

Women on Web - Constitutional Adjudication

Hello, my name is Yongmi Kwon from Korea University.

Along with the appeal, we are also preparing a constitutional complaint regarding the legal basis of the administrative measure made by Korea Communications Standards Commission(KCSC).

I. Provision at Issue

The KCSC blocked the website of Women on Web as a request for correction. Thus, at issue in this case is whether Article 21 Section 4 of the Act on the Establishment and Operation of Korea Communications Commission is unconstitutional.

The text of the instant provision is as follows: "Duties of the KCSC shall be: 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."

There was a request for constitutionality review of the same provision in 2011. In a 5-to-3 opinion, The Constitutional Court of Korea held constitutional. I will discuss this precedent further, as I go through our argument on the unconstitutionality of the instant provision.

II. Argument on the Unconstitutionality of the Provision

Our argument will be based on the following constitutional review standards: Principle of clarity, principle of statutory reservation, Principle against Blanket Delegation, and Principle against Excessive Restriction.

1. Principle of Clarity

Principle of clarity is the constitutional principle that any law restricting fundamental rights should be clear and distinct. If a law is not clear, it will allow the government's arbitrary interpretation of law by not guaranteeing legal integrity and predictability. The precedent stated that the principle of clarity need not be strictly applied to the provision, considering the ICT area is changing and expanding rapidly. However, the constitutional court also said, when it comes to the restriction of freedom of expression, the principle

of clarity applies in a stricter way. And we would like to emphasize this very point. If what is restricted is not clear, individuals with basic rights are likely to restrict their freedom of expression voluntarily since they are not able to verify whether their expression is within the restriction. This is called a "chilling effect."

But the concept of "sound communications ethics" in the instant provision is so unclear and abstract, that it does not suggest any more information than expressions like "public morals or social ethics" from the constitution, or "sound culture in the areas of information and communications" from the KCC Act.

Also, considering the fact that the Constitutional Court has already concluded the provision banning "improper communication" unconstitutional, the instant provision is also unconstitutional since it violates the principle of clarity.

Different individuals would make different judgments according to their value systems or ethical views, and it would be difficult for enforcement agencies to objectively define the meaning of the provision.

2. Principle of Statutory Reservation

The principle of statutory reservation does not simply require that administrative action be based on statute; rather, it further demands that the legislature, which represents the citizens, itself decide essential substantive matters within the realm that is fundamental and of significance to the State and its citizens, especially where the fundamental rights are concerned.

The precedent states that, since the request for correction does not meet the level of criminal law, the requirement for specific delegation is alleviated. To challenge this statement, we emphasize how fundamental and important freedom of expression is both in the Korean legal system as well as the international law.

Therefore, in establishing the system of requirement for correction that restricts the freedom of expression, the legislature should have concluded the parties, contents, and effects to concretize the system of request for correction. Even if we take fast-changing technology into consideration, the legislature should have, at the minimum, delegated to presidential decree along with specified guidance. However, the instant provision merely states 'request for correction on information' as a duty of KCSC without referring to any

of them or delegating them to presidential decree.

That is why there is room for arbitrary judgment and execution by the administrative agency. For instance, as we mentioned in Women on Web case, there is a significant difference between the deletion of relevant information and blocking access. But if you take a look at the presidential decree, they are included in the list without any criteria or limits, because the instant provision does not define substantive matters nor the scope of delegation. Thus, we argue that the principle of statutory reservation is violated.

3. Principle against Blanket Delegation

The principle against blanket delegation is related to the two principles that we have just discussed. If the legislature delegates the legislating authority to administrative agencies through presidential decree, (1) the scope of delegation must be specifically defined - which means it should be clearly prescribed by the law - and (2) the delegated legislation should be predictable. If the administration restricts the fundamental rights, the requirement of specificity and predictability of delegation is stricter.

However, as we discussed earlier, the concept of "sound communications ethics" is very vague and ambiguous, and the instant provision employing such a term does not provide citizens with ideas about the criteria or basic contents of regulation by the presidential decree. It also does not provide appropriate guidelines to the administrative agency, and fails to control administrative regulation properly.

4. Principle against Excessive Restriction

The principle against excessive restriction means any restriction on fundamental rights and legitimate interests which is to be protected by such restriction 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, and 4) Legal interests should be balanced.

The purpose of the instant provision is to protect the rights and interests of the public from illegal activities caused by information distributed via information and communication networks, and it seems legitimate. However, is the means appropriate? Is it okay for an administrative agency to have the authority to judge and regulate online information in the first place? Our argument might seem a bit radical, but we are trying

to persuade that the "request for correction" itself is inappropriate, especially considering the chilling effect on freedom of expression. Furthermore, the damage is excessive. because the instant provision is too ambiguous and does not even delegate with specific guidance, the administrative agency is able to regulate the information or expression as a whole, even though what really needs to be regulated is only a small part. This problem was clearly seen in Women on Web Case. Finally, we cannot say the abstract value of "sound communications ethics" is more important than freedom of expression.

III. Conclusion

Based on these four principles, we would like to argue that the instant provision that seriously violates freedom of expression is unconstitutional. We hope that this constitutional complaint could lead to more just legislation in Korea, as well as the cancellation of KCSC's "request for correction" that has blocked the website of Women on Web in Korea.