

## Ban on Internet Distribution of Obscene Materials Case

May 28, 2009 / Case NO. : 2006Hun-Ba109 etc, KCCR : 21-1(B) KCCR 545

In this case, the Constitutional Court decided that the contested provision which imposes criminal punishment on those who distribute and sell obscene materials over the information and communication network, does not violate the Constitution for the reason that "obscene" expressions are part of freedom of speech and press to be protected by the Constitution and the rule of clarity and the rule against excessive restriction cannot be found to be violated. Three Justices, however, agreed to this conclusion but based on different reason. Furthermore, in a 7 to 2 vote, the Court dismissed the complaints of part of petitioners who were acquitted during their trials respectively for the reason that it cannot be ascertained the relevance of the contested provision to the underlying cases.

### Background of the Case

The petitioners were prosecuted and being tried for violating Article 65 Section 1 Item 2 (hereinafter, "Instant Provision") of the former Act on Promotion of Information and Communications Network Utilization and Information Protection, Etc. (hereinafter, the "former Information and Communications Network Act") by distributing and openly displaying obscene materials on internet portals and mobile communication services. During their trials were pending, petitioners filed motions for their court's request for the constitutional review of the Instant Provision. As the motions were denied, however, the petitioners respectively filed these constitutional complaints with the Constitutional Court, arguing that the Instant Provision violates the rule of clarity and rule against excessive restriction, etc. from November 15. 2006. Meanwhile, some of the petitioners were ruled not guilty of violating the Instant Provision at their ordinary courts respectively.

### Provision at issue

Former Act on Promotion of Information and Communications Network Utilization and Information Protection, Etc.(revised by Act No. 6360 Jan. 16. 2001 but before revised by Act No. 8289 Jan. 26. 2007)

Article 65 (Punishment) Section 1 Item 2

Any person who has distributed, sold, rented, or openly displayed lascivious codes, letters, sounds, visuals, or films through information and communications network shall be punished by imprisonment with prison labor for not more than 1 year or by a fine not exceeding 10 million won (hereinafter, the "Provision").

## Summary of the Decision

In a unanimous vote, the Constitutional Court ruled the Instant Provision constitutional, reasoning that the Instant Provision does not contradict the rule of clarity and prohibition of excessive restriction. At the same time, in a 6 to 3 vote, the Court also overruled its precedent that an "obscene" expression in its strict sense is not protected under Article 21 of the Constitution that ensures freedom of speech and the press (95Hun-Ka16, April 30, 1998) according to the following reasons.

### 1. Court Opinion

If an "obscene expression" is interpreted to be outside the boundary of freedom of speech protected by the Constitution, it will not only be impossible to conduct a constitutional review of an obscene expression in accordance with basic constitutional principles for restriction on freedom of speech, such as the rule of clarity and ban on censorship, but also be difficult to apply constitutional basic principles for restriction on fundamental rights, such as statutory restriction and the rule against excessive restriction. As a result, it becomes also impossible to control every obscene expression through preliminary censorship and, in case of no such prior censorship, to impose criminal punishment, to ban possession of obscene materials without the purpose of distribution, or to unlawfully impose disadvantage on obscene publications. In the end, it cannot be overlooked that obscene expressions are highly likely to be denied even the minimum constitutional protection.

Therefore, it should be interpreted that, obscene expressions are also entitled to the protection of freedom of speech under Article 21 of the Constitution, except that they can be regulated for the purpose of ensuring national safety, public law and order or public welfare pursuant to Article 37 Section 2 of the Constitution. As the obscenity specified in the Provision should thus be protected by Article 21 of the Constitution that guarantees the freedom of speech and press, the Constitutional Court has come to overrule its former judgment that obscene expressions are not to be protected as freedom of speech under Article 21 of the Constitution (10-1 KCCR 327, 340-341, 95Hun-Ka16, April 30, 1998).

The "obscenity" in the Instant Provision may have room for more specificity, but it can be considered to provide, in its current form, offenders and law enforcement officials with appropriate standards for review or interpretation and exclude arbitrary interpretation and execution of law as regards which expression is "obscene". In this sense, "obscenity" in the Instant Provision does not contradict the rule of clarity. Even if obscene expressions are subject to constitutional protection of freedom of speech and thus imposing heavy criminal punishment on acts such as distribution of obscene materials and information may somewhat restrict the said fundamental rights, this restriction is necessary for public welfare. Therefore, the Instant Provision hardly contradicts the rule against excessive restriction under Article 37 Section 2 of the Constitution.

### 2. Concurring Opinion of Three Justices

Determining the inherent boundary of protection for fundamental rights under the law is significant as the first step of a constitutional review. It is evident that not all of the problematic expressions of every case can be

protected as part of the freedom of speech, so discussion on the scope of freedom of speech to be protected becomes an essential prerequisite for a constitutional review of freedom of speech.

As Article 31 Section 4 of the Constitution specifies the constitutional limitation to freedom of speech, expressions that exceed the limitation are not protected by the Constitution as part of the freedom of speech. Whether such obscene expressions are to be recognized as part of freedom of speech is a matter determined by how the review standard for obscenity as a normative concept is established.

The concept of "obscenity" in the Instant Provision is "obscenity" in the strict sense of the term--indecent and blunt sexual expression that distorts human dignity or personality, that solely appeals to sexual interest, and that overall has no literary, artistic, scientific or political values. In this context, such obscene expressions are sexual expressions similar to or more harmful than "obscenity" not considered by the U.S. Supreme Court to be part of rights protected under the First Amendment of the U.S. Constitution or "hardcore pornography" defined in the German criminal law. Therefore, obscene expressions in their strict sense exceeds the limitation allowed by Article 21 Section 4 of the Constitution and therefore are not protected by Article 21 Section 1 of the Constitution that ensures freedom of speech.

The concept of "obscenity" in the Instant Provision at least offers an appropriate guideline for offenders and law enforcement officers, and implication of the term hardly varies with individual preference of the competent enforcement authority. The Instant Provision, therefore, does not contradict the rule of clarity.

Meanwhile, because "obscenity" in its strict sense is not constitutionally protected as part of freedom of speech, there is no need for review of whether the Instant Provision that penalizes distribution of obscene materials through information and communication network violates the rule against excessive restriction in regulating the freedom of speech and press.