVS violated the least restrictive means principle<sup>86</sup> by intruding indiscriminately upon the private lives of all users, rather than confining State intrusions on personal life to particular and appropriate circumstances.<sup>87</sup>

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market for acceptance, full and free discussion exposes the false and they gain few adherents. . . . Full and free discussion has indeed been the first article of our faith.”)

82) CONSTITUTION, art. 21(2).

83) For leading American case law making this argument, see United States Supreme Court cases cited *supra* note 81.

84) The rights of citizens may be restricted by the government when such restrictions are necessary for national security, maintenance of law and order, or for public welfare. CONSTITUTION, art. 37. Such restrictions cannot violate the “essential aspect” of the right in question. CONSTITUTION, art. 37(2). See also Constitutional Court [Const. Ct.], 92Hun-Ga11 & 93Hun-Ga8-9-10 (consol.), Sept. 28, 1995.

85) Leakage of personal information is a real and pressing problem in Korea. See, e.g., Sophia Yan and K.J. Kwon, *Massive data theft hits 40% of South Koreans*, CNN, Jan. 21, 2014, available at <http://money.cnn.com/2014/01/21/technology/korea-data-hack/>; Sung-jin Yang, *35m Cyworld, Nate users' information hacked*, KOREA HERALD, July 28, 2011, available at <http://www.koreaherald.com/view.php?ud=20110728000881>.

86) For a restrictiveness analysis in a freedom of the press case, see Constitutional Court [Const. Ct.], 89Hun-Ma165, Sept. 16, 1991 (Request for a Corrective Report Case).

87) Such appropriate cases would include, for instance, reasonable searches in the investigation of a crime or, more analogously, the *ex post* tracking and identification of a perpetrator of a cyber-based crime using IP address information. Whether current Korean practices in cyber-investigation and surveillance using identifying information are in fact

Finally, complainants raised an alternative equality-based argument. They alleged that individuals seeking to express themselves on the Internet were treated differently from those who utilize offline mediums, where no government-enforced identity verification requirement attaches.<sup>88)</sup> The argument that was missing from the complainants' briefing was one concerning primary harms: that the RNVS violated the equality principle by disparately impacting specific social groups. By failing to raise this argument, the complainants presented to the Court a narrow equality argument that did not reinforce their expression and privacy arguments. As I discuss *infra*, this disparate impact forms the foundation of the most compelling argument that the RNVS was unconstitutional.<sup>89)</sup>

The government argued that the RNVS requirement appropriately advanced the public interest by promoting a more civil online culture and stimulating more widespread use of Internet portals, since individuals could feel protected from malign posts.<sup>90)</sup> The "balance of private and public interest" test<sup>91)</sup> was fully satisfied, according to the respondent, because the public interest had been advanced, while private interests in free expression had either not been restricted, or had been restricted as little as possible. Relatedly, the policy did not violate the "least restrictive means" test, because the restriction imposed had been so minor. The respondent also asserted that, because the Internet portals did not actively display the posting individual's identity, right of free expression was not violated.<sup>92)</sup> Finally, as the government alleged that expression had not been

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"appropriate" in a legal sense is the subject of present debate. See Se-Woong Koo, *South Korea's Invasion of Privacy*, N.Y. TIMES, Apr. 2, 2015, available at [http://www.nytimes.com/2015/04/03/opinion/south-koreas-invasion-of-privacy.html?\\_r=0](http://www.nytimes.com/2015/04/03/opinion/south-koreas-invasion-of-privacy.html?_r=0).

88) The complainants alleged that this inequality violated the arbitrariness standard. See Kim, *supra* note 66, at 70.

89) Such disparate impacts, even unintended ones, have triggered heightened scrutiny by the Court in order to protect disadvantaged minorities. See Constitutional Court [Const. Ct.], 98Hun-Ma363, Dec. 23, 1999 (Constitutional Complaint against Article 8(1) of the Support for Discharged Soldiers Act Case) [hereinafter *Constitutional Complaint against Article 8(1) of the Support for Discharged Soldiers Act Case*].

90) The respondent analogized the case to the News Site Case. See Constitutional Court [Const. Ct.], 2008Hun-Ma324 & 2009Hun-Ba31 (consol.), Feb. 25, 2010.

91) See SUNG, *supra* note 68, at 956-63.

92) The respondent by no means conceded that individuals have any right to, or

chilled or redirected, it argued that the criteria for legally proscribed prior censorship were not met in this case.<sup>93)</sup>

The respondent also argued that the voluntary nature of posting negated claims of a privacy right violation. The government did not advance a particular argument on the equality issue raised by the complainants, but apparently presumed that the equality argument would not be relevant to the Constitutional Court's ultimate decision.<sup>94)</sup>

### 3. *The Decision*

As anticipated by the parties, the Constitutional Court applied its well-established balancing test<sup>95)</sup> to weigh the social benefits of the RNVS against the degree of restriction it imposed on individual rights. As a threshold matter, the Court found that the State had a legitimate public purpose to justify the creation of the RNVS (*i.e.*, to discourage socially harmful expressions and to facilitate criminal sanctions and civil remedies against those who nonetheless post unlawful content).<sup>96)</sup> However, the Court concluded that the RNVS, in the form in which it had been implemented and applied, imposed an excessive restriction on certain constitutional rights, compared to the degree of benefits it imparted.<sup>97)</sup> Specifically, the Court found that the rights of expression, self-determination on private information, and the press were all violated.<sup>98)</sup>

Despite the fact that the goal of the RNVS was found to be "legitimate"

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legitimate interest in, anonymous expression.

93) Constitutionally, prior restraint standards arise from the tension between art. 21(2) ("...censorship of speech and the press... shall not be recognized") and, on the other hand, art. 21(4) ("neither speech nor the press shall violate the honor of other persons nor undermine public morals or social ethics") and art. 37(2) (rights may be restricted "when necessary for national security, the maintenance of law and order, or for public welfare").

94) The government might have argued that the RNVS is not unconstitutionally arbitrary because it concerns people who, by engaging in online expression, are differently situated from those expressing themselves through other channels. *See Ahn, supra* note 67, at 101.

95) *See SUNG, supra* note 68, at 962-63.

96) *RNVS Case, 2010Hun-Ma47* (approving of promoting a "social and healthy Internet culture" as the RNVS's ultimate purpose).

97) *Id.*

98) The Court's analysis focused heavily on the right of expression. *See id.*

and the means “appropriate”, the RNVS constituted an excessive restriction based on several factual considerations. First, other *ex post* means of identifying online law-breakers exist.<sup>99)</sup> Second, the application and enforcement of the RNVS requirement was arbitrary, due to the “vague standard” for calculating the number of users of a particular site.<sup>100)</sup> Third, the application of the RNVS to all users of qualifying sites was overly broad, because it applied to even passive users.<sup>101)</sup> Fourth, information was retained for too long (by law, a minimum of six months), doing little to aid law enforcement but increasing the risk of a security breach that could result in the theft and criminal exploitation of such information.<sup>102)</sup> Fifth, the Court accepted the argument that, in fact, the RNVS had not been highly effective at deterring malign and contemptuous expressions.<sup>103)</sup> Sixth, and relatedly, the Court believed that Korean netizens were essentially fleeing overseas to ISPs hosted outside of Korea, simultaneously eluding the jurisdictional reach of the RNVS and undermining the competitive position of the Korean ISPs.<sup>104)</sup> Finally, Korean-speakers outside of Korea were effectively excluded from participating in the online life of Korea.<sup>105)</sup>

These specific factual considerations are interconnected by the Court’s evident concern for protecting the unique characteristics of online expression, including “anonymous expression... speed and reciprocity”.<sup>106)</sup> The Court defended the value of anonymous online expression by asserting that “freedom of expression is protected by opening up the possibility for the will of social and political minorities to be reflected as part of the national policy.”<sup>107)</sup> This perspective draws upon both a concern for

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99) *Id.*

100) *Id.* In addition to casting doubt on the methods applied for determining the number of users of a particular site, the Court also questioned the government’s “technical ability” to make such determinations in a consistent manner. *Id.*

101) *Id.* The Court’s analysis on this point was not entirely clear, as name verification was only required by law as a precondition to posting, not reading.

102) *Id.*

103) *Id.*

104) *Id.*

105) *Id.*

106) *Id.*

107) *Id.*

vulnerable minorities and the “marketplace of ideas” theory of freedom of expression by countenancing the possibility that presently marginalized or disfavored ideas could, eventually, be reflected in policy. While the decision is grounded in specific inefficacy concerns, the language and logic of the decision acknowledged the Internet’s transformative features.

## V. Evaluation of the Constitutional Court Decision

In ruling for the complainants, the Court struck down the name verification requirement in its current form.<sup>108)</sup> As a practical matter, the decision resulted in the end of the RNVS or a similar mechanism for compelling Korean netizens to reveal their identities *ex ante*, at least for the foreseeable future. Below, I discuss the Court’s holding and reasoning in greater detail, and then offer specific critiques. In particular, I evaluate three inter-related features of the decision: (i) it continues the Constitutional Court’s practice of applying a prudential approach to individual liberties cases, (ii) it offers a relatively narrow holding that, in theory, leaves open the possibility that the RNVS, or a similar approach to identity verification, could be constitutionally implemented in the future, and (iii) it is rooted in an explicitly utilitarian calculus of freedom of expression rights. While all of these considerations are evidence of the Constitutional Court’s caution and restraint in wading into socially controversial topics, they also illustrate the limits of the decision as a basis for articulating a clear and positive vision for Korean constitutional rights applicable to online expression.

### 1. Distinguishing Characteristics

The decision in the RNVS Case appears to be fully consistent with the unofficial but pronounced tendency of the Constitutional Court to take a

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108) The Court’s legal conclusion was that the RNVS was “non-conforming” with constitutional requirements. See Jibong Lim, *Korean Constitutional Court Standing at the Crossroads: Focusing on Real Cases and Variational Types of Decisions*, 24 LOY. L.A. INT’L & COMP. L. REV. 327, 334-36 (2002).

prudential approach<sup>109)</sup> to sensitive constitutional questions.<sup>110)</sup> As noted by Professor Thomas Ginsburg, “when faced with major cases [the Constitutional Court has been] able to resolve them in a manner that was perceived as neutral and legitimate.”<sup>111)</sup> This neutrality and legitimacy stems from the perception that the decisions do not reflect a partisan agenda, but rather resonate with the sensibilities of the larger society.<sup>112)</sup>

Adopting this prudential spirit, the Court emphasized practical concerns with the RNVS, such as its ineffectiveness, economic costs, and data security risks.<sup>113)</sup> Further, the Court seemingly left open the possibility that a modified version of the RNVS could be constitutionally implemented. Such a version would presumably need to adequately respond to the Court’s concerns about ineffectiveness, data security breaches, and “leakage” to foreign ISPs.<sup>114)</sup> Such modified version would also need to address the Court’s stated objection that the standards and methods for determining whether to impose the RNVS requirement on a particular site were arbitrary.<sup>115)</sup> As a practical matter, however, it was widely understood that revisiting the RNVS and passing further legislation would not be politically practicable.<sup>116)</sup> In the years since the original legislative

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109) See Kronman, *supra* note 12.

110) This is not to say that the Court has hesitated to rule on controversial subjects or, in some cases, to render decisions that have placed the Court at the nexus of ongoing political and social debates. For instance, in the Relocation of the Nation’s Capital Case, the Court struck down signature legislation of the Moo-Hyun Roh administration that would have moved Korea’s political capital away from Seoul. Constitutional Court [Const. Ct.], 2004Hun-Ma554, Oct. 21, 2004. The decision was rooted in the Court’s views on unwritten constitutional custom that became the subject of significant political, social and academic opposition and debate. See Jonghyun Park, *The Judicialization of Politics in Korea*, 10 *ASIAN PACIFIC L. & POL. J.* 62, 75-80 (2008).

111) Tom Ginsburg, *The Constitutional Court and the Judicialization of Korean Politics*, in *NEW COURTS IN ASIA* (Andrew Harding et al. eds., 2009).

112) Professor Ginsburg describes this phenomenon as the “judicialization” of Korean politics, *see id.*, which might also be described as the tentative but persistent “politicization” of the Constitutional Court’s decision-making.

113) *RNVS Case*, 2010Hun-Ma47.

114) *See id.*

115) *See id.*

116) *See, e.g., Myo-Ja Ser, Law on real name use on Internet ruled illegal*, *KOREA JOONGANG DAILY*, Aug. 24, 2012; Evan Ramstad, *South Korean Court Knocks Down Online Real-Name Rule*, *WALL ST. J.*, Aug. 24, 2012.

enactment, refinements to the System resulted from executive action, as the legislature exhibited neither will nor capacity to remain engaged with the evolution of the RNVS. A sudden revisitation was rendered even more unlikely by the fact that, perhaps counterintuitively, an adequate response to the Court's concerns would require the System to be made more restrictive, not less.<sup>117)</sup>

A final noteworthy aspect of the decision is the Court's decidedly utilitarian approach to defining the contours of the individual rights at stake. Applying the canonical Korean framework, the Court compared and contrasted the social benefits derived from the RNVS to the detriments.<sup>118)</sup> Balancing interests under Korean law reflects a distinctly utilitarian character.<sup>119)</sup> Such an analysis can significantly favor incumbent government policy by including "law and order", "public welfare", and "national security",<sup>120)</sup> often by definition assessed only by the executive and only in confidence,<sup>121)</sup> as major pillars of "public interest". However, here, the

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117) The decision emphasized the RNVS's leakage and circumvention problems, *see RNVS Case*, 2010Hun-Ma47, which seemingly could only be addressed through more draconian measures.

118) *See* SUNG, *supra* note 68, at 962-63.

119) The perpetual presence of a social utility-based calculation of individual rights is illustrated by the manner in which the fundamental rights of expression and reputation are weighed against each other. According to the Korean Supreme Court, "When the protection of a person's reputation and the freedom of expression are in conflict, how the two rights should be mediated depends on the comparison of various social interests by comparing the benefit of free expression and the values achieved through the protection of personal rights." Supreme Court [S. Ct.], 85Da-Kha29, Oct. 11, 1988 (BEOBWONGONGBO 1988.11.15, 836, 1393).

120) CONSTITUTION, art. 37(2). Government policies that impact individual freedoms are often defended on the basis of national security-based rationales. *See* Lim, *supra* note 108, at 337-39. For a synopsis of national security and public interest considerations in expression-limiting laws in Korea, *see* John Leitner, *To Post or Not to Post: Criminal Sanctions for Online Expression in the Republic of Korea*, 25 TEMP. INT'L & COMP. L.J. 43, 48-53 (2011).

121) No single legal debate in Korea captures this concern as prominently as the legal challenges to the National Security Act. For instance, in the Praising and Encouraging under National Security Act Case, Constitutional Court [Const. Ct.], 89 Hun-Ka 113, Apr. 2, 1990, the Constitutional Court construed as constitutional the provision of the National Security Act that proscribes the act of praising or encouraging anti-State groups. To align the statutory language with the Court's construction, the Assembly subsequently added the element of "knowingly endangering the national integrity and security, or the basic order of free democracy." *See* CONSTITUTIONAL COURT OF KOREA, TWENTY YEARS OF THE CONSTITUTIONAL COURT OF KOREA 216-17 (2008). The added *mens rea* element presents its own concerns, as one might



“legitimate” government purpose that the Court recognized, to reduce reputational harms and personal distress from contemptuous online statements, was undermined in the utilitarian analysis by the failure of the RNVS to meaningfully advance that objective, in the face of the System’s various social and economic costs.<sup>122)</sup> This analysis allowed the Court to conclude that the RNVS is not just ill-advised as policy, but is also constitutionally non-conforming as implemented.

## 2. *The Constitutional Court’s Prudential Approach*

Prudence describes a judicial framework that provides considerable latitude for judges to responsibly apply their own judgment to harmonize the outcomes of their cases with social, political, and legal values.<sup>123)</sup> The tenets of this approach are evident in the Court’s reasoning in the RNVS Case. Admittedly, the Constitutional Court did not explicitly point to popular reactions against the RNVS in the years immediately preceding the decision. However, the Court alluded to a number of factors that can best be understood as relating to evolving social attitudes and behaviors. For instance, the Court stated that many Koreans were seeking out ISPs based outside of Korea to conduct their expressive activities.<sup>124)</sup> The legal relevance of this consideration seems to be that it demonstrated the desire of citizens to circumvent a policy that they did not respect or wish to follow, simultaneously revealing the ineffectiveness and societal illegitimacy of the RNVS.<sup>125)</sup> This analysis resonates with the Constitutional Court’s

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argue that the “basic order of a free democracy” includes State restraint from punishing citizens for their statements of praise and encouragement, no matter how inconsistent with majority viewpoints.

122) The Court detailed several social costs, including the increased risk that stored personal information could be compromised, the financial costs of “leakage” of Internet activities to non-Korean ISPs, and the exclusion of Korean speakers abroad from active participation in Korean-language Internet life all tipped the scales of the balancing test against the RNVS. *See RNVS Case*, 2010Hun-Ma47.

123) *See* Kronman, *supra* note 12, at 1569-1573; ALEXANDER BICKEL, *THE LEAST DANGEROUS BRANCH* 24-30 (1962); BICKEL, *supra* note 12.

124) *RNVS Case*, 2010Hun-Ma47.

125) One other explanation, discussed *infra*, is that the Court second-guessed the wisdom of the RNVS from a policy standpoint, in this case objecting to the economic costs to Korean

stated concern that the RNVS was fundamentally ineffective, a restraint without a corresponding social benefit.<sup>126)</sup>

Is “prudence” the most accurate way to characterize the Court’s analytical framework? It might be argued that the Constitutional Court applies the “desuetude” principle to its decisions on important social and political questions.<sup>127)</sup> This principle describes a judicial approach of cautiously invalidating laws that, through the passage of considerable time and a decisive shift in public opinion, contradict societal values but have proven impervious to amendment or repeal.<sup>128)</sup> However, in the RNVS Case and other precedents, the Court does not confine itself to merely badly antiquated laws (the RNVS itself was a recent response to an inherently contemporary social issue). Furthermore, the Court did not rely on trends in public opinion, but rather applied its own deductions and good judgment to the underlying problems presented by the government policy.

The Court might also be thought to be applying legal pragmatism, a theory of rules of decision made famous in American jurisprudence by Judge Richard Posner. However, legal pragmatism is both more rigorously quantitative<sup>129)</sup> and more resistant to qualitative judgments on norms and policy analysis<sup>130)</sup> than the path followed by the Court. Alternatively, the concept of prudence better captures the Constitutional Court’s approach.

A similar interplay between popular attitudes and legal outcomes can be observed in a range of major Constitutional Court decisions. I do not argue that prudential reasoning characterizes all of the Court’s decisions; as in any sophisticated body, the Court’s decisions and rationales are too varied to characterize with a single philosophical precept. However, particularly in cases relating to individual liberties and equality, prudence

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actors of a migration to foreign ISPs. These two interpretations are certainly not mutually exclusive.

126) *RNVS Case*, 2010Hun-Ma47.

127) See Cass Sunstein, *What Did Lawrence Hold? Autonomy, Desuetude, Sexuality, and Marriage*, 2003 SUP. CT. REV. 27 (2004).

128) See *id.*

129) See, e.g., Richard Posner, *Some Uses and Abuses of Economics in Law*, 46 U. CHI. L. REV. 281, 287 (1979).

130) See, e.g., Richard Posner, *The Present Situation in Legal Scholarship*, 90 YALE L.J. 1113, 1115 (1981).

has been an implicit guiding principle for the Court. This common thread appeared in the first years after the Constitutional Court was established in 1988<sup>131)</sup> and continues to the present. In 1991, for instance, the Court found that ordering a public apology as a remedy for a reputational harm violates the constitutional rights of conscience and personality.<sup>132)</sup> The underlying interpretive insight of the case was that conflicts between a rule based on traditional notions of social propriety and State power and a more modern conception of personal freedom could legitimately be resolved in favor of the latter.<sup>133)</sup>

This principle was subsequently applied in such cases as the “Same-Surname-Same-Origin Marriage Ban Case.”<sup>134)</sup> In that case, the civil law forbidding marriage between two persons with the same family name and a common ancestral line was found to violate the constitutional rights to gender equality and individual dignity in family life.<sup>135)</sup> Though the ruling was made in the face of significant lobbying from groups advocating adherence to Confucian traditions and values,<sup>136)</sup> the Court nonetheless concluded that the law had lost “its social acceptability or rationality”.<sup>137)</sup> However, exercising characteristic prudence, the Court reached an intermediate holding<sup>138)</sup> by ruling that the law was “non-conforming” with the Constitution,<sup>139)</sup> and the Assembly was given the opportunity to attempt

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131) CONSTITUTIONAL COURT OF KOREA, *supra* note 121, at 92-94.

132) Constitutional Court [Const. Ct.], 89Hun-Ma160, Apr. 1, 1991.

133) See Ilhyung Lee, *Korean Perception(s) of Equality and Equal Protection*, B.C. INT’L & COMP. L. REV. 31, 73-83 (2008) (describing an empirical study assessing the relative weight of Confucian values in an equal protection-related fact scenario).

134) Constitutional Court [Const. Ct.], 95Hun-Ka6, July 16, 1997. As noted in the decision, such common name and origin groups are in some cases so large as to encompass nearly four million individuals.

135) CONSTITUTION, art. 36, sec. 1. See also Ahn, *supra* note 67, at 106.

136) CONSTITUTIONAL COURT OF KOREA, *supra* note 121, at 421-24.

137) *Id.* at 421-22.

138) According to the text of the Constitution, the only rulings on constitutional merits are “constitutional” or “unconstitutional”. CONSTITUTION, art. 45. However, drawing from German constitutional practice, the Constitutional Court has adopted the alternative holdings of “limited constitutionality,” “limited unconstitutionality,” and “nonconformity with the Constitution.” See CONSTITUTIONAL COURT OF KOREA, *supra* note 121, at 101.

139) Such an intermediate approach might facilitate an iterative interaction between the courts and the political branches. See Tom Ginsburg, *Confucian constitutionalism? The emergence*

to cure it.<sup>140)</sup> In keeping with the idea that the Constitutional Court had reached a decision that resonated in popular opinion (and, arguably, in common sense), the Assembly ultimately revised the relevant provision of the Civil Code to delete the reference to the marriage entirely.<sup>141)</sup>

The role of the Court as a modernizing force in Korean law, especially on matters of personal freedom and social rights, has continued into the Twenty-First Century. In one paradigmatic case, the “Sexual Intercourse under Pretence of Marriage Case,”<sup>142)</sup> the Constitutional Court struck down the criminal law proscribing the act of “induc[ing] a woman who is not prone to an obscene act into sexual intercourse under pretence of marriage.”<sup>143)</sup> The Court found that the law violated the right to privacy, which, as analyzed by the Court, includes a right to sexual self-determination. The Court explicitly referenced the changes in Korean social perception of sex and marriage as relevant to its conclusion that the law excessively restricted the right to privacy.<sup>144)</sup> In dissent, three justices referenced “physical differences” and the perception gap between men and women in arguing that the Assembly was within its powers to criminalize the “engagement pretense” at issue in the case.<sup>145)</sup> In essence, the case amounted to a dispute amongst the justices as to which view of the law was best supported by sound policy and by the evolving state of Korean society.

A recent case powerfully illustrates the prudential tendencies of the Court. In February of 2015, in its fifth review<sup>146)</sup> of the Korean criminal law

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*of constitutional review in Korea and Taiwan*, 27 *LAW & SOCIAL INQUIRY* 763, 779 (2002); Lim, *supra* note 108, at 334-36. On the other hand, it may also serve to effectively invalidate a law while maintaining an appearance of deference to the political branches.

140) See CONSTITUTIONAL COURT OF KOREA, *supra* note 121, at 130-31, 150-51, 164-67; Constitutional Court [Const. Ct.], 88Hun-Ka6, Sept. 8, 1989.

141) See Minbeob [Civil Code of the Republic of Korea], Act No. 7427, Mar. 31, 2005, art. 809.

142) Constitutional Court [Const. Ct.], 2008Hun-Ba58 & 2009Hun-Ba191 (consol.), Nov. 26, 2009.

143) *Id.*

144) *Id.*

145) *Id.*

146) *Korea Scraps Adultery Law*, CHOSUNILBO, Feb. 27, 2015, available at [http://english.chosun.com/site/data/html\\_dir/2015/02/27/2015022701120.html](http://english.chosun.com/site/data/html_dir/2015/02/27/2015022701120.html). In prior challenges to the law in 1990, 1993 and 2001, there were no more than three of the necessary six votes to strike a

proscribing adultery, the Constitutional Court struck down the law, by a 7-2 vote,<sup>147)</sup> as an unconstitutional infringement of individual rights.<sup>148)</sup> The Court referenced the lack of consensus supporting the law,<sup>149)</sup> in addition to a lack of deterrent effect or other social benefit that would offset the law's impact on "self-choice".<sup>150)</sup> As a practical matter, unless the Court had been legally incorrect in four prior decisions, the most plausible explanation of the differing result upon a fifth review is that evolving social values impacted the Court's conclusion.<sup>151)</sup>

Taken in the context of preceding and subsequent decisions on personal liberty, the RNVS Case fits comfortably into the Court's continuing custom of applying its sense of changing social attitudes and values in defining the scope and applications of individual rights. In several respects, this decision also reflected distinctive aspects of the prudential approach. First, the significant period of time that the Court allowed to elapse between the oral arguments in the RNVS Case and the decision, a span of more than two years,<sup>152)</sup> is itself evidence of the Court's restrained and prudential tendencies. The Court acted only after it became clear that neither the Assembly nor the Executive was likely to dismantle the RNVS in the near future, and the passage of time may have allowed for public perception against the RNVS to gain greater momentum.<sup>153)</sup> Secondly, the Court extended the use of prudential reasoning to invalidate an instrumentality of

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law as unconstitutional; a challenge in 2008 garnered five votes.

147) Constitutional Court [Const. Ct.], 2009Hun-Ba17, Feb. 26, 2015.

148) Choe Sang-hun, *Adultery Is No Longer an Affair of the State in South Korea*, N.Y. TIMES, Feb. 26, 2015, available at <http://www.nytimes.com/2015/02/27/world/asia/south-korea-strikes-down-adultery-law.html>. An official English-language summary of the Constitutional Court's decision was not publicly available as of the date of this article's publication.

149) *Id.*

150) Sarah Yoon, *Ruling on adultery reflects cultural, generational schisms*, KOREA HERALD, Mar. 27, 2015, available at <http://www.koreaherald.com/view.php?ud=20150327001035>.

151) The two dissenting justices shared the majority's focus on social attitudes, arguing that the adultery law is best defended on the grounds that it promotes societal values of morality and familial order. *See id.*

152) Oral arguments were heard in July of 2010; the decision was rendered in August of 2012.

153) It should be noted that the System was not actively opposed by a majority of the public at the time of the decision. *See materials cited supra* note 5.

State information-gathering and, therefore, State power. The Court sagely inferred that underlying social preferences on issues of free expression, data security, and Korean economic prosperity all contradicted the State's preference for stripping netizens of their anonymity.

### 3. Critique of the Decision

In striking down the RNVS law, the Court relied on a reasoning that reflects the broader tendencies in the Court in handling sensitive individual rights cases—judicial minimalism<sup>154)</sup> and restrained prudence. Further, the Court focused on many of the particular issues that were most emphasized by the parties in the case.<sup>155)</sup> However, the RNVS Case presented an opportunity for the Court, and by extension Korean society, to go beyond the secondary and consequential harms of the RNVS in order to address the primary harms. The Court should have reckoned with the meaning of freedom of expression, as well as the rights of privacy and equality, in a more sweeping and impactful manner. The Court's narrow decision settled the fate of the RNVS in the short term, but it brought little clarity to the longer arc of Korean expressive freedoms in the years and decades to come.

Firstly, even as compared to other prudential cases, the Court relied too heavily on considerations that appear to fall squarely into the realm of "public policy," and are particularly difficult to contextualize as the relevant prongs of a constitutional law analysis. For instance, the complainants focused their privacy argument upon the issue of data security, asserting that the risk of identity data leakage violates the right to control and keep private one's personal information. The Court responded to this pragmatic concern, adding the more constitutionally remote idea that Korean entities not party to the RNVS Case might be suffering economic loss.<sup>156)</sup> This argument resonates in policy, but it has constitutional force, if at all, primarily as a prudential consideration. Every government activity that gathers, aggregates, and preserves personal data poses a risk that data security may be compromised. Whether an additional form of

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154) See generally Cass Sunstein, *Problems with Minimalism*, 58 STAN. L. REV. 1899 (2005).

155) Public Relations Department of the Constitutional Court, *supra* note 61.

156) *RNVS Case*, 2010Hun-Ma47.

data collection is advisable in any given case, in light of administrative or social benefits and data security risks, presents a question of how to design good policy. Further, the costs imposed on business interests when government chooses to regulate seem, in the absence of some infringement of the rights of the holders of those business interests, to be a matter of pure policy. The nuanced integration of factors in the Court's analysis deserves credit. However, an adherent to constitutional analysis as principles-based might see the Court's ruling as a policy preference masquerading as constitutional law.<sup>157)</sup>

More fundamentally as a matter of legal concepts, the analysis of expression, as a stand-alone right, gives little guidance as to how the RNVS can be found to violate the legally recognized conceptions of the right of expression, specifically the conception that contains an entitlement to *ex ante* anonymity. This particular dimension of the right to expression is hard to justify under Korean law without interrelating this notion to other constitutionally protected rights. Below, I offer my own proposal, that the right to expression should be understood in the context of the rights of equality and privacy, an approach that defends a broad scope of the right of expression.<sup>158)</sup> The specific element of anonymous expression is defensible when understood as indispensable for certain individuals and groups to elaborate upon their personal and social existences online.

The complainants made an equality argument that was left unaddressed by the Court. While this may have simply been the result of the Court's minimalistic ruling, it should be noted that the complainants' argument

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157) This argument recurs in constitutional law. For instance, in criticizing the American Supreme Court's decision in *Roe v. Wade*, 410 U.S. 113 (1973), Professor John Hart Ely described the distinction between "juridical" and "legislative" approaches to adjudication as the difference "between constructionists and non-constructionists, those who do and those who do not see judicial review as a task of construing the living meaning of past political decisions". John Hart Ely, *The Wages of Crying Wolf*, 82 *YALE L.J.* 920, 947-48 & n. 141 (1973) (characterizing *Roe* as a non-constructionist decision that "is not constitutional law and gives almost no sense of an obligation to try to be").

158) Existing academic debates have sought to position the right of expression as either aligned more closely with liberty or with equality, of which I favor the latter interpretation. See, e.g., Kathleen M. Sullivan, *Two Concepts of Freedom of Speech*, 124 *HARV. L. REV.* 143, 144-45 (2010) (discussing the political liberty and political equality approaches to the First Amendment of the U.S. Constitution).

suffered from being framed narrowly. The alleged inequality was between individuals expressing themselves online and individuals expressing themselves offline, an argument that invited a powerful rebuttal by the State. The purportedly disadvantaged group identified in this argument is a vast and hardly disenfranchised class<sup>159)</sup> consisting generally of those individuals who utilize Internet portal sites and may be inclined towards online expression. Regulation that does, in fact, impose a special burden on that group need only meet a minimum degree of judicial review (though in practice, a more searching scrutiny can apply in sensitive cases).<sup>160)</sup> The government rationale for the RNVS is that it addresses a peculiar problem of cyberspace expression: *ex ante* online anonymity (an anonymity likely to be far more pervasive and easier to obtain and maintain than in the offline world) and the social problems that anonymity purportedly enables.<sup>161)</sup> The distinction drawn is at least arguably rational as a novel approach to the

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159) If one embraces the view that a central purpose of judicial review is to guard against incursions of minority rights by a politically empowered majority, then one might confine the scope of searching judicial scrutiny to those cases where a minority of members of the society, especially a conspicuous and vulnerable minority, has arguably been prejudiced by a particular public policy. As a point of comparative reference, recognition of such minority rights cases as distinctive can be traced in American law to 1938, where the Supreme Court noted in dicta that statutes distinguishing “discrete and insular minorities” may be reviewed with a heightened level of judicial scrutiny. *United States v. Caroline Products*, 304 U.S. 144, n. 4 (1938). For an elaborated version of the minority-rights dimension of “democracy reinforcement theory” based on the logic of footnote 4 of *Caroline Products*, see JOHN HART ELY, *DEMOCRACY AND DISTRUST* 145–71 (1980).

160) The Constitutional Court, in principle, does not apply different levels of scrutiny. However, Korean courts arguably do look deeper into the facts of the case when an important constitutional right is being limited. *Rhee*, *supra* note 15.

161) In Korea, it is often argued that the special and growing social problem of “cyber-defamation” justifies special online regulations. The Korean police reported 10,028 cases of online libel in 2007, a substantial increase from the 3,667 cases reported in 2004. Sang-hun Choe, *Korean Star's Suicide Reignites Debate on Web Regulation*, N.Y. TIMES, Oct. 12, 2008, available at <http://www.nytimes.com/2008/10/13/technology/Internet/13suicide.html>. Cases involving popular celebrities have certainly helped to mobilize public opinion in favor of greater regulation of cyberspace. See, e.g., Sang-hun Choe, *Web Rumors Tied to Korean Actress's Suicide*, N.Y. TIMES, Oct. 2, 2008, available at <http://www.nytimes.com/2008/10/03/world/asia/03actress.html?em>; Choi Jin-sil, *Akpeuli Jukyeotda Dongryeo Netizen Kongbun [Negative replies kill Choi]*, SPORTSKHAN, Oct. 2, 2008, available at [http://sports.khan.co.kr/news/sk\\_index.html?cat=view&art\\_id=200810022225376&sec\\_id=562901](http://sports.khan.co.kr/news/sk_index.html?cat=view&art_id=200810022225376&sec_id=562901); see also Lee Tee Jong, *Seoul Rushes Internet Bill*, THE STRAITS TIMES, Oct. 13, 2008, available at [http://www.straitstimes.com/Breaking%2BNews/Asia/Story/STIStory\\_289173.html](http://www.straitstimes.com/Breaking%2BNews/Asia/Story/STIStory_289173.html).



reality that, in the absence of some State intervention, *ex ante* anonymity is pervasive in cyberspace.

Perhaps most unfortunately for the complainants, their equality argument framed the issue in a manner that permitted the respondent to argue that, at least *de facto*, the RNVS brings greater equality to Korean society by eliminating the veil of anonymity that enshrouds online expression but rarely attaches to offline speakers. The social ramifications of engaging in certain kinds of expression would seemingly be equalized by the RNVS's specific focus upon counteracting a disparity between the online and offline worlds.<sup>162)</sup>

The natural inference from the Court's decision, then, is that the State pursued perfectly acceptable, even desirable, policy goals, but simply chose an ineffective means of doing so, and inflicted too much collateral damage in the process.

## VI. Governing Principles and a New Paradigm for Expressive Freedoms

In this section, I argue that a nuanced and contextualized understanding of equality and privacy should inform and extend the right of free expression, leading to the conclusion that the RNVS violated each of these individual rights. I introduce broader conceptions of equality and privacy than were directly considered in the RNVS Case, and then synthesize the "autonomy" notion of privacy with the right of equality. In this context, the value of online anonymity can be fully assessed and defended on its own terms as an essential component of freedom of expression.

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162) I present *infra* a broader and at the same time more specific reconstruction of the concept of "equality", where the disadvantaged parties are not all netizens, but rather netizens for whom anonymous online expression, or at least expression in which the individual freely chooses whether and how to self-identify, is vital to realizing an equally empowered and dignified existence within the society.

## 1. Equality

Under Korean law, “equality” exists as a broad constitutional command.<sup>163)</sup> Laws that impose different treatment on similarly situated groups are subject to legal scrutiny.<sup>164)</sup> That scrutiny is heightened<sup>165)</sup> where certain groups are affected,<sup>166)</sup> notably groups based on sex, religion or social status,<sup>167)</sup> as well as other groups specifically protected under the Constitution.<sup>168)</sup> The Korean equality-based legal inquiry advances two central proscriptions: the prohibition of arbitrary distinctions between groups,<sup>169)</sup> and the prohibition of over-restriction on fundamental rights for members of a particular group.<sup>170)</sup> The essence of these protections is that such discrimination deprives the affected individuals of dignity and equal respect.<sup>171)</sup> To engage the social utility logic of many Korean constitutional rulings,<sup>172)</sup> such a society is also a collectively impaired one: talents may be squandered, cultural richness depleted, and societal harmony undermined by legally perpetuated if informal castes.<sup>173)</sup>

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163) Under the Constitution, “All citizens shall be equal before the law.” CONSTITUTION, art. 11(1).

164) See Ahn, *supra* note 67.

165) See *Constitutional Complaint against Article 8(1) of the Support for Discharged Soldiers Act Case*, 98Hun-Ma363.

166) This approach resembles a “suspect class” analysis. See *id.*

167) It has been argued that, at least facially, the Constitution’s equality clause is, in comparative perspective, unusually specific and positive rights-oriented. Lee, *supra* note 133, at 53. However, while certain groups are specifically referenced in the constitutional text as protected (see CONSTITUTION, art. 11(1), referencing sex, religion and social status), other groups (defined by such characteristics as sexual orientation or ethnicity) are given heightened legal protections, if at all, only by statute.

168) See, e.g., CONSTITUTION, art. 34(5) (“the handicapped and others who cannot make a living due to illness and age are entitled to the state’s protection...”).

169) The Court’s arbitrariness analysis is, in essence, a rational-basis review. See CONSTITUTIONAL COURT OF KOREA, *supra* note 121, at 151-52.

170) SUNG, *supra* note 68, at 950.

171) ““All citizens shall be assured of human dignity and worth...” CONSTITUTION, art. 10. Korean precedent identifies the advancement of human dignity as the “essential aspect” of fundamental rights in general. See Kim, *supra* note 66, at 70.

172) See, e.g., *Conscientious Objection of Military Service Case*, 2002Hun-Ka1.

173) See Ginsburg, *supra* note 139; Lee, *supra* note 133.

The government argued in the RNVS Case, and might argue on the issue of promoting attractive culture in general, that a society of “equal respect and dignity” is at the core of the stated vision of improved cyber-culture.<sup>174)</sup> Defamation and contempt laws<sup>175)</sup> provide prosecutorial tools to punish insulting, degrading, and personally injurious content, and, thereby, to protect the targets of such malign statements;<sup>176)</sup> the RNVS provided an information-gathering tool and enforcement instrument. I take issue with this assessment on several levels.

First, one must question the basic purposes of the RNVS. Arguably, criminal law is not an acceptable tool for promoting the State’s vision of an attractive culture.<sup>177)</sup> The Court in the RNVS Case quickly credited the State’s interest in bringing greater civility to Korean-language cyberspace.<sup>178)</sup> However, it should not have been so deferential to the political branches. While civility is tenuously connected to the State interests in maintaining law and order and promoting public welfare,<sup>179)</sup> the right to expression is a core democratic freedom.<sup>180)</sup> When the competing social interests are understood in those terms, limiting expressive freedom to promote Internet

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174) The Information and Communication Network Act’s stated purpose is to improve the lives of individual and advance collective welfare by promoting the use of networks, protecting the personal information of users, and developing a safe and robust environment for users. *See* Information and Communications Network Act, *supra* note 1, art. 1.

175) Defamation and contempt are both criminalized under Korean law. Hyongbeob [Korean Criminal Code], arts. 307, 311. Special criminal sanctions are prescribed for cyber-defamation (defamatory statements made online). *See* Information and Communications Network Act, *supra* note 1, art. 70.

176) The argument that criminal law should distinguish between punishable acts and non-punishable expressions has been made, even from the bench, but has not generally prevailed. *See* Constitutional Court [Const. Ct.], 98Hun-Ma425, etc. (consol.), Apr. 25, 2002 (Pledge to Abide by the Law Case, stating that “[i]n a free democratic society, the rights of even opponents of free democracy are protected; only their specific actions can be restrained when they are deleterious to the public interest”) (dissenting opinion) [hereinafter *Pledge to Abide by the Law Case*].

177) *See* Leitner, *supra* note 120. *See also* Sang-Jo Jong, *Criminalization of Netizens for Their Access to On-line Music*, 4 J. KOREAN L. 51, 63-67 (2004) (questioning the penological value of copyright infringement sanctions that do not reflect or impact public judgments of wrongfulness).

178) *See RNVS Case*, 2010Hun-Ma47.

179) *See* CONSTITUTION, art. 37(2).

180) *See Conscientious Objection of Military Service Case*, 2002Hun-Ka1.

civility is inherently over-restrictive of freedom of expression. The Court's reasoning in the RNVS Case too readily viewed expression as a social utility that the government can manage, rather than a personal liberty that intimately affects each individual.

Second, the RNVS itself undermines and obstructs the individual right of equality by depriving certain groups of individuals of the means of leading lives of dignity and respect<sup>181)</sup> that would otherwise be available to them.<sup>182)</sup> Specifically, the RNVS deprives certain individuals of expressive opportunities that others enjoy. The Constitution protects the right of minorities to be heard and respected as essential to "the establishment of the democratic basic order."<sup>183)</sup> Such minorities,<sup>184)</sup> with legally permissible but controversial views or characteristics, are precisely the groups disadvantaged by the RNVS. While this harm can broadly be characterized as an affront to dignity, the Constitution contains a more specific anchoring point: the right of conscience.<sup>185)</sup> Selectively suppressing expression on deeply personal and sensitive issues directly affects the substance of freedom of conscience, because it frustrates that "strong and sincere inner voice that his moral integrity will disintegrate if the individual does not take certain actions after judging the rights or wrongs of a matter".<sup>186)</sup>

## 2. Privacy

The notion of privacy as a right of disengagement and concealment is

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181) See DWORKIN, *supra* note 45, at 268-278 (evaluating the relationship between the "law as integrity" theory of rights and anti-majoritarian exercises of individual liberty).

182) As discussed *supra*, empirical evidence indicated that the RNVS had a general chilling effect. See Woo et al., *supra* note 4.

183) See *Conscientious Objection of Military Service Case*, 2002Hun-Ka1 ("Listening to the voice of the 'minorities' who think differently from the majority and reflecting it under the democratic decision making structure based upon the majority rule is a core element in the basic ideas of our Constitution of the guarantee of the inviolable basic human rights of individuals and the establishment of the democratic basic order.").

184) In the RNVS Case, the Court identified certain minority groups that are particularly reliant on Internet communications to participate in social discourse alongside majorities, including "class, social status, age, gender, etc." *RNVS Case*, 2010Hun-Ma47.

185) CONSTITUTION, art. 19.

186) See *Pledge to Abide by the Law Case*, 98Hun-Ma425, etc. (consol.).

robust in Korea. In the text of the Constitution, the right of privacy includes the right to freedom of a private life<sup>187)</sup> and the freedom to exercise control over one's own personal information.<sup>188)</sup> This approach resembles the vision of "privacy" as a legal right identified as implicit in American law by Warren and Brandeis in 1890<sup>189)</sup> as "the right to be let alone".<sup>190)</sup> The usual view of Korean privacy, like Warren and Brandeis's early and persistent vision of privacy,<sup>191)</sup> amounts, as a practical matter, to an entitlement to elect against having or maintaining a public image or profile, or at least to withhold certain information from one's public image. Korea's right of concealment is further bolstered by a constitutionally enshrined protection of personal honor<sup>192)</sup> and arguably the most expansive reputation-related criminal laws in the developed world.<sup>193)</sup>

However, the Korean legal development of the principle of privacy has taken on a critical additional nuance: privacy is not only defined by concealment, but also control. For instance, the right over private information is not limited to the right to withhold such information from others, but also the right to control the manner in which one shares that information.<sup>194)</sup> The Protection of Personal Information Act,<sup>195)</sup> passed in 2011 and made fully effective over the course of 2011 and 2012, exemplifies an approach to data privacy that empowers the individual as a critical decision-maker.<sup>196)</sup> This law applies broadly to parties gathering and

187) CONSTITUTION, art. 17 ("The privacy of no citizen shall be infringed.").

188) CONSTITUTION, art. 18 ("The privacy of correspondence of no citizen shall be infringed."). This is sometimes described in case law as the "right of self-determination on private information." See, e.g., *RNVS Case*, 2010Hun-Ma47.

189) Samuel D. Warren and Louis D. Brandeis, *The Right to Privacy*, 4 HARVARD L. REV. 193 (1890).

190) *Id.* at 195 (citing THOMAS M. COOLEY, A TREATISE ON THE LAW OF TORTS 29 (2d ed., 1888)).

191) Korean privacy law recognizes this form of a privacy right.

192) See CONSTITUTION, art. 21(4) ("Neither speech nor the press shall violate the honor or rights of other persons nor undermine public morals or social ethics.").

193) Leitner, *supra* note 120, at 56-63.

194) See Constitutional Court [Const. Ct.], 99Hun-Ba92, Aug. 30, 2001.

195) Gaenjeongbobohobeob [Personal Information Privacy Act], Act No. 10465, Mar. 29, 2011 [hereinafter Personal Information Privacy Act]. English translation available at <http://koreanlii.or.kr/w/images/9/98/DPAct1110en.pdf>.

196) See Graham Greenleaf & Whon-il Park, *Korea's New Act: Asia's Toughest Data Privacy*

processing personal information, and provides for such affirmative individual rights as information and consent rights,<sup>197)</sup> rights to suspend data collection and processing and to delete data,<sup>198)</sup> the right of notification of any data collection (and a right to be notified of suspension and deletion rights),<sup>199)</sup> detailed notice rights related to any data breach,<sup>200)</sup> and access rights.<sup>201)</sup> While the specific rights are rooted in the statute, the statutory scheme builds upon the constitutional foundation of “realizing the dignity and value of the individuals by protecting their privacy from the unauthorized collection, leak, abuse or misuse of personal information.”<sup>202)</sup>

Both sides of the RNVS debate could claim an affinity with this active, control-oriented dimension of the privacy. When supporters of the System argued for the paramount importance of deterring malign statements, including defamatory statements,<sup>203)</sup> their goal could be characterized as preventing expressions that deprive others of the right to control their personal information. However, viewed another way, the RNVS deprived individuals of the ability to exert autonomy in several ways. First, it conditioned the ability to post expressions on revealing one of the most sensitive pieces of personal information: one’s identity.<sup>204)</sup> Second, viewed at a higher level of abstraction, private control also relates to the right of conscience: the right to “autonomously decide what is good or bad for himself... [and to] *act* on what an individual believes is good.”<sup>205)</sup> The essence of privacy, then, is a right to control personal information related to identity, but also to freely make the choices that imbue that identity with

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*Law*, 117 PRIVACY LAWS & BUSINESS INTERNATIONAL REPORT 1-6 (June 2012), available at <http://ssrn.com/abstract=2120983>.

197) Personal Information Privacy Act, *supra* note 195, art. 2.

198) *Id.*

199) *Id.* at art. 20.

200) *Id.* at art. 34.

201) *Id.* at art. 35.

202) *Id.* at art. 1.

203) See Public Relations Department of the Constitutional Court, *supra* note 61.

204) See Jisuk Woo, *The Right Not to Be Identified: Privacy and Anonymity in the Interactive Media Environment*, 8 NEW MEDIA & SOCIETY 949 (2006); but see Bryan Choi, *The Anonymous Internet*, 72 MD. L. REV. 501 (2012).

205) *Pledge to Abide by the Law Case*, 98Hun-Ma425, etc. (consol.) (concurring opinion) (emphasis added).

meaning.<sup>206</sup>) It is that privacy right that was heavily restricted, and in some cases perhaps totally frustrated, by the RNVS.

### 3. *Equality/Privacy Synthesis and Application to Expression in Cyberspace*

The equality of respect and dignity and the personal autonomy to shape identity possess a common essence. Both entail the freedom to project personality and will into the world, assert a public identity, and participate in social and political discourse.<sup>207</sup>) Essential to both rights is that individuals enjoy meaningful opportunities to express themselves, and that the government does not systematically and disparately impact some individuals and groups in their expressive activities. Expressive opportunity is no guarantee of influence, but it does ensure that individuals are free to contribute to the body of expression on social ideas.<sup>208</sup>) Such contributions have the potential to be heard or read, and the potential to influence others.<sup>209</sup>) Even if no other person is in fact influenced, the very act of expression has intrinsic value as an exercise of personal will and act of participation.<sup>210</sup>) Viewed through the prism of vindicating the right of conscience and the right to exercise autonomous control over one's identity, equality and privacy, individually and together, rely upon free and equally accessible expressive spaces for their full realization.

The immediate, if not immediately apparent, consequence of the RNVS

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206) "Autonomy" and "dignity" can be understood to have distinct but complementary meanings in the privacy context: autonomy is rooted in personal control, while dignity depends upon an external atmosphere of respect. See Robert Post, *Three Concepts of Privacy*, 89 GEO. L.J. 2087, 2092 (2000). I argue that the two concepts are critically related because public respect for private autonomy is necessary for the State to facilitate personal dignity.

207) This freedom is embodied, in part, by the Constitutional right of conscience. See CONSTITUTION, art. 19 ("All citizens shall enjoy freedom of conscience.").

208) See *Conscientious Objection of Military Service Case*, 2002Hun-Ka1 ("Conscience that is protected by the Constitution is an acute and concrete conscience that is the powerful and earnest voice of one's heart, the failure to realize which in action upon judging right and wrong of a matter would destroy one's existential value as a person.").

209) See BENKLER, *supra* note 14, at 273-300 (elaborating upon the increasingly participatory nature of popular culture).

210) See *id.* at 133-75; Post, *supra* note 206.

was to compel individuals to choose between protecting their identities or expressing themselves in ways that are essential to personal dignity and fulfillment of a meaningful life. This consequence resulted from the RNVS's interference with individual freedom to engage with online modes of expression. Online expression is of a special character because it enables expression that, as compared to off-line expression, is more instantaneous and accessible.<sup>211)</sup> More dramatically, online expression enables forms of expression that are new and defined by their online character.<sup>212)</sup>

At its most sweeping and ambitious, cyberspace creates the potential for dramatic forms of equality between individuals and provides potent tools for shaping one's identity. Internet high-speed access (in general and thus far) provides roughly equal online access to each end user.<sup>213)</sup> For the large majority of Koreans (and residents of Korea) with reliable Internet access, cyberspace represents a sphere of existence free from (or at least freer from) socio-economic inequalities and social constraints. Without the *ex ante* requirement of self-identification, individuals can equally share in the personal freedom to choose how to express themselves, including whether and how to self-identify. To generally restrict that freedom is an over-restriction on privacy and expression, and the disparate impact of that restriction imposes an unconstitutional inequality.<sup>214)</sup>

#### 4. Group and Individual Marginalization and Stigmatization

The obligation to reveal one's identity is not the minor procedural

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211) In the RNVS Case, the Constitutional Court identified "speed and reciprocity" as special characteristics of Internet expression. *RNVS Case*, 2010Hun-Ma47.

212) See John Leitner, *Korean Netizen Equality in the Shadow of Real Name Verification*, in *THE LAW IN THE INFORMATION AND RISK SOCIETY* 103, 111-19 (2011).

213) User experience and convenience would naturally vary based upon the precise connection speed each user maintains, although high-speed Internet access is widely available in Korea. See Thapasya Chandran, *Top 10 countries with the fastest internet speeds*, *GULF BUSINESS*, May 25, 2015, available at <http://gulfbusiness.com/2015/05/top-10-countries-fastest-internet-connection/#.VXxvUmRViko>; Mark McDonald, *Home Internet May Get Even Faster in South Korea*, *N.Y. TIMES*, Feb. 21, 2011, available at [http://www.nytimes.com/2011/02/22/technology/22iht-broadband22.html?\\_r=2&ref=technology](http://www.nytimes.com/2011/02/22/technology/22iht-broadband22.html?_r=2&ref=technology).

214) For a discussion of the disparate impact analysis under Korean law, see *Constitutional Complaint against Article 8(1) on the Support for Discharged Soldiers Act*, 98Hun-Ma363.



hurdle that the State alleged in the RNVS Case, but rather a burden that, in the case of some individuals and groups in particular, had the effect of excessively and unfairly encumbering their ability to give voice to their conscience, and thus to enjoy the rights of equality and privacy. In its seminal case on applying heightened scrutiny to certain claims of unequal treatment, the Constitutional Court insisted that it must look past the superficial level of a law's application to "examine concretely" what groups are disparately impacted.<sup>215)</sup> In that case, the policy of awarding bonus points to military veterans taking the Korean civil service examination was found to violate constitutional equality protections.<sup>216)</sup> Although the distinction between "veterans" and "non-veterans" appeared non-arbitrary and defensible, the Court looked past this "formal concept[]" to identify women and handicapped men as groups impermissibly disadvantaged by the bonus points practice.<sup>217)</sup>

Similarly, cognizable vulnerable groups lie beneath the surface of the online-offline distinction in the RNVS Case.<sup>218)</sup> Generally speaking, the members of such groups are characterized by a need for segregation between their professional lives and their private expression, those for whom identified association with aspects of their personality could prove socially invidious.<sup>219)</sup> Such groups include, but are not limited to, individuals with controversial and minority political views;<sup>220)</sup> sincere

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215) *Id.*

216) *Id.*

217) *Id.*

218) The Court recognized that such groups may include "class, social status, age, gender, etc." *RNVS Case*, 2010Hun-Ma47. While each of these groups could deservedly warrant careful analysis, I focus in particular on certain groups characterized by minority social status and gender/sexual identity issues.

219) As the Court recognized, "Expression done anonymously, or expression done using a pseudonym, allows the people to criticize the majority or state authority, by freely expressing and sharing their thoughts and ideologies, without being subject to explicit or implicit external pressure." *Id.* I would also add that expressive activities may serve a multitude of other functions, such as development of personal identity and will, that are socially valuable and utterly reliant upon anonymity.

220) Under Korean law, belief may form the basis for criminal prosecution. *See* materials cited *supra* note 121. For a survey of Korean criminal law enforced against online expression, including general criminal proscriptions and provisions specific to online speech, *see* Leitner, *supra* note 120. Given the ideological restrictions that continue to be imposed in some cases,

practitioners of civil disobedience as a matter of conscience;<sup>221)</sup> individuals with rare and socially stereotyped health conditions, such as HIV-positive individuals;<sup>222)</sup> migrant laborers;<sup>223)</sup> foreign spouses;<sup>224)</sup> and other groups of socially marginalized non-citizens;<sup>225)</sup> and individuals with a sexual orientation alternative to heterosexuality, such as homosexuality and bisexuality.<sup>226)</sup> It should be noted that, as a matter of heightened scrutiny,

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see *Pledge to Abide by the Law Case*, 98Hun-Ma425, etc. (consol.), the best question here may be whether the law should tacitly facilitate civil disobedience. See *infra* note 221.

221) Civil disobedience is, in some cases, transformed into protected expression and action in a moment, although in Korean jurisprudence, a more qualified result is often likelier. See, e.g., *Conscientious Objection of Military Service Case*, 2002Hun-Ka1.

222) Korea has implemented various reforms to reduce the stigma on AIDS patients implicit in government policy. However, it continues to be criticized for alleged failures to fulfill international commitments regarding the treatment of such persons, such as the pledge to end mandatory testing policies. See, e.g., Joseph Amon, *Seoul's Broken Promises on HIV Testing*, HUMAN RIGHTS WATCH (June 29, 2013), available at <http://www.hrw.org/news/2013/06/29/seoul-s-broken-promises-hiv-testing>. More important to my argument than specific government restrictions is the reality that serious social stigmas continue to attach to this health condition, leading any sufferer to have strong incentives to conceal it. See Benjamin K. Wagner and Matthew Van Volkenburg, *HIV/AIDS Tests as a Proxy for Racial Discrimination? A Preliminary Investigation of South Korea's Policy of Mandatory In-Country HIV/AIDS Tests for its Foreign English Teachers*, 11 J. KOREAN L. 179 (2012); see also Emily Rauhala, *South Korea: Should Foreign Teachers Be Tested for HIV?*, TIME, Dec. 24, 2010, available at <http://content.time.com/time/world/article/0,8599,2039281,00.html>.

223) Foreign laborers constitute a discrete minority within Korean society, one lacking political power and consisting of individuals potentially vulnerable to systemic and individualized victimization. See, e.g., *South Korea: End rampant abuse of migrant farm workers*, AMNESTY INTERNATIONAL (Oct. 19, 2014), available at <https://www.amnesty.org/en/articles/news/2014/10/south-korea-end-rampant-abuse-migrant-farm-workers/>.

224) For a general discussion of this group, see *Farmed Out*, THE ECONOMIST, May 24, 2014.

225) Non-citizens may rely upon open channels of expression and association to draw attention to their interests and social disadvantages. However, non-citizens were entirely excluded from expression on regulated Internet portals while the RNVS was in effect. See *RNVS Case*, 2010Hun-Ma47. Note that the Constitutional Court focused more on the exclusion of ethnically Korean non-citizens abroad, but non-Korean residents are, individually and as a group, relatively likely to have legitimate personal concerns regarding Korean social policies.

226) Individuals with non-heterosexual lifestyles face considerable social stigmatization in Korea. See UNITED STATES DEPARTMENT OF STATE, REPUBLIC OF KOREA 2013 HUMAN RIGHTS REPORT (2013), available at <http://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/index.htm?year=2013&dliid=220204>. Furthermore, homosexual conduct can result in criminal sanctions under some circumstances, such as homosexual sodomy between military personnel (the relevant provision of the Korean Military Criminal Act, art. 92, was upheld by the Court in 2002 and 2011). See Bae Hyun-jung, *Court upholds ban on gays in military*, KOREA

many of these groups would likely not warrant special protection under the Constitutional Court's current jurisprudence<sup>227)</sup> or under Korean anti-discrimination laws.<sup>228)</sup> However, careful review is warranted where fundamental constitutional principles are in conflict, and the selective chilling of certain "minority" perspectives raises serious constitutional concerns, even if the affected group cannot be easily associated with the groups specifically named in the Constitution.<sup>229)</sup>

I have argued that the RNVS disparately impacted certain social groups by depriving them of opportunities for personally meaningful expression. I will briefly illustrate, in greater detail, a particular scenario in which the RNVS had the effect of reducing expression of vital personal and social significance. Given their existence but near-invisibility in Korean society, I focus below on homosexual (and other non-heterosexual) individuals.

Homosexuality<sup>230)</sup> as a lifestyle choice may bring significant social consequences in many societies. This is certainly true in Korea, where homosexuals face multifaceted if unofficial discrimination.<sup>231)</sup> To be publicly identified as homosexual could have many detrimental results, including loss of professional opportunities, ostracization from social groups and organizations, and shunning by other members of the society.<sup>232)</sup> A homosexual person, even one highly inclined to be publicly open about his or her sexual orientation, may find such transparency powerfully detrimental to one's social status and opportunities to pursue fulfilling

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HERALD, Mar. 31, 2011.

227) Persons with physical impairments receive special constitutional protection in connection with employment matters. See *Constitutional Complaint against Article 8(1) of the Support for Discharged Soldiers Act*, 98Hun-Ma363, but that category of protection likely does not extend to any of the aforementioned groups.

228) See UNITED STATES DEPARTMENT OF STATE, *supra* note 226.

229) See, e.g., *Conscientious Objection of Military Service Case*, 2002Hun-Ka1.

230) I focus specifically on the alternative lifestyle of homosexuality inasmuch as it represents a more prominent alternative lifestyle, and one that carries considerable stigma in many societies.

231) Stigma directed to homosexuals may, in part, relate to HIV/AIDS-related stigmas. See Aeree Sohn & Sung Bok Park, *HIV/AIDS Knowledge, Stigmatizing Attitudes, and Related Behaviors and Factors that Affect Stigmatizing Attitudes against HIV/AIDS among Korean Adolescents*, 3 OSONG PUBLIC HEALTH & RES. PERSPECT. 24, 26 (2012).

232) See UNITED STATES DEPARTMENT OF STATE (2013), *supra* note 226.

roles in professional and community life. For example, Korean media personality (and children's television show actor) Hong Suk Cheon revealed that he was a homosexual.<sup>233)</sup> Shortly thereafter, he was dismissed from the television show and could no longer secure other television appearances.<sup>234)</sup>

There are very few high-profile homosexual individuals in Korea, beyond a number of entertainers and filmmakers. In other areas of social prominence, openly homosexual individuals are conspicuously absent. For instance, there are no openly homosexual members of the Assembly. Under present conditions, many persons identifying with a homosexual (or other non-heterosexual) identity find an anonymous Internet to be the only recourse for open expression.<sup>235)</sup>

This soft but potent pressure for concealment places homosexual persons at a sharp disadvantage from heterosexual persons in several key respects. A lack of expressive opportunity deprives homosexual persons of reasonable opportunities to develop their identities and personae. Homosexual persons may find few channels through which to voice opinions and perspectives on the multitudinous social dilemmas and controversies relevant to sexual orientation, their voices effectively silenced by the threat of being publicly identified as a homosexual or sexual identity non-conforming person. These limitations on expression position members of the stigmatized group as inherently unequal and encumbered in their pursuit of an autonomous private life.

An anonymous Internet dramatically reduces the social barriers that impose these inequities. The Internet provides a forum for association,

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233) Cha Yeon, Hong Suk Cheon, "*nawoanolmyeongeidoina*" '*insaengeun...*' *binangwangnoebunno*, NOCUT NEWS, Sept. 30, 2010, available at <http://www.nocutnews.co.kr/show.asp?idx=1592350>.

234) *Id.* Even the fictionalized depiction of homosexual relationships has triggered significant social controversy. See, e.g., Michele Richinick, *Lesbian kiss on South Korean TV drama creates controversy*, MSNBC, Feb. 27, 2015, available at <http://www.msnbc.com/msnbc/lesbian-kiss-south-korean-tv-drama-creates-controversy>.

235) Online homosexual communities, frequently behind the veil of anonymity, have thrived in Korea in the last decade, even as offline discourse on the subject has been intermittent and unconstructive. See SONG PAE CHO, *FACELESS THINGS: SOUTH KOREAN GAY MEN, INTERNET, AND SEXUAL CITIZENSHIP* (2011), available at <https://www.ideals.illinois.edu/handle/2142/29525>.

presents multifarious channels for the promotion of personal dignity, and hosts potentially anonymous discourse on the social and political questions facing the society. The combination of low entry barriers and *ex ante* anonymity provides assurances that otherwise disadvantaged individuals can pursue comparable expressive activities. From this perspective, the disparate impact the RNVS imposed on groups like homosexuals becomes evident. Requiring self-identification chills the expression of particular individuals that is most central to leading an autonomous and dignified personal life.<sup>236)</sup>

## VII. Conclusion

The RNVS remains a unique legal response<sup>237)</sup> to the perceived social ills of unfettered Internet culture. The System did impact Korean “cyber-culture”, but the nature of that impact was of little demonstrable social benefit, and instead imposed a significant constraint upon online expression. Since the Constitutional Court’s decision in the RNVS Case in 2012, the social costs and constitutional problems have only become clearer, while the decision itself has come to occupy a secure position within the Court’s constitutional canon of individual rights decisions similarly supported by prudential considerations.

The RNVS was much more than an implement for facilitating discrete legal recourses, or a parameter within which to encourage responsible individual decision-making. Its supposedly benign and procedural exterior concealed the full implications and impact of the RNVS, which was to frustrate the expressive efforts of many netizens, and in particular those who desire to post expressions related to politically, socially, or culturally sensitive subjects. An *ex ante* anonymous Internet environment contains great potential for promoting greater privacy and equality between

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236) To my knowledge, no empirical study has examined the effects of the RNVS, or other identification requirements, on homosexuals (or similarly positioned groups) in Korea. Such research would make a valuable contribution to establishing the extent to which the RNVS or other obstacles to expression disparately impact vulnerable minorities.

237) No other nation in the world has introduced a nationwide program of mandatory identity-revelation for Internet users. See Leitner, *supra* note 11, at 96-97.

individuals by equalizing and broadening the expressive opportunities that individuals enjoy. By depriving certain individuals of the ability to access such expressive opportunities through the suppressive act of identification, the RNVS rendered the society less equal and less respectful of personal privacy. The Court's decision modelled judicial caution and minimalism. However, the RNVS Case should have occasioned a robust defense of the entitlement to express oneself online without first making a proffer of identity. I hope that this article can contribute to the ongoing discussion about the nature, dimensions, and essential substance of Korean constitutional rights as they are vindicated or violated in cyberspace.

From an international perspective, the complex history of the RNVS should be given careful attention. It presents a rare opportunity for other democracies to observe the entire life cycle of a policy that, in its five-year history, sought to render a dramatic technical, procedural, and substantive overhaul to online expression. The specific lesson is that *ex ante* identification poses serious risks and troubling individual rights problems; the general insight is that even sincerely formulated and meticulously implemented attempts to recast Internet forums in the State's preferred image pose hazards to individual freedoms. The RNVS Case provides a valuable study of just where those hazards lie, and how carefully a society must evaluate the costs of attempting to remake Internet culture by force.