

## **Ban on Improper Communication on the Internet Case**

**[14-1 KCCR 616, 99Hun-Ma480, June 27, 2002]**

### **Contents of the Decision**

1. Whether Article 53(1) of the Telecommunications Business Act banning communication which contain contents that could harm the public peace and order or social morals and good customs violates the rule of clarity.
2. Whether Article 53(1) of the Telecommunications Business Act violates the rule against excessive restriction.
3. Whether Article 53(2) of the Telecommunications Business Act delegating legislation regarding specific contents of communication deemed harmful to the public peace and order or social morals and good customs to the Presidential Decree is in violation of the rule against blanket delegation.
4. Whether Article 53(3) of the Telecommunications Business Act allowing the Minister of Information and Communication to order a telecommunications business operator to refuse, suspend, or restrict communications that could harm the public peace and order or social morals and good customs and Article 16 of the Enforcement Decree of Telecommunications Business Act which enumerate contents of communication that could harm the public peace and order or social morals and good customs based on Article 53(2) of the Telecommunications Business Act are unconstitutional.

### **Summary of the Decision**

1. The rule of clarity is especially important in legislation that regulates freedom of expression. When it is unclear what kind of expression is being prohibited by such legislation, it is very likely that a person would abstain from expressing himself lest he should be punished for making such expression when he is not certain that what he is about to express is subject to regulation or not. Therefore, it is constitutionally required that statutes regulating freedom of expression should be specific and clear about what expression is the subject of regulation. 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. "The public peace and order" is almost identical to "national security" and "the maintenance of law and order" used in Article 37(2) of the Constitution, and "social morals and good customs" is indistinguishable from "public morals or social ethics" stipulated in Article 21(4) of the Constitution, respectively. Such terms do not concretize the concepts used in the Constitution. 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.

2. Article 53 of the Telecommunications Business Act regulates communication that could "harm the public peace and order or social morals and good customs." Ambiguity, abstractness, and comprehensiveness of the concept of improper communication inevitably results in the regulation of communication that should not be regulated, and leads to the violation of the rule against excessive restriction. Article 53 of the Act could be used to regulate "indecent" expression which this Court has explicitly held to be protected under the Constitution, or those provocative "media materials harmful to juveniles," communication of which should not be prohibited when expressed or accessed by adults because they are not obscene, citing that such expressions are against "social morals and good customs." It could be employed to regulate expressions regarding sexuality, marriage, or family system for harming "social morals and good customs," and it could be used to regulate expressions regarding sensitive political or social issues by labelling them as harmful to "the public peace and order." This would violate the essential features of freedom of expression.

3. Article 53(2) of the Telecommunications Business Act stipulates that "the objects, etc. of the communication, which are deemed harmful to the public peace and order or social morals and good customs under paragraph (1), shall be determined by the Presidential Decree." This is in violation of the rule against blanket delegation. As seen above, the concepts of "the public peace and order" or "social morals and good customs" are very vague and ambiguous, and the provision employing such terms 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. Thus, the administrative agency could even regulate those expressions that should be protected under the Constitution according to its own judgment or preference about what the concepts of "the public peace and order" or "social morals and good customs" should represent. This is evident in Article 16(ii) and Article 16(iii) of the Enforcement Decree of Telecommunications Business Act which employ terms as unclear and broad as those used in Article 53(1) of the Telecommunications Business Act.

4. Article 53(3) of the Telecommunications Business Act, which stipulates refusal, suspension, or restriction of improper communication, and Article 16 of the Enforcement Decree of Telecommunications Business Act that provide definitions of improper communication are unconstitutional because the legitimacy of Article 53(1) and Article 53(2), which are clearly unconstitutional, is a precondition for their constitutionality.

Dissenting Opinion of Justices Ha Kyung-chull, Kim Young-il, and Song In-jun

#### 1. Concerning Article 53(1) and 53(2) of the Telecommunications Business Act

According to the interpretive rule of preference for constitutionality, which espouse the principle of maximum protection and least restriction of basic rights, "public peace and order" or "social morals and good customs" used as standards for delegation of legislation in the instant statutory provisions could be construed as the "minimum level of public order or social morals and good customs that all citizens should abide by and comply with." It cannot be argued that the above terms do not function as effective guidelines for

administrative regulation or that they inevitably result in excessive regulation of those expressions that should not be regulated, and they provide a relatively clear standard for the delegation of the rule-making power. Constitutionality of a statutory provision is a matter of creating limits within which a statutory provision could exist effectively. It does not require optimization of policy judgment. While the above statutory provisions may not be the best possible legislation, in terms of the rule of clarity, it is constitutional as long as it is not impermissible under the rule against blanket delegation because of the vagueness of the concepts employed by these statutory provisions. In other words, the statutory provisions are constitutional as long as any citizen can predict the basic features concerning the standard and scope of improper communication that would be regulated by the provisions of the presidential decree based on delegation by the Act.

## 2. Concerning Article 16 of the Enforcement Decree of the Telecommunications Business Act

The instant provision specifies and finalizes the contents of improper communication delegated by Article 53(2) of the Act. It is obvious that "telecommunications with contents that aim at a criminal act or that abet a criminal act", as stipulated by Article 16(i) of the Decree, refers to communication either to commit or incite crimes punishable under the criminal codes, and therefore, this is not against the rule of clarity. However, "telecommunications with contents that aim at committing anti-state activities" and "telecommunications with contents that impede the good customs and other social orders", as stipulated by Article 16(ii) and Article 16(iii), employ concepts that are too abstract and unclear to prevent arbitrary judgments of law enforcement agencies. These provisions could be abused to infringe on the freedom of expression, and hence, they violate the rule of clarity.

## 3. Article 53(3) of the Telecommunications Business Act

According to this statutory provision, the Minister of Information and Communication can not only order the deletion of a particular message identified as a improper communication but also close down a web site or suspend use of the particular user ID of the individual who posted the improper writing. However, the instant statutory provision does not impose any legal responsibility on such individuals. It is clear that an independent order for deletion of a particular expression would not be effective as the means to deal with improper communications when communications in cyberspace posts a problem. Closure of the web site operated by a particular internet service provider (ISP) or suspension of use of a specific user ID are only confined to a particular service managed by the ISP. The user would not be prevented from using online services offered by other service providers. In this light, the statutory provision does not violate the principle of proportionality, thereby encroaching on the freedom of expression. According to the Administrative Procedures Act, users of telecommunication services are considered to be interested parties. He is to be notified in advance when administrative agencies are rendering certain dispositions, and should be given an opportunity to submit opinions regarding such disposition. Furthermore, he can participate at formal or public hearings. Under these circumstances, it would not be against due process even if the instant statutory provision does not grant the right to make statements to a telecommunication service user. Therefore, the statutory provision is not in violation of the principle of proportionality nor due process of law, and does not infringe on the freedom of expression.

## **Parties**

Complainant

Kim Sun-wook

Counsel of record : 1. Legal Corporation Duksoo

Attorney in charge : Kim Ki-joong

2. Legal Corporation Hankyul

Attorney in charge : Cho Kwang-hee

## **Holding**

1. Article 53 of the Telecommunications Business Act (wholly amended by Act No. 4394 on August 10, 1991) and Article 16 of the Enforcement Decree of Telecommunications Business Act (wholly amended by Presidential Decree No. 13558 on December 31, 1991) are unconstitutional.

2. The complaint filed against parts of Article 71(vii) of the Telecommunications Business Act (Amended by Act No. 5220 on December 30, 1996) concerning Article 53(3) of the same Act is dismissed.

## **Reasoning**

1. Overview of the Case and the Subject Matter of Review

A. Overview of the Case

The complainant is a student at Hankook Aviation University, and has signed up to Nownuri, a comprehensive computer network service provided by Nowcom, Inc., under the user ID of "I-ui-je-ki (request for correction Trans.)".

On June 15, 1999, the complainant posted a message entitled "Exchange of Gunfire in the West Sea, Sloppy Kim Dae-Jung!" on the "urgent message board" of the internet community "Chanwoomul." On June 21, a system manager for Nownuri deleted this message from the board, and suspended the complainant's

use of Nownuri service for one month according to an order of the Minister of Information and Communication.

On August 11, 1999, the complainant filed a constitutional complaint against Article 53 and parts of Article 71(vii) concerning Article 53(3) of the Telecommunications Business Act as well as Article 16 of the Enforcement Decree of Telecommunications Business Act, alleging that the provisions infringe on his freedom of expression as well as freedom of science and arts, is against due process, and violates the principle against excessive restriction.

#### B. Subject Matter of Review

The subject matter of review is the constitutionality of Article 53 ("Minister of Communication" in Article 53(3) was changed to "Minister of Information and Communication" in accordance with Act No. 5220 on December 30, 1996) of the Telecommunications Business Act (wholly amended by Act No. 4394 on August 10, 1991), Article 71(vii) (amended by Act No. 5220 on December 30, 1996) of the same Act concerning Article 53(3) of the same Act, and Article 16 of the Enforcement Decree of Telecommunications Business Act (wholly amended by Presidential Decree No. 13558 on December 31, 1991). The provisions are as follows:

Telecommunications Business Act (wholly amended by Act No. 4394 on August 10, 1991)

#### Article 53 (Regulation of Improper Communication)

(1) A person in use of telecommunications shall not make the communication with contents that harm the public peace and order or social morals and good customs.

(2) The objects, etc. of the communication, which are deemed harmful to the public peace and order or social morals and good customs under paragraph (1), shall be determined by Presidential Decree.

(3) The Minister of Information and Communication may order a telecommunications business operator to refuse, suspend, or restrict the communication under paragraph (2).

#### Article 71 (Penal Provisions)

A person falling under any of the following subparagraphs shall be punished by imprisonment for not more than two years or by a fine not exceeding twenty million won: (Amended by Act No. 5220, December 30, 1996)

(vii) A person who fails to implement orders under Article 53(3) or 55

Enforcement Decree of Telecommunications Business Act (wholly amended by Presidential Decree No. 13558 on December 31, 1991)

Article 16 (Improper Communication)

Telecommunications which are deemed to be harmful to the public peace and order or social morals and good customs under Article 53(2) of the Act shall be as follows:

- (i) Telecommunications with contents that aim at a criminal act or that abet a criminal act;
- (ii) Telecommunications with contents that aim at committing anti-state activities; and
- (iii) Telecommunications with contents that impede the good customs and other social orders.

## 2. Complainants' Arguments and Opinion of the Minister of Information and Communication

### A. Complainants' Arguments

(1) The statutory provision of the Article 53(1) and (2) of the Telecommunications Business Act only provides an abstract and comprehensive criterion of communication that could "harm the public peace and order or social morals and good customs" to regulate certain expression, and this allows the arbitrary intervention of an administrative agency in regulating expression. Article 16(3) of the Enforcement Decree of Telecommunications Business Act concretizes the above provisions and also employs very abstract phrases such as "telecommunications with contents that aim at committing the anti-state activities" and "telecommunications with the contents that impede the good customs and other social orders."

A statutory provision restricting freedom of expression should be specific and clear, and would be "void for vagueness" when ambiguous terms are used. The scope of application for "public peace and order" or "social morals and good customs" is too wide and unclear, and use of such terms would abridge the freedom of expression. It enables law enforcement agencies to conveniently and arbitrarily apply the law. Thus, it not only encroaches on the freedom of expression but also is against the rule of law, the principle of separation of powers, and the principle of *nulla poena sine lege*.

(2) According to the above provisions, ordinary expression of opinion about changes in the national political system that does not call for force or violence as well as any criticism against the government, could be

regulated. It would also prohibit expression of "indecent expression that may target adults" in addition to obscene expression banned by the Constitution and the Criminal Act, and thus, violates the essential aspect of the freedom of expression.

(3) Article 53(3) of the Telecommunications Business Act bestows on the Minister of Information and Communication the authority to order an internet service provider to "refuse, suspend, or restrict" communication containing improper materials, and the internet service provider who does not obey such order may be subject to criminal punishment under Article 71(vii) of the same Act. This provision practically gives the Minister of Information and Communication an unrestricted power to block expression on the PC communication or Internet. The internet service provider, on the other hand, is not given an opportunity to raise an objection or submit his opinion about such order by the Minister of Information and Communication under the current law. Moreover, the law does not provide any legal procedure through which an individual whose freedom of expression is directly restricted can raise an objection or submit his opinion, and the law does not provide any means of relief for the wrongful restriction of the freedom of citizens. This is against due process of law, as stipulated by Article 12(1) of the Constitution.

(4) Even if it is necessary to regulate "improper communication", Article 53(3) of the Telecommunications Business Act is in violation of the principle against excessive restriction as stipulated by Article 37(2) of the Constitution because it allows suspension or prohibition of the use of internet communication service by the user in addition to removal of the message containing problematic expression.

#### B. Opinion of the Minister of Information and Communication

(1) The instant provisions themselves do not restrict basic rights of people without an administrative action, and therefore, the instant constitutional complaint against the provisions are unjusticiable because it does not satisfy the directness requirement.

(2) The instant provisions employ "public peace and order" or "social morals and good customs" which are value judgements. However they delegate detailed rule-making to the enforcement decree to specify the contents of these concepts. The meanings of "public peace and order" and "social morals and good customs" used to define improper communication are not unclear when compared to "public morals and social ethics," "national security," and "the maintenance of law and order" used in Article 21(4) and 37(2) of the Constitution. Currently, numerous acts employ these concepts in their provisions, and they are not so unclear as to threaten legal stability by impeding predictability.

(3) The instant provisions do not allow preliminary inspection or censorship by the government, and it does not contain any means to directly regulate individuals who provided the particular information in cyberspace. Therefore, it does not infringe on the freedom of expression.

(4) The Telecommunications Business Act is enacted to regulate business practices of telecommunication service providers. Therefore, an individual user is not a directly interested party of an administrative

disposition based on the Act, and procedural rights for an individual user need not be guaranteed. If procedural rights of users and businesses to object to an administrative disposition ordering refusal, suspension, or restriction of communications were to be guaranteed before it takes effect, such disposition would not function effectively as the means to regulate circulation of improper information because of the accessibility and speed of the online media.

(5) The provisions pass the proportionality test requiring the legitimacy of the end, appropriateness of the means, use of the least restrictive means, and balance of interests.

#### C. Opinion of the Director of the National Intelligence Service

Opinions of the Director of the National Intelligence Service are mostly in agreement with the opinions of the Minister of Information and Communication.

#### D. Opinion of the Juvenile Protection Committee

Article 53 of the Telecommunications Business Act is especially important for the maintenance of sound social morals and good customs in our society, protection of teenagers, and the management of a wholesome and safe cyberspace in the current internet age. If the instant provision is declared unconstitutional, the Information and Communication Ethics Committee would not be able to perform even legitimate reviews for improper communication.

#### E. Opinion of the Commissioner General of the National Police Agency

Premeditated and habitual activities to negate the free democratic regime, or to praise and propagate the North Korean regime, abusing the characteristics of the Internet or PC communication, are illegal under the present legal order, and it is necessary to regulate such activities to protect the currently adopted political system. Therefore, it is inevitable to impose a sanction on the activities of individuals responsible for improper communication in the cyberspace.

### 3. Review of Legal Prerequisites

A. According to Article 68(1) of the Constitutional Court Act, a person whose constitutionally protected basic right has been violated by an exercise or non-exercise of governmental power can file a constitutional complaint. Here, a person whose basic right has been violated refers to an individual whose basic right has been directly and presently infringed upon by an exercise or non-exercise of governmental power, and it does not include a third party who only has indirect, practical, or economic interest in the matter (4 KCCR 579, 580, 92Hun-Ma175, September 4, 1992; 10-2 KCCR 461, 470-471, 97Hun- Ma372, August 27, 1998).



The Court will examine sua sponte whether the self-relatedness prerequisite has been satisfied for the complaint filed against parts of Article 71(vii) of the Telecommunications Business Act concerning Article 53(3) of the same Act.

Article 71(vii) stipulates that "a person who fails to implement orders under Article 53(3)" should be punished by imprisonment for not more than two years or by a fine not exceeding twenty million won. The provision makes it clear that the subject of punishment is not a user of telecommunication service, but a telecommunication business operator.

Therefore, this part of the complaint lacks self-relatedness, and is unjusticiable.

B. Let us examine the argument of the Minister of Information and Communication that the instant constitutional complaint is unjusticiable because the instant statutory provisions do not directly infringe upon basic rights.

(1) In Case of Article 53(1), (2) of the Telecommunications Business Act and Article 16 of the Enforcement Decree of Telecommunications Business Act

Above provisions are inseparable from each other. Collectively, they define the contents of improper communication and prohibit such communication. They order users of telecommunications not to exchange communication that may be harmful to the public peace and order or social morals and good customs.

As such, users of telecommunications are prohibited from exchanging communication with improper contents not by an administrative disposition but by these provisions directly. Then, the directness of infringement of the basic rights is satisfied.

(2) In Case of Article 53(3) of the Telecommunications Business Act

In order for a statutory provision to be a subject for a constitutional complaint, the statutory provision should directly infringe upon the basic rights of citizens by the statute itself, not by particular disposition of an administrative agency. Existence of a specific administrative action enforcing the provision does not always prohibit filing of a constitutional complaint against a statutory provision. Even if there was an administrative disposition to enforce the statutory provision, an individual can file a constitutional complaint under the following conditions as long as the administrative action is based on the statutory provision: when there is no remedy process to relieve citizens from an infringement of their rights or interests by illegal dispositions of administrative agencies; or even if there exists a remedy process, when the prospect of relief of individual rights through such process is dismal and when it only forces the individual to take an unnecessary detour (4 KCCR 194, 203, 90Hun-Ma82, April 14, 1992; 9-2 KCCR 295, 303-304, 96Hun-Ma48, August 21, 1997)

Article 53(3) of the Telecommunications Business Act stipulates that the Minister of Information and Communication could order refusal, suspension, or restriction of communication with improper materials. Infringement of basic rights by this provision, then, would require existence of an administrative disposition in the form of an order by the Minister of Information and Communication.

A person whose freedom of expression is infringed upon by this provision is an individual user of a telecommunication service such as the complainant. There is a possibility that such user would not be allowed to seek relief for the infringement of his rights through an administrative litigation because he is a third party, not the party, as far as the administrative disposition of the Minister of Information and Communication is concerned. Therefore, the complainant could file a constitutional complaint against this provision since the case qualifies as an exception to the general rule.

(3) In conclusion, the argument of the Minister of Information and Communication that the instant statutory provisions do not directly infringe upon basic rights is without merit.

#### 4. Review on Merits

##### A. Regulation of Improper Communication under the Telecommunications Business Act

###### (1) Concept of Improper Communication and Its Regulation

According to Article 53(1) of the Telecommunications Business Act, "improper communication" refers to communication with contents harmful to the public peace and order or the social morals and good customs.

Article 53(2) of the same act delegates the detailed rule-making required to determine communication harmful to the public peace and order or the social morals and good customs to a presidential decree. Based on the delegation of legislation by this provision, Article 16 of the Enforcement Decree of Telecommunications Business Act define the following three types of communication as improper: Telecommunications with contents that aim at a criminal act or that abet a criminal act; Telecommunications with contents that aim at committing the anti-state activities; and telecommunications with contents that impede the good customs and other social orders.

Moreover, Article 53(3) of the Telecommunications Business Act stipulates that the Minister of Information and Communication can order a telecommunications business operator to refuse, suspend, or restrict the communication that could harm the public peace and order or social morals and good customs, and Article 71(vii) of the Act stipulates punishment of a person who fails to implement orders under Article 53(3) by imprisonment for not more than two years or by a fine not exceeding twenty million won in order to secure the effectiveness of the regulation.

## (2) Reason for and Structure of Regulation of Improper Communication

Interference with the contents of traditional means of communication such as telegrams and telephone conversation had not been permitted, in principle, to protect the secrecy of communication. With the advance of technology, telegrams and telephones not only function as a means of private communication but also as a means to spread information to the mass, and it has become necessary to control the influence of such means of communication.

The order of the Minister of Information and Communication to refuse, suspend, or restrict the improper communication functions as an important means to regulate not only information transmitted through such traditional means of communication as wired or mobile telephones but also information circulated through such online media as PC network or Internet.

This regulation system of improper communication has the following structure and characteristics.

First, an administrative agency, the Minister of Information and Communication, directly regulates the contents of expressions.

Second, the legal structure of regulation forms a triangular relation linking the Minister of Information and Communication, telecommunication service providers, and telecommunication service consumers. While only telecommunication service providers are subject to the administrative disposition of the Minister and penal clause, telecommunication service consumers are the ones whose freedom of expression are abridged by such regulation in fact. The subject of order and punishment is distinguished from the entity whose freedom of expression is restricted, and ultimately, threats of criminal punishment are used to secure the effectiveness of the regulation for the freedom of expression. Since a telecommunication service consumer is only a third party and not the party directly receiving the administrative order, it will be difficult for him to participate in an administrative procedure or institute an administrative litigation to seek relief for infringement of his basic rights.

Third, the regulation takes the form of ex post facto restriction of freedom of expression. However, considering the power relation between the users and the telecommunication service providers and that between the telecommunication service providers and the Minister of Information and Communication, it is highly likely that the service providers would regulate the contents of communication of service consumers through the user's agreement form even if the Minister has not given any specific order to refuse communication of particular messages. The user, in turn, would have to look out for himself when using such service. In other words, this could lead to substantially continuous self-censorship.

## B. Restriction of Freedom of Expression

#### (1) Freedom of Expression and rule of clarity

Elements of regulation by the law must be clearly defined in order to inform individuals being subject to the law what actions would be regulated under the law so that they can determine the course of their action accordingly, and this would prevent discriminatory or arbitrary interpretation of law by providing an objective guideline to the law enforcement agency (4 KCCR 255, 268-269, 90Hun-Ba27, etc., April 28, 1992). The rule of clarity is an expression of the democracy and the rule of law, and it is required of all legislation restricting basic rights of citizens. The rule of clarity is an inherent part of the principle of *nulla poena sine lege*, the principle of statutory taxation, and the principle of the rule against blanket delegation.

The rule of clarity takes on an especially important meaning in legislation restricting the freedom of expression. In a democratic society, freedom of expression is an essential tool to realize the people's sovereignty. Ordinarily, the freedom of expression functions to encourage exchange of diverse opinions, interpretations, and ideas among individuals and during the course, to verify validity of such expressions. However, restriction of freedom of expression by an unclear statutory provision would bring about the chilling effect on constitutionally protected expression, and cause malfunctioning of this freedom. When it is unclear what kind of expression is being prohibited by such legislation, it is very likely that a person would abstain from expressing himself lest he should be punished for making such expression because he is not certain that what he is about to express is not subject to regulation. Therefore, it is constitutionally required that statutes regulating freedom of expression should be specific and clear about what expression would be subject to regulation (10-1 KCCR 327, 342, 95Hun-Ka16, April 30, 1998).

#### (2) Freedom of Expression and Principle Against Excessive Restriction

The principle against excessive restriction as stipulated by Article 37(2) of the Constitution functions as a limit for all legislation restricting citizens' basic rights. Therefore, legislation restricting freedom of expression should be in accordance with the principle. In the case of freedom of expression, the principle against excessive restriction is closely linked with the rule of clarity seen above. Restriction of freedom of expression through an unclear statutory provision would result in regulation of even those expression that should be constitutionally protected, and this would violate the principle against excessive restriction.

### C. Constitutionality of Article 53(1) of the Telecommunications Business Act

#### (1) Violation of rule of clarity

(A) Article 53(1) of the Telecommunications Business Act stipulate that "a person in use of telecommunications shall not make the communication with contents harming the public peace and order or social morals and good customs."

As seen above, in order to restrict the freedom of expression, the requirement of the rule of clarity becomes more demanding. Even more specific and clear stipulation of expression that would be subject to regulation is especially required for legislation regulating the contents of expressions like the instant provision.

(B) The concept of improper communication defined as that with contents "harming the public peace and order or social morals and good customs" is too unclear and ambiguous.

Article 37(2) of the Constitution stipulates that the freedoms and rights of citizens may be restricted by Act only when necessary for national security, the maintenance of law and order or for public welfare, and Article 21(4) of the Constitution stipulates that speech or the press shall not undermine public morals and social ethics. Article 53(1) of the Telecommunications Business Act defines improper communication as "communication harming the public peace and order or social morals and good customs" and prohibits such communication. "The public peace and order" is almost identical to "national security" and "the maintenance of law and order" used in Article 37(2) of the Constitution, and "social morals and good customs" is indistinguishable from "public morals or social ethics" stipulated in Article 21(4) of the Constitution, respectively. Such terms do not concretize the concepts used in the Constitution. The meaning of Article 53(3) of the Act is so unclear and abstract that it can be said that the article does not define the concept of "improper communication" but rather, is a duplicate of the Constitution stipulating the minimal condition of restriction of basic rights and the limits of freedom of speech and press.

Since "the public peace and order" and "the social morals and good customs" are such abstract concepts, different individuals may make different judgments about whether a particular expression is harmful to "the public peace and order" or "the social morals and good customs" because of differences in individuals' value systems or moral values. Furthermore, it would be difficult to objectively define their meaning through an ordinary interpretation of law by enforcement agencies.

While Article 53(2) of the same Act delegates the detailed rulemaking about the specifics of improper communication to a presidential decree, it is unpredictable from the statute itself how the presidential decree would define the subject of regulation. In other words, it does not inform citizens what types of communication would be prohibited. People may have vague ideas about what "public peace and order" and "social morals and good customs" may mean, but such ideas would be very subjective and would lead to different meanings for different individuals.

Of course, the necessity to employ indefinite concepts in legislation cannot be denied altogether, and use of such concepts as "public peace and order" and "social morals and good customs" are not always prohibited. Sometimes, use of such terms would be allowed in light of the legislative purpose, nature of legal relations subject to regulation, and contents of related statutory provisions. However, it violates the rule of clarity required for regulation of constitutionally protected freedom of expression to comprehensively regulate contents of expression using such vague notion as "harming public peace and order or social morals and good customs" without further details. This would be so even if Article 53(2) of the Act delegates detailed rule-making about the subject of the regulation to a presidential decree.

The Minister of Information and Communication argues that the statutory provisions do not violate the rule of clarity because they employ concepts similar to those used in the Constitution. However, it cannot be allowed to employ concepts used in the Constitution or abstract notions similar to those used in the Constitution to legislate individual statutes restricting people's liberties and rights.

(C) It would not be easy to legislate statutes that would be clear not to bring about "a chilling effect" on the freedom of expression and at the same time effectively regulate what are clearly improper communication. While there may be diverse and divergent subjects of regulation, the state should not give up its pursuit to uphold the rule of clarity through individualization or categorization. If this is not possible, the state must choose underregulating rather than excessively restricting of expression. There would be more to lose than to gain to restrict expression who is not proven to be detrimental to the public good. This is the basic nature of the freedom of expression.

(D) In conclusion, Article 53(1) of the Telecommunications Business Act violates the rule of clarity because it does not specify what kind of expression would be subject to regulation.

## (2) Violation of Principle Against Excessive Restriction

(A) Necessity of such regulatory measures as deletion of messages cannot be denied considering the rapid speed of online information dissemination. However, while restriction of circulation of expression to protect juveniles could be allowed, generally, regulation or suppression of online expression based on its contents should not be allowed unless it contains materials clearly illegal or obviously detrimental to the public good (i.e. child pornography, divulgence of national secrets, or copyrights violation). Comprehensive regulation of contents of expression based on vague doubt about harmfulness or possible harmfulness is not in accordance with the freedom of expression.

Article 53 of the Telecommunications Business Act regulates communication that could "harm the public peace and order or social morals and good customs." Ambiguity, abstractness, and comprehensiveness of the concept of improper communication inevitably results in regulation of communication that should not be regulated, and leads to violation of the rule against excessive restriction.

(B) Article 53 of the Act could be used to regulate "indecent" expression which this Court has explicitly held to be protected under the Constitution (10-1 KCCR 327, 95Hun-Ka16, April 30, 1998), citing that these expressions are against "social morals and good customs". This Court has ruled that comprehensive prohibition of indecent expression would violate the freedom of expression because "indecent" expression, unlike "obscene" expression, has some social value. This Court defined "indecent" expression as a sexual expression not reaching the level of obscenity, expressions of not too much violence, rather detailed description of a murder scene, humor based on sexual matters, or satire on distorted social morals and good customs or ethics that may contain some vulgarity (10-1 KCCR 352-353, 95Hun-Ka16, April 30, 1998). A lot of such indecent expressions may cumulatively be against "the public peace and order" or "social morals and good customs."

(C) Media materials harmful to juveniles refer to those materials whose circulation and management are regulated for the purpose of juvenile protection. They include not only such illegal expressions as obscene materials that are also prohibited for adults but also those expressions which contain contents that may be unsuitable for teenagers but not for adults.

Comprehensiveness of the concepts of "the public peace and order" or "social morals and good customs" may lead to regulation of those expressions for which it would be enough to prohibit access by juveniles, classifying them as improper communication. While it may be necessary to block teenagers from accessing provocative materials which may stimulate sexual desire of juveniles (refer to Article 10(1)(i) of the Juvenile Protection Act), prohibition of such expression or access by adults is not required as long as the materials are not obscene. However, under the instant provisions, these expressions may be subject to regulation because they may be classified as improper communication since they contain contents harmful to the "social morals and good customs".

(D) The instant statutory provision also blocks routes to present and solve the social problems in a sound manner through free debates and exchange of comments expressing diverse opinions. It could be employed to regulate expressions regarding sexuality, marriage, or the family system (i.e. expressions regarding living together before marriage, contractual marriage, or homosexuality) for harming "social morals and good customs," and it could be used to regulate expressions regarding sensitive political or social issues (i.e. expressions about opposition to conscription, conscientious objection to war, reunification issues), by labelling them as harmful to "the public peace and order." This would inevitably have a chilling effect on the users of telecommunication services, and open discussions would be impossible for some social issues. This would violate the essential features of the freedom of expression.

Unlike a totalitarian society, a democratic society does not believe that a state can do no harm. Diversity and moral relativism form the fundamental principles of a democratic society. It would distort the free market of ideas and the press if a state could freely wield its power to decide what expression to allow and what to ban based on such relative and variable concepts as "public peace and order" or "social morals and good customs." Furthermore, the state could abuse such power to achieve certain political or ideological goals, and any criticism toward the head of the state would be regulated for being harmful to "public peace and order." In a previous ruling, this Court has said that the government should not be the primary organ to judge whether certain expression or information is valuable or harmful and that such judgment should be left to the self-correction mechanism inherent in a civil society, that is, competition of ideas and opinions (10-1 KCCR 327, 339-340, 95Hun-Ka16, April 30, 1998)

(E) Means of regulating improper communication has not changed much since its adoption through Article 6 of former Telecommunications Act in 1961. This is not desirable in order to adapt to the changing environment where the Internet and other online media have become more important.

One of the primary media being subject of regulation for improper communication is the Internet. Unlike the broadcast media, it is "the most participatory media", or "media encouraging expression of individuals." Scarcity of radio wave frequencies, pervasiveness of broadcasts, and lack of control by recipients of

information characterize the broadcasting media. Because of such characteristics, public responsibility and the public interest aspect have been emphasized for use of such media, and forceful regulatory measures that may not be applied to other types media were justified. However, the Internet does not have equivalent characteristics: The barrier to entry is low; Mutual exchange of expression is possible; And active and premeditated action by participants is necessary. The Internet has become the largest and most powerful media, and regulation of expression on the Internet with emphasis on maintenance of order would be detrimental to the promotion of freedom of expression. Technological advance about the media continue to widen the scope of freedom of expression and bring about changes in the quality of such expression. In this light, new regulatory measures within Constitutional limits should be developed to keep up with the continuously changing environment in this field.

(F) In conclusion, Article 53(1) of the Telecommunications Act restricts freedom of expression too excessively and comprehensively, and therefore, violates the principle against excessive restriction.

#### D. Constitutionality of Article 53(2) of the Telecommunications Business Act

(1) Article 53(2) of the Telecommunications Business Act stipulating that "the objects, etc. of the communication, which are deemed harmful to the public peace and order or social morals and good customs under paragraph (1), shall be determined by the Presidential Decree" violates the rule against blanket delegation.

(2) The rule against blanket delegation is the rule of clarity applied in cases of delegation of legislation to the administrative branch. The phrase that "matters delegated to him [the President Trans.] in a concrete, limited scope by statute," as stipulated by Article 75 of the Constitution, means that the parental statute should specify the basic contents and scope of the matters to be determined by the presidential decrees in sufficient details so that anyone could predict their content in outline (3 KCCR 336, 341, 91Hun-Ka4, July 8, 1991). The requirement for specificity and the clarity of delegation varies with the type and the nature of the subject matter. It becomes more exacting in the areas which directly abridges or is likely to infringe upon basic rights than in the areas dealing public benefits. The specificity requirement should be especially demanding in the instant case where freedom of expression is restricted based on the contents of expression and individuals would be made subject to criminal punishment for violation of regulatory measures.

However, concepts of "public peace and order" or "social morals and good customs" are very abstract and unclear, and the provision employing such terms does not provide citizens with even vague ideas about the criteria or basic contents of regulation by presidential decrees.

(3) The instant statutory provision also does not provide appropriate guidelines to the administrative agency, and thereby fails to control administrative regulation properly. This would be possible when the statute clearly defines the scope of delegation. But "public peace and order" or "social morals and good customs" cannot limit the scope of administrative regulation. Thus, the administrative agency could even regulate those expressions that should be protected under the Constitution according to its own judgment or



preference about what the concepts of "the public peace and order" or "the social morals and good customs" should represent.

This is evident in Article 16(ii) and Article 16(iii) of the Enforcement Decree of Telecommunications Business Act which has defined "communication that are deemed to be harmful to the public peace and the order or the social morals and good customs" as "telecommunications with contents that aim at committing the anti-state activities" or "telecommunications with contents that impede the good customs and other social orders." These terms to regulate communication are as unclear and broad as those used in Article 53(1) of the Telecommunications Business Act.

(4) Article 53(2) of the Telecommunications Business Act delegates the detailed legislation specifying contents of improper communication to the presidential decree, stipulating that "the objects... of the communication which are deemed harmful to the public peace and order or the social morals and good customs." This is against Article 37(2) of the Constitution requiring specification of the details of regulation by "Act" to decide when it is "necessary for national security, the maintenance of law and order or for public welfare" or what communication would be against "public morals or social ethics in Article 21(4) of the Constitution". The provision has wrongfully delegated what should have been legislated by the National Assembly to the executive branch. In case of administrative actions restricting liberties and rights of citizens, it is not enough that essential features of such restriction are based on statutes legislated by the parliament: essential features of such restriction need to be decided by the legislature itself (11-1 KCCR 633, 644, 98Hun-Ba70, May 27, 1999).

(5) In conclusion, Article 53(2) of the Telecommunications Business Act violates the rule against blanket delegation because it does not delegate the detailed rule-making in a specific and clear manner and it is not possible to predict the contents and scope of improper communication to be regulated through a presidential decree.

#### E. Constitutionality of Article 53(3) of the Telecommunications Business Act

We need not look further to conclude that Article 53(3) of the Telecommunications Business Act is unconstitutional since legitimacy of Article 53(1) and Article 53(2) of the Act, which are unconstitutional, is a precondition for its constitutionality. Article 53(3), which deals with refusal, suspension, or restriction of improper communication, may be against due process since it does not provide telecommunication service consumers, who are being made subject to the regulation under the Act, with the opportunity to express opinions. We would like to point out that it may be against the rule against excessive restriction if we were to interpret that refusal, suspension, or restriction of communication includes suspension of use of a particular user ID or closure of the web site since it would make it impossible for that user to circulate other legitimate information through the service.

#### F. Constitutionality of Article 16 of the Enforcement Decree of Telecommunications Business Act

Since Article 53(2) of the Telecommunications Business Act is unconstitutional as seen above, Article 16 of the Enforcement Decree of Telecommunications Business Act based on legitimacy of Article 53(2) is also unconstitutional.

## 5. Conclusion

In conclusion, Article 53 of the Telecommunications Business Act and Article 16 of the Enforcement Decree of Telecommunications Business Act infringe on the freedom of expression of the complainant, and hence, are unconstitutional. The complaint filed against parts of Article 71(vii) of the Telecommunications Business Act concerning Article 53(3) of the same Act is dismissed. This decision is pursuant to the consensus of all justices except Justices Ha Kyung-chull, Kim Young-il, and Song In-jun who wrote a dissenting opinion.

## 6. Dissenting Opinion of Justices Ha Kyung-chull, Kim Young-il, and Song In-jun

The majority of Justices concluded that Article 53(1) and 53(2) of the Telecommunications Business Act are contrary to the rule against blanket delegation and the rule against excessive restriction, and that Article 53(3) of the Act and Article 16 of the Enforcement Decree which are based on legitimacy of Article 53(2) are unconstitutional.

We, however, disagree with the majority of Justices in their conclusion that Article 53(1) and 53(2) are against the Constitution. Accordingly, we have a different opinion regarding constitutionality of Article 53(3) of the Act and Article 16 of the Enforcement Decree. We are writing this dissenting opinion to clarify our disagreement.

### A. About Article 53(1) and 53(2) of the Telecommunications Business Act

(1) These statutes are legislation restricting freedom of expression since they define improper communication which would be subject to regulation. They do not prescribe contents of improper communication definitely and completely in themselves, but delegate detailed rulemaking about the scope of improper communication to a presidential decree.

All legislation abridging basic rights of citizens need to observe the rule of clarity, one of the principal features of the principle of the rule of law. As the majority of Justices observed, in case of delegation of legislation, the rule against blanket delegation is one of the main issues and the requirement of the rule of clarity is satisfied by deciding whether the statute is in accordance with the rule against blanket delegation.

(2) The majority opinion wrote that the requirement of the rule of clarity becomes more exacting for legislation regulating the freedom of expression because of the role and function that freedom of expression

plays in a democratic society and the chilling effect on expression that an unclear statute engenders. In addition, the requirement for the specificity and clarity of delegation becomes more demanding in this area.

In order to decide whether the above provisions are against the rule against blanket delegation, the following elements should be considered.

First, disadvantage suffered by the telecommunication service users by the instant statutory provisions is refusal, suspension, or restriction of use of service by the telecommunication businesses; more specifically, deletion of the particular expression, suspension of user ID, or closure of the web site. This should be distinguished from restriction of freedom of expression by threats of criminal punishment, because requirements of the rule of clarity have been more exacting as it is more likely that the chilling effect on expression would be greater if criminal punishment were to be employed as the means of regulation.

As such, if relatively light means of regulation is employed to restrict expression violating certain laws and if the degree of seriousness of such means of regulation is by no means equivalent to criminal punishment, specially exacting standard of review concerning the rule of clarity or the rule against blanket delegation need not be employed just because the issue on review concerns the freedom of expression.

Second, a statute delegating detailed rule-making to presidential decrees or other lower forms of legislation need not be perfectly clear in itself. In other words, these statutes demand a degree of clarity that may not be as strict as that required by other statutes that do not delegate legislation to lower rules.

In the instant case, the provision directly applied to telecommunications service users are not the provisions of the Act but provisions of presidential decree. An expression would not be regulated for being harmful to "the public peace and order" or "the social morals and good customs": it can only be regulated for violating the specific provision in the enforcement decree. Therefore, the concepts of "public peace and order" or "social morals and good customs" only need to give specific guidelines for legislation of the enforcement decree. In the meanwhile, the provisions in the enforcement decree need to be more specific, and they need to meet more exacting demands of the rule of clarity because violation of these provisions would directly lead to administrative regulation.

(3) The majority of Justices conclude that "the public peace and order" or "the social morals and good customs" are very abstract and subjective concepts. They rule that these concepts do not provide appropriate guidelines for administrative regulation, and thus, the statutory provision employing these terms does not function as effective limits for administrative agency responsible for delegated legislation. Furthermore, the majority of Justices conclude that ambiguity and comprehensiveness of these concepts would inevitably lead to regulation of those communication that should not be regulated, and lead to violation of the rule against excessive restriction. They write that the instant statutory provision could be used to regulate "indecent" expression which this Court has explicitly held to be protected under the Constitution, or those provocative "media materials harmful to juveniles" whose expression or access by adults should not be prohibited altogether. Let us examine the validity of such arguments.

The interpretive rule of preference for constitutionality requires the Court to interpret the statutes, which may seem unconstitutional at first glance, in a way that maintains their normative validity if the text and the legislative intent of the statute provide any room for the decision of constitutionality. In other words, this principle requires the Court to abstain from issuing the decision of unconstitutionality needlessly. The rule is based on the principle of the separation of powers and deference to the legislative power.

According to the interpretive rule of preference for constitutionality which espouse the principle of maximum protection and least restriction of basic rights, "public peace and order" or "social morals and good customs" used as standard for delegation of legislation in the instant statutory provisions could be construed as the "minimum level of public order or social morals and good customs that all citizens should abide by and comply with."

The legislative intent of legislators when adopting the provision stipulating "A person in use of telecommunications shall not make the communication with contents of harming the public peace and order or the social morals and good customs" was not to regulate all expressions that have even the faintest hint of harming the public peace and order or the social morals and good customs in the broad sense. The provision reflects the opinion of legislators that they cannot help but regulate communication that could threaten the minimum level of public order or social morals and good customs that our society requires while taking the importance of the freedom of expression into consideration.

While the concepts of the public peace and order or the social morals and good customs are indeed abstract, they are intermediary concepts adopted because it is impossible to regulate all kinds of specific and diverse forms of expression using a single criterion, and as such, they are not concepts that may not be accepted at all cost.

If the public peace and order or the social morals and good customs are construed thus, it cannot be argued that above terms do not function as effective guidelines for administrative regulation or that they inevitably result in excessive regulation of those expressions that should not be regulated in the first place.

In other words, the above concepts only refer to those which "all citizens should abide by and comply with." Provocative media materials harmful to juveniles, or materials that juveniles should be prevented from accessing while adults should be allowed to access, would not be regulated under the label of improper communication. Furthermore, since they refer to "the minimum level of public order or social morals and good customs", "indecent" expression which this Court has explicitly held to be protected under the Constitution would not be regulated for being improper communication.

It is difficult to specify what is "the minimum level of public order or social morals and good customs that all citizens should abide by and comply with" because this varies with changes in society. It would be very difficult to decide whether expression supporting or urging opposition to conscription, conscientious objection to war, or homosexuality is against such standard, and these are but some of the numerous boundary problems.

Legislators opted to delegate detailed rule-making to the administration for these reasons. The provisions of decrees, an output of administrative regulation, could be subject to review by either the Constitutional Court or ordinary courts. If the agencies were to legislate a provision to regulate expressions that are not proscribed as improper communication or employ unclear terms in legislating a provision, such provision would be either unconstitutional or would not be applied at all.

"The minimum level of public order or social morals and good customs that all citizens should abide by and comply with" can only be concretized and made clear through specific administrative regulation and judgment of the Constitutional Court or ordinary courts regarding the validity of such legislation.

The concepts of "public peace and order" or "social morals and good customs" reviewed in light of the interpretive rule of preference for constitutionality render a relatively clear meaning as a standard for delegation of legislation. They do provide specific guidelines to the agencies about the contents, purpose, and scope of delegation. Therefore, the provision does not engender the danger of excessive restriction.

(4) While concluding that above provisions violate the rule against blanket delegation, the majority of Justices also write that the state should not give up its pursuit to uphold the rule of clarity through individualization or categorization even if there may be diverse and divergent subjects of regulation.

While we conclude that the instant statutory provisions are constitutional, it does not mean that we believe that the instant statutory provisions are optimal choices for the legislative policy purpose. Constitutionality of a statutory provision will be decided on whether it could effectively suggest legitimate limits. It does not require the optimization of policy judgments.

It is not impossible to find a way to improve the clarity of expression for the better protection of the freedom of expression even if the instant statutory provisions are delegating legislation.

For example, the provision in the Enforcement Decree about improper communication could be included in the parental Act. Or the provision of the Act could enumerate examples of improper communication and then delegate detailed legislation about specific contents of improper communication. Such method may be more desirable.

However, the requirements of clarity of delegated legislation would not be totally satisfied even if the above method of legislation had been adopted. It would be still unclear to decide what expression should be banned when the agencies faced problems on the boundary.

In other words, the rule of clarity that matters in delegation of legislation is the degree of clarity. Existence of room for improvement does not automatically make a statute unconstitutional.

While the above statutory provisions may not be the best possible legislation in terms of the rule of clarity, it is constitutional as long as it is not impermissible under the rule against blanket delegation because of vagueness of the concepts employed by these statutory provisions. In other words, the statutory provisions are constitutional as long as any citizen can predict the basic features about standard and scope of improper communication that would be regulated by the provisions of presidential decree based on delegation by the Act.

#### B. About Article 16 of the Enforcement Decree of the Telecommunications Business Act

(1) The instant provision specifies and finalizes the contents of improper communication according to delegation by Article 53(2) of the Act. The central issue in deciding the constitutionality of the provision is whether the provision violates the rule of clarity, thereby infringing on the freedom of expression

(2) It is obvious that "telecommunications with contents that aim at a criminal act or that abet a criminal act", as stipulated by Article 16(i) of the Act, refers to communication either to commit or incite crimes punishable under criminal codes, and therefore, this is not against the rule of clarity.

(3) However, "telecommunications with contents that aim at committing the anti-state activities" and "telecommunications with contents that impede the good customs and other social orders", as stipulated by Article 16(ii) and Article 16(iii), employ concepts that are too abstract and unclear to prevent the arbitrary judgment of law enforcement agencies. These provisions could be abused to infringe on the freedom of expression, and hence, they violate the rule of clarity.

In case of "telecommunications with contents that aim at committing the anti-state activities" stipulated in Article 16(ii), "anti-state activities" are very abstract and unclear. Under provisions with such vague notions, it would be up to the discretion of law enforcement agencies whether a certain activity should be regulated as an antistate activity in a specific case, and it would be highly probable that opinions criticizing the government would be regulated as anti-state activities. Thus, it is not difficult to predict that an infringement on the freedom of expression by this provision will occur. Therefore, the criterion proffered by Article 16(ii) is not complete in itself as a provision regulating the freedom of expression.

In case of "telecommunications with contents that impede the good customs and other social orders" stipulated in Article 16(iii), the concepts of "good customs and other social orders" is not any better than the concepts of "the public peace and order or the social morals and good customs" used in the enabling statute in terms of clarity. Such abstract criterion would not prevent the arbitrary judgment of law enforcement agencies. While the use of criterion given by Article 16(iii) would be allowed for the enabling statute, it is too abstract and unclear to be a final provision regulating the freedom of expression.

Even when compared to Article 16(i), The criteria suggested by Article 16(ii) and 16(iii) clearly lack specificity.

Article 13 and 15 of the Regulation of Information Communication Ethics Committee Review as well as Article 17 of the Detailed Rules on Information Communication Ethics Committee Review provide more specific criteria related to Article 16(ii) and Article 16(iii) of the Enforcement Decree of Telecommunications Business Act. We would like to point out that while the criteria suggested by the provisions of the Enforcement Decree need not be as detailed as those of the Regulation or the Detailed Rules, they can infringe on the freedom of expression because they are too broad when compared with the provisions of the Regulation and the Detailed rules.

In addition, Article 10 of the Juvenile Protection Act and Article 7 of the Enforcement Decree of Juvenile Protection Act providing for the criteria for deliberation of media materials harmful to juveniles provide more specific criteria from the enabling clause than criteria offered by Article 16(ii) and Article 16(iii) of the Enforcement Decree of Telecommunications Business Act. This again leads to the conclusion that Article 16(ii) and Article 16(iii) of the Enforcement Decree do not satisfy the requirements of the rule of clarity.

(4) Therefore, while Article 16(i) of the Enforcement Decree of Telecommunications Business Act does not violate the rule of clarity, Article 16(ii) and Article 16(iii) of the Enforcement Decree are against the rule of clarity, thereby infringing on the freedom of expression.

#### C. Article 53(3) of the Telecommunications Business Act

(1) The instant statutory provision enables the Minister of Information and Communication to order a telecommunications business operator to refuse, suspend, or restrict improper communication, thereby restricting the freedom of expression of the complainant.

Freedom of expression, like all other rights and liberties, could be restricted by the Act when necessary for national security, the maintenance of law and order, or for public welfare. In such case, the principle against excessive restriction, the guiding principle of legislation restricting individual rights and liberties stipulated by Article 37(2) of the Constitution must be satisfied. Also, when the Minister issues an order for refusal, suspension, or restriction of improper communication, whether the requirements of due process of law such as guaranteeing of an opportunity to submit opinions regarding such order for the telecommunications service user is observed carries some significance. Next let us examine these issues.

#### (2) Rule Against Excessive Restriction

(A) First, the legitimacy of legislative purpose to prevent ill effects of online media and encourage sound development of telecommunications service through regulation of improper communication is accepted. The means of regulation chosen to achieve such purpose, namely, the issuance of an order by the Minister of

Information and Communication for refusal, suspension, or restriction of improper communication is one of the effective and appropriate methods.

(B) Moreover, we believe that the issuance of an order by the Minister of Information and Communication for refusal, suspension, or restriction of improper communication satisfies the requirements of the necessity of the means or the doctrine of the least restrictive means and the balance of interest for the following reasons.

First, under the current system of regulation, no legal duty is directly imposed on individual telecommunication service users. In case of telecommunication service providers, they are first ordered to refuse, suspend, or restrict improper communication, and they will be subject to criminal punishment (Article 71(vii) of the Telecommunications Business Act) only when they do not follow such order. In light of such facts, it would be hard to conclude that such regulation is excessive in terms of the necessity of the means or the doctrine of the least restrictive means.

Second, according to the instant statutory provision, the Minister of Information and Communication can not only order deletion of a particular message identified as improper communication but also close down the host of online bulletin boards or suspend use of the particular user ID of the individual who posted the improper writing. It is clear that an independent order for deletion of a particular expression would not be effective as the means to deal with improper communication when communication in cyberspace posts a problem.

The individual could repeatedly post an identical or similar message with improper contents after the original message has been deleted. This occurs frequently in real life. In such case, there is not an effective means to stop such individual if closure of the web site or suspension of the user ID is not allowed. Therefore, permission of use of the above methods of regulation is unavoidable, and thus, not excessive.

Third, closure of the web site operated by a particular internet service provider (ISP) or suspension of use of a specific user ID are only confined to a particular service managed by the ISP. The user would not be prevented from using online services offered by other service providers. Therefore, the private interest being neglected is not greater than the public interest protected by the above methods of regulation.

(C) In conclusion, the instant statutory provision granting the Minister of Information and Communication the authority to order a telecommunications business operator to refuse, suspend, or restrict improper communication satisfy the requirements of legitimacy of the end, the appropriateness of the means, the necessity of the means or the doctrine of the least restrictive means and the balance of conflicting interests. Therefore, the statutory provision does not infringe on freedom of expression in violation of the principle against excessive restriction.

(3) Due Process of Law



(A) Article 21(1) of the Administrative Procedures Act stipulates that the administrative agency should notify the parties of the contents of the disposition, the legal basis, and other necessary information when it renders an administrative disposition imposing duties on or restricting the rights or interests of the parties. Article 22(3) of the same Act stipulates that the parties should be given an opportunity to submit opinions regarding the administrative disposition when an administrative agency issues such administrative disposition unless there was a formal hearing or a public hearing.

According to Article 2(iv) of the Administrative Procedure Act, the term "parties" is defined as the direct counter parties of the disposition of administrative agencies, or interested parties who are requested to participate in the administrative procedure by administrative agencies ex officio or upon personal request.

A user of telecommunication services can be viewed as interested parties to the order to refuse, suspend, or restrict improper communication based on Article 53(3) of the Telecommunications Business Act under Article 2(iv) of the Administrative Procedures Act based on the decision of administrative agency ex officio or upon personal request. He is thus granted the opportunity to be notified of the administrative disposition in advance and to submit opinions about the disposition.

According to Article 22(1) and 22(2) of the Administrative Procedures Act, an administrative agency could host a formal or public hearing even when other Acts and their subordinate statutes do not provide provisions concerning a formal or public hearing, if the administrative agency decides that it is necessary. In such case, the telecommunication services consumer could participate in a hearing as an interested party, submit arguments, present documentary evidence, and address questions to the relevant witness and expert witness (Article 31(2) of the same Act); request administrative agencies for the inspection or duplication of the documents regarding the investigation results of the cases, and other documents related to the dispositions concerned, (Article 37 of the same Act); and be notified of the hearing when the administrative agency has decided to hold a public hearing (Article 38 of the same Act)

(B) Article 21(4) of the Administrative Procedures Act stipulates that the administrative agency may choose not to notify the parties of its administrative disposition in advance when "an urgent disposition is necessary for the safety and welfare of the general public" or when other exceptional conditions are met. Furthermore, Article 22(4) stipulates that the administrative agency need not conduct hearing of opinions when conditions listed in Article 21(4) are met, or when parties have clearly indicated the intent to renounce the opportunity to submit their opinions.

In other words, the Administrative Procedures Act provides exceptional conditions such as "when an urgent disposition is necessary for the safety and welfare of the general public," under which the agency may omit advance notification of an administrative disposition or hearing of opinions (submission of opinions ? formal hearing ? public hearing).

In the information communication review process, most parties are not given the opportunity to submit opinions because of the rapidity of information proliferation: It would be impossible to attain effectiveness of regulation if every telecommunications service consumer were given a chance to submit his opinion.

(C) As seen above, even if Article 53(3) of the Telecommunications Business Act does not provide a telecommunication service user with an opportunity to submit his opinion when an administrative agency issues a disposition, the user, as an interested party, would be notified in advance when an administrative agency is about to render a disposition, would be given an opportunity to submit opinions regarding such disposition, and participate at a formal or public hearing under the Administrative Procedures Act.

While most parties in the information communication review process are not given the opportunity to submit opinions regarding an administrative disposition, this is not because of lack of a statutory provision providing the right to submit opinion but to secure effectiveness of regulation when proliferation occurs so rapidly. This is also based on the Administrative Procedure Act.

Since the telecommunication services user would be given procedural safeguards through the Administrative Procedures Act, the statutory provision cannot be said to violate due process of law because it does not explicitly grant the right to submit opinions against an administrative disposition.

(4) Therefore, the statutory provision is not in violation of the principle of proportionality nor due process of law, and does not infringe on the freedom of expression.

D. In conclusion, we agree with the majority of Justices in their conclusion to dismiss parts of the provisions on review. But unlike the majority, we think that Article 53 of the Telecommunications Business Act and Article 16(i) of the Enforcement Decree of Telecommunications Business Act are constitutional, and thus the complain against these provisions should be rejected. Furthermore, we believe that Article 16(ii) and 16(iii) of the Enforcement Decree of Telecommunications Business Act are unconstitutional and infringe on freedom of expression because they are against the rule of clarity.

Justices Yun Young-chul(Presiding Justice), Han Dae-hyun, Ha Kyung-chull, Kim Young-il(Assigned Justice), Kwon Seong, Kim Hyo-jong, Kim Kyoung-il, Song In-jun, and Choo Sun-hoe