



Int'l Human Rights Clinic

Women on Web Administrative Litigation Case


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I. Procedural Defect

A. WoW comes under Article 21 of the Administrative Procedures Act, for whom prior notice of administrative action is required. Article 21 states that the administrative authority should provide an opportunity for the parties to submit their opinions.

Whether or not WoW is a “party” subject to notice and hearing is a matter of practicality, *i.e.*, intent of legislation.

- The 1st trial decided that WoW was not a “party” subject to seeking opinions and rather that *the direct counter-party was the network system operators*.

- However, the article’s purpose is to protect – as much as circumstances allow – *the rights and interests of parties which may be restricted* by the authority and their *right of defense*. (Supreme Court, 2017두31064)

- The litigation for revocation of an administrative action can be raised by not only the direct counter-party but also *a third party whose legally protected interests have been violated by the administrative action*. (Article 12; Supreme Court, 2006두12289) Although this case is about the standing to challenge an administrative action, the right to notice and hearing is indispensable to the right to the practical value of the standing one has in challenging an administrative action because, if there is no notice, it is impossible to file any suit.

→ WoW’s rights and interests regarding the expression and distribution of information has been violated by the administrative action.

I. Procedural Defect

B. This is not a case wherein hearing can be omitted. 21 (4) states that the administrative agency may omit the notice where reasonable grounds exist to acknowledge that hearing of opinion is highly impractical or clearly unnecessary regarding the nature of the relevant administrative action.

1. The reproducibility as well as the speed and volume of information distribution online are not sufficient grounds for omission of hearing.
 - The 1st trial decided that such features of online information *called for urgent action* in blocking access to WoW's website.
 - However, *strict interpretation is needed in executing invasive administrative actions* imposed by exceptive clauses such as 21 (4).
 - The hearing process takes up to ten days at most (21. 7 (2)), and the ensuing administrative action would *fundamentally block the distribution of crime-related content*. (Act On Promotion Of Information And Communications Network Utilization And Information Protection 44-7 (1) 9.)
 - Given that *the two medications distributed by WoW have been certified by WHO as safe for self-administration* after receiving counseling from a professional, which is given also by Women on Web, *the fact that the South Korean government is slow in approving the drug or that a non-pharmacist is distributing the drug does not constitute any urgent reason*. (Technicality)
2. The objection to a request for corrective action regulated by 25 (2) of the Act on the Establishment and Operation of Korea Communications Commission & Article 8 (5) of the enforcement decree of the Act does not adequately protect WoW's rights.
 - The 1st trial *denied the necessity of hearing procedures relying on the availability of the right to objection, i.e., post-facto relief procedures*.
 - However, since WoW was not given prior notice, it was *not possible to exercise this right in due course*.

→ The denial of hearing rights to WoW on the basis of "urgency" and "post-facto relief procedures" is unjustifiable.

II. Lack of Grounds for Administrative Action

A. Providing information on abortion medications is not crime-related content regulated by the Act On Promotion Of Information And Communications Network Utilization And Information Protection 44-7 (1) 9. Item 9 prohibits circulating such unlawful information and allows KCSC to reject, suspend, or restrict management of the information.

The purpose of committing a crime cannot be directly deduced from the information provided by WoW; neither is the content explicitly illegal and socially harmful. (the exclusion of *corpus delicti*)

- If information is to be evaluated as crime, *the content itself should incontestably imply criminal purposes.*
 - The Pharmaceutical Affairs Act 44 (1), 61 (1), 31 (1) (3) prohibit distribution of unauthorized drugs.
 - However, the website's "counseling/consultation" tab does not distribute – as in "sell" – abortion medications, and *merely requests donations at a fluctuating price.* Users can still obtain medications without making the donations. The 1st trial did not prove that the transactions on WoW constitute a sale.
 - Also, the Constitutional Court previously reviewing the constitutionality of similar online content regulation ruled that the takedown can be applied only when *the general public* with sound common sense and legal sentiment *may sufficiently expect that such information would be prohibited* (Constitutional Court, 2008헌마500).
 - However, *the 2019 decision of constitutional nonconformity on abortion charges, coupled with WHO's recommendations* on using Mifepristone and Misoprostol as safe pregnancy termination measures, offsets the general public's expectation of such prohibition.
 - Moreover, *the majority of Constitutional Court's precedents on recognizing "illegality and social harm"* as the permissible basis for taking down online information *cover information which violates the National Security Act*, which cannot be compared to the information in this case.
- The information on WoW's website concerning abortion medications is not content that attempts to commit a crime. Also, the content does not explicitly express illegality and social harm.

II. Lack of Grounds for Administrative Action

B. Granting that *corpus delicti* is established, providing information on abortion medications is justified by law, *i.e.*, justification.

The provision meets the criteria for Article 20(Justifiable Act) and 22(Necessity) in Criminal Act on the grounds of substantive “impending danger” and the principle of subsidiarity.

- *The principle of superior interest* is satisfied in that women’s rights to self-determination, health, and motherhood overrides the improvement of public health protected by The Pharmaceutical Affairs Act.

- *The principle of suitability* is satisfied in that the WHO has biannually included Mifepristone and Misoprostol in EML(Model List of Essential Medicines). The New England Journal of Medicine(NEJM) also corroborated on January 6, 2022 the stability of complications and side effects after legalizing abortion medications in Canada. At least 94 countries have already legalized mifepristone.

- *The principle of necessity, which includes the assessment of impending danger and subsidiarity*, is satisfied in that Korean women are denied their “safe and effective” rights to abortion due to a legislative void following the decision of constitutional nonconformity.

Women of low income, refugees, migrants, and underage mothers must turn to surgical operations(amnestykorea), which still imposes practical “social and economic” limitations(Constitutional Court, 2017헌바12)

→ Providing information on abortion medications is justified by law, taking into account that abortion medications are Korean women’s only means, in substance, to evade impending danger.

III. The Administrative Action as an Abuse of Authority

A. Granting that *corpus delicti* is established, the administrative action by KCSC deviates from, or abuses authority by violating the principle of proportionality.

1. Blocking access to the website in full measure is only permissible in exceptional situations.

- The rejection, suspension, or *restriction of other legal information infringes on the freedom of expression* protected by 21 (1) of the Constitution.
- If information that violates the Act On Promotion Of Information And Communications Network Utilization And Information Protection 44-7 (1) 9 coexists with other legal information, blocking access to the entire website is permitted if (a) *the entire website can be deemed equal to content that attempts to commit a crime*, and (2) *such blockage is inevitable* (Supreme Court, 2012두26432).

2. WoW's website is not an exceptional situation described above.

- Considering that WoW is a non-profit organization operating with the aim of *providing quality information reproduction rights and health as well as safe abortion*, the website's "*counseling/consultation*" tab only accounts for a small fraction of (a) the information provided on the website and (2) the structure of the website. The other 3 tabs(Q&A, Video, About US) and their contents are irrelevant to the provision of abortion medications.
 - Furthermore, information within *the counseling/consultation tab does not center around the provision of medication*. The tab comprises 10 menus, only two of which are relevant to the provision of abortion medications. *The consultation process also focuses on actual counseling and information provision by a 25-item questionnaire*, rather than immediately introducing the product and payment methods.
- Blocking access to the website in full measure is an illegitimate administrative action with regards to the website's purpose, structure and general content.

III. The Administrative Action as an Abuse of Authority

B. The abuse of authority is overregulation which unduly infringes upon the freedom of expression, citizens' right of access to information, and citizens' right to health and security.

1. The administrative action violates freedom of expression. Guaranteeing this right to the fullest extent is fundamental for the development of liberal democracy (Constitutional Court, 90헌가23).

- Regulations for Deliberation on Information And Communications Network 4 (1) 1. stipulates *the principle of minimum regulation*; 4 (2)

1. takes into consideration the quantitative/qualitative degree of violation as well as the proportion of violation.


- In line with the Supreme Court of Spain's precedent(R.CASACION/6147/2021), *a less onerous and technically viable measure* – such as deleting a portion of the information or restricting access to a specific tab on the website – *was neglected by KCSC*.

2. The administrative action violates citizens' rights of: access to information, health, security.




- *WoW's website was a singular route* through which Koreans could acquire quality information on pregnancy termination.

- *Sexual and reproductive health and rights are universal human rights* protected by Article 10 and 16 of the Convention on the Elimination of All Forms of Discrimination Against Women(CEDAW).

→ The unconditional, unrestricted administrative action by KCSC violates fundamental human rights such as freedom of expression, the right of access to information, the rights to health and security.



Constitutional Adjudication

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- **Provision at Issue**
 - **Argument on the Unconstitutionality of the Provision**
 - **Conclusion**
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I. Provision at Issue

Act on the Establishment and Operation of Korea Communications Commission
(hereinafter, the “KCC Act”; enacted by Act No. 8867 on February 29, 2008)

Article 21 (Duties of Korea Communications Standards Commission)

Duties of the Korea Communications Standards Commission shall be as follows:

4. Review and **request for correction** on information prescribed by Presidential Decree as necessary for nurturing sound communications ethics, from among information open and transmitted to the public via telecommunication circuits

I. Provision at Issue

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Constitutional Precedent

Constitutional Court 2011Hun-Ka13, Feb 23, 2012 → **5 Constitutional : 3 Unconstitutional**

**Originally, there are 9 judges in the Constitutional Court of Korea.*

II. Argument on the Unconstitutionality of the Provision



**CONSTITUTIONAL REVIEW
STANDARDS**

- 1. Principle of Clarity**
- 2. Principle of Statutory Reservation**
- 3. Principle against Blanket Delegation**
- 4. Principle against Excessive Restriction**

II. Argument on the Unconstitutionality of the Provision

1. Principle of Clarity

- Constitutional principle that any law restricting fundamental rights should be clear and distinct
- When it comes to the restriction of the **freedom of expression**, the principle of clarity applies in a strict way — "*chilling effect*"

II. Argument on the Unconstitutionality of the Provision

1. Principle of Clarity

4. Review and request for correction on information prescribed by Presidential Decree as necessary for nurturing *sound communications ethics*, from among information open and transmitted to the public via telecommunication circuits

II. Argument on the Unconstitutionality of the Provision

1. Principle of Clarity

“sound communications ethics”

Constitution Of The Republic Of Korea Art. 21(4) : *constitutional requirements for the limitations of freedom of speech and publication*

Neither speech nor the press shall violate the honor or rights of other persons or undermine *public morals or social ethics*. ...

KCC Act Art. 18(1) : *Purpose of establishing the KCSC*

The Korea Communications Standards Commission shall be established to perform its duties independently, with the purposes of guaranteeing the public nature and fairness of broadcasting contents, creating a *sound culture in the areas of information and communications*, and creating an *environment where information and communications are used in an appropriate manner*.

II. Argument on the Unconstitutionality of the Provision

1. Principle of Clarity *"sound communications ethics"*

Constitutional Court 99Hun-Ma480, Jun 27, 2002

Improper communication, defined as *communication with contents that could "harm the public peace and order or social morals and good customs", is too unclear and ambiguous. ... Since "the public peace and order" and "social morals and good customs" are such abstract concepts, different individuals would make different judgments about whether a particular expression is harmful to "the public peace and order" or "social morals and good customs" because of differences in individual value systems or ethical views. Furthermore, it would be difficult to objectively define their meaning through the ordinary interpretation of law by enforcement agencies.*

II. Argument on the Unconstitutionality of the Provision

2. Principle of Statutory Reservation

- Does not simply require that administrative action be based on statute
- Demands that the **legislature itself decide essential substantive matters** within the realm that is fundamental and of significance to the State and its citizens, especially where the basic rights are concerned

II. Argument on the Unconstitutionality of the Provision

2. Principle of Statutory Reservation

KCC Act Art. 21 (Duties of Korea Communications Standards Commission)

Duties of the Korea Communications Standards Commission shall be as follows:

4. Review and *request for correction on information* prescribed by Presidential Decree as necessary for nurturing sound communications ethics, from among information open and transmitted to the public via telecommunication circuits

- **should have concluded** the parties, contents, effects, etc. of the request for correction
- at the minimum, **should have delegated** to presidential decree along with **specified guidance**

II. Argument on the Unconstitutionality of the Provision

2. Principle of Statutory Reservation

KCC Act Art. 21 (Duties of Korea Communications Standards Commission)

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Enforcement Decree of KCC Act Art. 8

Kinds of requests for corrective action under subparagraph 4 of Article 21 of the Act shall be as follows:

1. *Deletion of the relevant information or blocking access thereto*;
2. Suspension or termination of the use of the relevant information to users;
3. Fulfillment of the duty to label information harmful to juveniles or alterations of labeling methods, and other matters deemed necessary.

II. Argument on the Unconstitutionality of the Provision

3. Principle against Blanket Delegation

- The scope of delegation must be **specifically defined**
 - The delegated legislation should be **predictable**
- stricter requirements if the administration restricts the fundamental rights

II. Argument on the Unconstitutionality of the Provision

3. Principle against Blanket Delegation

Not Predictable

KCC Act Art. 21 (Duties of Korea Communications Standards Commission)

Duties of the Korea Communications Standards Commission shall be as follows:

4. Review and *request for correction* on information prescribed by Presidential Decree as necessary for nurturing *sound communications ethics*, from among information open and transmitted to the public via telecommunication circuits

Not Specific

II. Argument on the Unconstitutionality of the Provision

4. Principle against Excessive Restriction

- Any restriction on fundamental rights and legitimate interests shall be proportionate in the following manner:
 - 1) The **purpose** should be **legitimate**
 - 2) The **means** should be **appropriate**
 - 3) The **damage** should be **minimized**
 - 4) **Legal interests** should be **balanced**

III. Conclusion

KCC Act Art. 21 (Duties of KCSC)

Duties of the KSCS shall be as follows:

4. Review and *request for correction on information* prescribed by Presidential Decree as necessary for nurturing *sound communications ethics*, from among information open and transmitted to the public via telecommunication circuits

- 1. Principle of Clarity**
- 2. Principle of Statutory Reservation**
- 3. Principle against Blanket Delegation**
- 4. Principle against Excessive Restriction**