

## Criminal Penalty on False Communication

Dec 28, 2010 / Case NO. : 2008Hun-Ba157 2009Hun-Ba88(consolidated), KCCR : 22-2(B) KCCR 684

### [SUMMARIES OF OPINIONS]

This case is about the decision of unconstitutionality by 7 (unconstitutional) to 2(constitutional) on the Article 47(1) of the Electrical Telecommunication Act ("instant provision") which penalizes anybody who makes a false communication through the electric telecommunications facilities and equipment with the intent to harm the public interest.

#### Background of the Case

The petitioner in 2008Hun-Ba15 was charged with the violation of "the Electric Telecommunication Act, Article 47(1)" by posting untrue information on an internet site that a woman was raped by police during the protest while the petitioner in 2009Hun-Ba88 was charged with the same offense by posting the untrue statements on an internet site that currency exchange was halted because the Korean foreign reserve was drained and also that the Korean government ordered seven major Korean banks and other major export companies to halt dollar buying. Petitioners filed the motions for constitutional review of the Instant Provision. After trial courts denied their petitions, petitioners directly filed motions to review the constitutionality of the Instant Provision with the Constitutional Court of Korea.

#### Provisions at Issue

The Electrical Telecommunication Act (amended into the Act 5291 on December 30, 1996)

The Article 47(penalty provision) (1):

"A person who has publicly made a false communication through the electric telecommunication facilities and equipment with the intent to harm the public interest shall be punished by imprisonment for not more than five years or by a fine not exceeding fifty million won."

#### Summary of the Decision

##### 1. Summary of Majority Opinion

The instant provision is a restrictive legislation on the freedom of expression with criminal penalties and, therefore, it is subject to the rule of clarity on a strict level. While the instant provision prohibits false communication with 'the intent to harm public interest,' the "public interest" used here is such unclear and abstract that it seems to be the rewriting of the constitutional provisions which prescribes minimum conditions to restrict basic rights and the limitation of the Constitution. Since the Instant Provision does not notify ordinary citizens of what purpose of communication, among 'permitted communications,' is prohibited, it is unconstitutional for violating the rule of clarity stemming from the freedom of expression and the rule of clarity embedded in the principle of nulla poena sine lege.

2. The concurring opinion of four Justices on the issue of violation of the rule of clarity with respect to 'false communication.'

The legislative intent of the instant provision is to regulate 'communication with false pretense.' Yet, the issue on the meaning of 'false communication' arises as it has recently been applied to the case involving communication with false information despite the instant provision has not been quoted for forty years. The instant provision opens a door to the broad interpretation and the application of a law because it fails to materialize the legislative intent in its plain language and in the legal structure with other related provisions. Therefore, the instant provision does not satisfy the rule of clarity in the principle of nulla poena sine lege because of its latent ambiguity not only in 'intent to harm the public interest' but also in 'false communication.'

3. The concurring opinion of five Justices on the issue of violation of the rule against excessive restriction

We cannot exclude a certain expression from the protection of the freedom of expression because it contains certain contents. Therefore, "expression of false communication" remains within the scope of protection of the freedom of speech and the press under the Article 21 of the Constitution although it could be restricted under the Article 37(2) of the Constitution. Yet, the instant provision, by purporting to regulate false communication with the 'intent to harm public interest,' violates the rule against excessive restriction because it, due to its ambiguous, abstract and overbroad nature, ends up regulating the expressions which should not be regulated. Therefore, the instant provision infringes the freedom of expression by violating the rule against excessive restriction and thus is against the Constitution.

4. The dissenting opinion of two Justices

(1)The 'public interest' is 'the interest of all or the majority of citizens who live in Korea and the interest of a state composed of those citizens,' while 'intent to harm' the public interest includes the case where the major intent of an act is for harming the public interest. "False communication" is about 'the fact of which the truthfulness can be verified objectively' and thus implies both the communication with false contents and the communication with false pretense. Therefore, its meaning is clear and not against the rule of clarity in the principle of nulla poena sine lege.

(2)The legislative goal of the instant provision is justifiable as it contributes to the development of democracy by preventing the disturbance of public morality and social ethics and the disorder of the public order. The stricter restriction should apply to the communication with palpably false information because electric telecommunication has the features such as: 1) the severe ramification from the dissemination of false information, 2) difficulty to correct false information by communication users in a swift manner and; 3) the high social expense for lengthy discussion surrounding false information. Further, the instant provision punishes only when an act of transmission of false information through electric telecommunication facility is committed with the intent to 'harm the public interest.' Therefore, the instant provision does not violate the rule of the least restrictive means. Finally, as the restricted basic rights is the freedom to disseminate palpably false information both from an objective and a subjective perspective with the intent to harm the public interest, there is no gross imbalance between the protected public interest by the instant provision and the restricted basic right. Therefore, the instant provision is not against the freedom of expression by violating the rule against excessive restriction.

**[FULL OPINIONS]**

## Questions Presented

Whether the Article 47(1) of the Electric Telecommunication Act (hereinafter as "the Instant Provision"), which criminalizes those who transmit false communication through electric communication facility with the intent to harm the public interest, violates the principle of nulla poena sine lege and the rule of clarity (Unconstitutional)

## Summary of Decisions

The Instant Provision is a restrictive legislation on the freedom of expression with criminal penalties and, therefore, it is subject to the rule of clarity in a strict level. While the Instant Provision prohibits the false communication with 'the intent to harm public interest,' the "public interest" used here is such unclear and abstract that it seems to be the rewriting of the constitutional provisions which prescribes minimum conditions to restrict basic rights and the limitation of the constitutional freedom of speech and the press. Whether a certain expression violates the public interest drastically varies depending on individual's value system and ethical standard. This is also true even when legal professionals interpret the meaning of the public interest. Further, its meaning cannot be fixed by the legal professionals' customary work of interpretation of law. Since, under the current pluralistic and value subjective society, the public interest at issue is not monolithic when a certain act becomes an issue, the balancing work of different public interests in order to find an act harmful to public interest does not always produce clear results. In conclusion, because the Instant Provision does not notify ordinary citizens of what purpose of communication, among 'permitted communications,' is prohibited, it is unconstitutional by violating the rule of clarity applied to the freedom of expression and the rule of clarity embedded in the principle of nulla poena sine lege.

Concurring Opinion of Justice Cho, Dae-Hyen, Justice Kim, Hee-Ok, Justice Kim Jong-Dae, Justice Song, Doo-Hwan on the Issue of Violation of the Rule of Clarity with Respect to 'False Communication'

The legislative purpose of the Instant Provision is to regulate 'communication under illegally used other's name'(hereinafter, 'communication with false pretense') Yet, the issue on the meaning of 'false communication' arises as it has recently been applied to the case involving communication with false information despite the Instant Provision has not been quoted for many years. Since 'falsity' includes the falsity in both contents and form, its meaning should be clarified before it becomes an element of a crime. Yet, the Instant Provision opens a door to the broad interpretation and the application of a law because it fails to materialize the legislative purpose in its plain language and in the legal structure with other related provisions. In conclusion, the Instant Provision does not satisfy the rule of clarity in the principle of nulla poena sine lege because of its latent ambiguity not only in 'intent to harm the public interest' but also in 'false communication.'

Concurring Opinion of Justice Lee, Kang-Kook, Justice Lee, Kong-Hyun, Justice Cho, Dae-Hyen, Justice Kim, Jong-Dae, Justice Song, Doo-Hwan on the Issue of Violation of the Rule against Excessive Restriction.

We cannot exclude a certain expression from the protection of the freedom of expression because it contains certain contents. Therefore, "expression of false communication" remains within the scope of protection of the freedom of speech and the press under the Article 21 of the Constitution although it could be restricted under the Article 37(2) of the Constitution. Yet, the Instant Provision, by purporting to regulate false communication with the 'intent to harm public interest,' violates the rule against excessive restriction

because it, due to its ambiguity, abstract and overbroad nature, ends up regulating the expressions which should not be regulated. The Instant Provision will deter the expression of those who are not sure whether their expressions violate the law. If people refrain from expressing their opinion in fear of punishment, then the freedom of expression is infringed. Therefore, the Instant Provision infringes the freedom of expression by violating the rule against excessive restriction and thus is against the Constitution.

Dissenting Opinion of Justice Lee, Dong-Heub, Justice Mok, Young-Joon

(1)The Instant Provision, by adding "the intent to harm the public interest" as the specific intent crime, significantly reduces the scope of elements of acts and, therefore, it does not require such a high level of clarity as the element of general intent. Legally, 'public interest' is 'the interest of all or the majority of citizens who live in Korea and the interest of a state composed of those citizens,' while 'intent to harm' the public interest includes the case where the major intent of an act is for harming the public interest. Therefore, it is not difficult to predict the meaning of 'the intent to harm the public interest.' With respect to 'false communication,' it is impossible that "false communication" in the Instant Provision excludes 'communication with false information' because, generally, the concept of 'falsity' includes both the communication with false contents and the communication with false pretense and other criminal law regulates the false pretense separately. Meanwhile, 'false information' is something incompatible with the truth distinguishable from 'opinion' and 'suggestion.' Therefore, 'false information' in the Instant Provision is clear in its meaning and not against the rule of clarity in the principle of nulla poena sine lege.

(2)Although false information is not excluded from the scope of protection under the freedom of expression, the review of standard should be the more lenient standard of the rule of the least restrictive means instead of the strict rule of proportionality because false information is not civil and political expression about idea and knowledge. The legislative purpose of the Instant Provision is legitimate and the Instant Provision is an appropriate means for the purpose as it contributes to the development of democracy by preventing the disturbance of public morality and social ethics and the disorder of the public order. On the other hand, the stricter restriction should apply to the communication with palpably false information because electric telecommunication has the features such as: 1) the severe ramification from the dissemination of false information, 2) difficulty to correct false information by communication users in a swift manner and; 3) the high social expense for lengthy discussion surrounding false information. Further, the Instant Provision punishes only when an act of transmission of false information through electric telecommunication facility is committed with the intent to 'harm the public interest.' Therefore, the Instant Provision does not violate the rule of the least restrictive means. Finally, as the restricted basic rights is the freedom to disseminate palpably false information both from an objective and a subjective perspective with the intent to harm the public interest, there is no gross imbalance between the protected public interest by the Instant Provision and the restricted basic right. Therefore, the Instant Provision is not against the freedom of expression by violating the rule against excessive restriction.

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### Parties

Petitioners: 1. Kim, ○ Joo (2008Hun-Ba157), Represented by Yum, Hyung Kook, Attorney at Law

2. Park, ○ Sung (2009Hun-Ba88) Represented by Park, Je Sung of Bom Law Firm and two others

Underlying Case

1. Seoul Central District Court 2008Go-dan3896 Violation of the Electric Telecommunication Act et al (2008Hun-Ba157)

2. Seoul Central District Court 2009Go-dan304 Violation of the Electric Telecommunication Act (2009Hun-Ba88)

### **Holding**

The Article 47(1) of the Electric Telecommunication Act (revised by Act No. 5291 on December 30, 1996) is found unconstitutional

### **Reasoning**

#### 1. Introduction of the Case and Subject Matter of Review

##### A. Introduction of the Case

###### (1) 2008Hun-Ba157

Petitioner Kim, ○ Joo was charged with the violation of "the Electric Telecommunication Act, Article 47(1)" by allegedly posting false information that a woman was raped by police during the protest against the import of the U.S. beef and also posting a photo picture artificially created by the petitioner on the homepage of the Progressive New Party ([www.newjinbo.org](http://www.newjinbo.org)) as well as the cyber Caf ? of Daum, an internet portal site operated under the name of "Campaign for Impeachment of President Lee, Myung Bak" ([caf ? .daum.net/antimb](http://caf?.daum.net/antimb)). By doing these acts, the petitioner allegedly transmitted false communication through electric telecommunication facility on two separate occasions with the intent to harm the public interest. During the trial (Seoul Central District Court 2008Godan3896), the petitioner filed the motion to request for the review of the constitutionality of the provision at issue (Seoul Central District Court 2008Chogi2420).

After the above district court denied the motion and rendered a guilty verdict on October 22, 2008, the petitioner filed the instant constitutional complaint on December 12, 2008.

###### (2) 2009Hun-Ba88

On July 30, 2008, Petitioner, Park, ○ Sung posted an article on 'Agora', an online forum for economic issues of the Daum, an internet portal site under the title 'finally the foreign reserve explodes.' In the article, the petitioner stated that the currency exchange was halted because the Korean foreign reserve was drained. Thereby, the petitioner allegedly posted the article of false information through electric telecommunication facility for the purpose of harming the public interest by letting hundreds thousands of people read it and thus to cause damages on the government's credibility in foreign currency exchange policy as well as on Korea's economic credit to the world. Further, petitioner posted another article under the title of 'the first emergency notice to the government' which again caused damages on the government's foreign currency exchange policy as well as Korea's economic credit. In the article, the petitioner allegedly claimed that the Korean government ordered seven major Korean banks and other major export companies to halt dollar buying. Over ten thousand people read this article and, subsequently, the petitioner was charged for the violation of the Article 47(1) of the Electric Telecommunication Act. During the trial (Seoul Central District

Court 2008 Godan 304), the petitioner filed a motion to request for the review of constitutionality of the provision at issue (Seoul Central District Court 2009 Chogi 258).

The above district court denied the motion and rendered not guilty verdict. Subsequently, the prosecutor filed a notice of appeal (Seoul Central District Court 2009 No 1203) and the petitioner filed a motion to request for the review of constitutionality of the provision at issue again on May 14, 2009.

#### B. Subject matter of review and relevant provision

The subject matter is whether the Article 47(1) of the Elective Telecommunication Act (revised by Act No. 5219, Dec. 30, 1996, hereinafter referred as "Instant Provision") is unconstitutional. The text of the Instant Provision and relevant Provisions are as follows;

#### **[Instant Provision]**

Electrical Telecommunication Act (revised by Act No. 5219, Dec. 30, 1996)

Article 47(Penalties)

(1)A person who has publicly made a false communication through the electric telecommunications facilities and equipment with the intent to harm the public interest shall be punished by imprisonment for not more than five years or by a fine not exceeding fifty million won.

#### **[Relevant provisions]**

Electrical Telecommunication Act (revised by Act No. 5219, Dec. 30, 1996)

Article 1 (Purpose) The purpose of this Act is to contribute to the enhancement of the public welfare by managing telecommunications efficiently and stimulating the development of electric telecommunications by providing basic matters on electric telecommunications.

Article 2 (Definitions) The definitions of the terms as used in this Act shall be as follows:

1. The term "electric telecommunications" means transmission or reception of code, words, sound or image through wired, wireless, optic, and other electro-magnetic processes;

2. The term "electric telecommunications facilities and equipment" means machinery, appliances, lines for telecommunications, and other facilities necessary for telecommunications;

3-8 (intentionally omitted)

Article 47 (Penalties)

(2)A person who has publicly made a false communication through electric telecommunications facilities and equipment for the purpose of benefiting himself or the third party or inflicting damages on the third party shall be punished by imprisonment for not more than three years or by a fine not exceeding thirty million won.

(3) In case where the false communication under section (2) is of a telegraphic remittance, it shall be punished by imprisonment for not more than five years or by a fine not exceeding fifty million won.

(4) When a person engaged in the electric telecommunications business commits the act under section (1) or (3), he shall be punished by imprisonment for not more than ten years or by a fine not exceeding hundred million won, and in case of committing the act under section (2), he shall be punished by imprisonment for not more than five years or by a fine not exceeding fifty million won.

## 2. Petitioners' Arguments, Reason of the Seoul Central District Court's Denial the Motions to Request for the Review of Constitutionality of the Instant Provision and Other Interested Bodies' Arguments

(Intentionally omitted)

### 3. Review

#### A. Legislative history of the Instant Provision

(1) The former Electric Telecommunication Act, Article 89(1), which was enacted on December 30, 1961, prescribes that "those who transmit false information through electric telecommunication facility with the intent to harm the public interest are subject to the maximum five years of imprisonment or minimum 500,000,000 hwan of fines." Despite several revisions, this provision has remained intact except its location (moved to the Article 111(1) by the Act 3091 on December 31, 1997) and the amount of fine (minimum 500,000 won of fine by the Act 3091 on December 31, 1977 and minimum five million won of fine by the Act 3421 on April 7, 1981) until the time when the former Electric Telecommunication Act was divided into the Electric Telecommunication Act and the Air Electric Telecommunication Business Act.

(2) The Electric Telecommunication Act enacted on December 30, 1980 prescribes, in the Article 39, the punishment of the acts similar with that in the Instant Provision. The penalty is maximum five years of imprisonment or five million won of fine. Later, when the Electric Telecommunication Act was wholly revised by Act No.4393 on August 10, 1991, the elements of offenses remained unchanged except that the location of the provision was moved to the Article 47(1) and the amount of fine was raised into 'maximum twenty hundred thousand won.' The current law was the result of the revision by Act No.5291 of December 30, 1996 and yet survived any significant changes except the increase of the fine into 'fifty hundred thousand won.'

#### B. Whether the Instant Provision violates the rule of clarity

(1) The freedom of expression, the principle of nulla poena sine lege and the rule of clarity

(A) The rule of clarity requires a law to be clear. It, as the revelation of democracy and the rule of law, applies to all the laws which restrict basic rights. Particularly, it becomes more important to the laws restricting the freedom of expression. Under the current democratic society where the freedom of expression is essential for the realization of the idea of people's democracy, the restriction of the freedom of expression with unclear norms creates chilling effects toward constitutionally protected expression and results in losing the original function of the freedom of expression which was supposed to provide the forum for various opinions and ideas and to enable interactive verifications. If what is prohibited is not clear, people abstain from making expressions because they are not sure whether their expressions are subject to restriction. Therefore, law regulating the freedom of expression shall prescribe the concept of expression to be restricted by the law in

a concrete and a clear manner which is the constitutional requirement (10-1 KCCR 327, 342, 95Hun-Ka16, April 30, 1998).

(B)On the other hand, the principle of nulla poena sine lege requires laws to prescribe clearly the criminal offenses and their penalties so that people may predict punishable offenses and thereafter decide their acts. If the provisions of a criminal law are ambiguous and abstract, people do not know what the prohibited acts are and thus cannot obey the law. Further, the idea of the rule of law, which purports to protect citizens' freedom and rights by the principle of nulla poena sine lege, cannot be practiced if the commission of criminal offenses is to be decided with judge's arbitrary discretion (8-2 KCCR 785, 792-293, 93Hun-Ba65 December 26, 1996).

(C)The Instant Provision is the law to restrict the freedom of expression with criminal penalties and thus is subject to the rule of clarity in a strict level.

(2) Whether the rule of clarity is violated

(A)As the Instant Provision punishes 'those who communicate false information with the intent to harm the public interest through electric telecommunication facility,' there arises the issue of what constitutes the elements of 'the intent to harm the public interest' by being a specific intent.

(B)The Article 37(2) of the Constitution prescribes 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 or right shall be violated. Meanwhile, the Article 21(4) of the Constitution prescribes that neither speech nor the press shall violate the honor or rights of other persons nor undermine public morals or social ethics.

While the Instant Provision prohibits the false communication with 'the intent to harm public interest,' the "public interest" used here is neither concrete nor clear. Rather it seems to be the repetition of "national security and the maintenance of order" prescribed in the Article 37(2) of the Constitution and "public morals and social ethics" in the Article 21(4) of the Constitution. The Instant Provision, unclear and abstract, therefore, becomes nothing more than rewriting of the constitutional provisions which prescribes minimum conditions to restrict basic rights and the limitation of the constitutional freedom of speech and the press. We find that it simply fails to elaborate a concrete standard to constitute the elements of a crime.

Because "the public interest" is such an abstract concept, whether a certain expression violates the public interest drastically varies depending on individual's value system and ethical standard. While there exist certain interests clearly perceived to be the public interests by ordinary people, there remain certain interests in a gray area where the constitution of the public interests may be different depending on who judges it. It is true even in case where legal professionals judge it. Therefore, we do not think the meaning of the public interest can be fixed by the legal professionals' customary work of interpretation of law.

Furthermore, in the current pluralistic and value subjective society, the public interest at issue is not monolithic when a certain act becomes an issue. The act at issue may be beneficial to one public interest while being harmful to the other public interests. Therefore, we have to measure different public interests in order to find an act harmful to public interest. Yet, this work does not always lead to a clear cut result.

After all, we find the Instant Provision does not notify ordinary citizens of what purpose of communication, among 'permitted communications,' is prohibited. Although the vague prediction is not impossible, it, even if possible, still yields to ample subjectivity.



(C) It is true that the abstract concept may be needed for legislative work and the use of the concept, "the public interest" cannot be always impermissible. Such a concept may be permitted depending on legislative goal, legal relation and the nature of act at issue and other related legal norms. Yet, we find the Instant Provision does not satisfy the rule of clarity applied to the freedom of expression and the rule of clarity embedded in the principle of nulla poena sine lege because it restricts and punishes expression based on undetermined concept of "public interest" as the element of a crime even if we see the potential harm inherent in 'false communication' and the legislative goal of the Electric Telecommunication Act to promote efficient management and development of electric telecommunication.

(D) Therefore, the Instant Provision is against the Constitution by violating the rule of clarity.

#### 4. Conclusion

The Instant Provision is unconstitutional.

5. Concurring Opinion of Justice Cho, Dae-Hyen, Justice Kim, Hee-Ok, Justice Kim Jong-Dae, Justice Song, Doo-Hwan on the Issue of Violation of the Rule of Clarity with Respect to 'False Communication'.

We not only find that 'intent to harm the public interest' violates the rule of clarity in the principle of nulla poena sine lege but also find that 'false communication' does as well.

#### A. Legislative purpose of the Instant Provision

The legislative purpose of the Instant Provision is to regulate 'communication under illegally used other's name'(hereinafter, 'communication with false pretense') not to punish 'dissemination of false information through communication facility.'

As discussed in the majority opinion, the almost same provision with the Instant Provision has remained intact since the Electric Telecommunication Act was enacted on December 30, 1961. When this kind of provision was enacted, the communication facility was nothing more than telephone and telegram. Thus, there was no need to regulate the dissemination of false information by telephone and telegram.

Further, the legislative purpose of the former Electric Telecommunication Act was 'to promote public welfare by warranting the equal use of the electric telecommunication facility and the reasonable assignment of maintenance work.' The legislative purpose of the former Electric Telecommunication Act (the one before revised by Act No.9708 on May 22, 2009) was 'to promote public welfare by efficiently maintaining electric telecommunication and facilitating development with the basic rule on electric telecommunication.' It was further for the promotion of electric telecommunication technology (chapter 2); electric telecommunication facility (chapter 3); maintenance of electric telecommunication device (chapter 4); and the management of communication failure (chapter 5(2)). The law regulated the technological issues such as the standard, maintenance and management of communication facilities. Therefore, it is clear that the legislative purpose of the Instant Provision was to regulate 'communication with false pretense.' Further, it is the deviation from legislative purpose and the systematic interpretation of law to interpret the Instant Provision as the regulation of substantive 'contents' of a communication.

It should be noted that, in criminal law, the punishment of falsity in writing is limited to few exceptional cases such as writing false medical report and false government document. Therefore, it is not compatible with the

legal structure to punish, in addition to 'false pretense,' 'false information' based on the reason that the false communication is through electric telecommunication device.

#### B. Whether the Instant Provision violates the rule of clarity

Since it was enacted forty years ago, the Instant Provision has hardly been quoted. Yet, the issue on the meaning of 'false communication' arises as it is recently quoted in many cases.

'Falsity' means 'not right' or 'not true.' Since it may imply the falsity in both contents and form, its meaning should be clarified before it becomes an element of a crime. For example, the act of defamation is defaming someone by 'indicating false information' not defaming someone with 'falsity.' Likewise, in the crime involving document, 'falsity' is raised to designate the falsity in contents while 'forgery' to designate falsity in form and name. These distinctions are set to satisfy the rule of clarity.

Yet, the Instant Provision opens a door to the broad interpretation and the application of a law because it fails to materialize the legislative purpose in its plain language and in the legal structure with other related provisions.

Such ambiguity may be cured by case laws accumulated by court's organized and reasonable interpretation of law from the perspective of historical background. Yet, even if so, this Instant Provision inherently casts the danger of wrong interpretation far from normal and predictable interpretation because, it, having not been quoted for such a long time, is vulnerable to an irrational interpretation, which in turn, becomes the standard of interpretation. This inherent problem primarily owes to the abstract nature of the word, "false communication."

In conclusion, we find the Instant Provision not compliant with the rule of clarity in the principle of *nulla poena sine lege* because its latent ambiguity, without accumulated precedents, creates confusion to citizens in terms of what is prohibited and also opens the door to court's arbitrary interpretation.

6. Concurring Opinion of Justice Lee, Kang-Kook, Justice Lee, Kong-Hyun, Justice Cho, Dae-Hyen, Justice Kim, Jong-Dae, Justice Song, Doo-Hwan on the Issue of Violation of the Rule against Excessive Restriction.

We find that the Instant Provision unconstitutional due to its ambiguity as well as excessive restriction by infringing upon the freedom of expression.

#### A. The expression of 'false information' and the scope of protection in the freedom of expression

(1)The Instant Provision punishes one who makes false communication through electric telecommunication facility with the intent to harm the public interest. Here, the issue arises on whether 'the expression of false information' is protected under the freedom of expression since the petitioners were accused based on the court's interpretation of "false communication" to be "communication with false information."

(2)'False information' is not always a clear concept. In one's expression, it is highly difficult to distinguish 'opinion' from 'fact.' It is also difficult to distinguish 'truth' and 'lies.' In some cases, what is perceived as a lie at the present moment may become truth in the future. As such, it brings many difficult tasks to discern 'expression of false information.'

Furthermore, even if we find an expression makes a clear case of falsity, we cannot definitely conclude that such an expression always infringes upon others' pride, rights and public ethics deterring the promotion of citizens' rights.

Among various expressions of false information, some may be the expressions causing gross harm without cure. Yet, there still remains an issue whether such expressions remain out of the scope of protection under the constitutional freedom of expression and the press and becomes subject to state's intervention. This issue cannot be resolved without weighing the freedom of expression as constitutional basic rights. Although the Article 21(4) of the Constitution proclaims that 'neither speech nor the press shall violate the honor or rights of other persons nor undermine public morals or social ethics,' it enumerates the condition of the restriction of the freedom of speech and the press as well as emphasizes the duty and responsibility in the freedom of speech and the press. However, it should not be construed such that it sets the scope of protection in constitutional freedom of expression (21-1(B) KCCR 545, 559-560, 2006Hun-Ba109 May 28, 2009).

In other words, we cannot exclude a certain expression from the protection of the freedom of expression because it contains certain contents and the 'expression of false information' is against the social ethics to some extent. Rather, we find that even the 'expression of false information' belongs to the scope of protection under the freedom of speech and the press as set in the Article 21 of the Constitution and yet it may be restricted for the purpose of national security, public order and public welfare as prescribed in the Article 37(2) of the Constitution.

(3) In conclusion, "false communication" of the Instant Provision remains within the scope of protection of the freedom of speech and the press under the Article 21 of the Constitution and therefore should be governed by the constitutional limitation as a restrictive legislation on the expression of the freedom.

#### B. Whether the rule against excessive restriction is violated

(1) If the freedom of expression is regulated by an unclear norm, it will be infringed by the excessive restriction which ends up regulating even constitutionally protected expressions. If then, it will violate the rule against excessive restriction. Likewise, if the contents of expression are extensively regulated based on the suspicion of harmfulness, it will result in violating the freedom of expression (14-1 KCCR 616, 628-630, 99Hun-Ma480, June 27, 2002).

The Instant Provision, by purporting to regulate false communication with the 'intent to harm public interest,' violates the rule against excessive restriction because it, due to its ambiguous, abstract and overbroad nature, ends up regulating the expressions which should not be regulated.

(2) Once people receive false communication, they are able to suspect the truthfulness of the matter and to verify it. Further, they are able to collect information in various channels and simultaneously raise objections to specific information. We do not believe that above mentioned possibilities will not be feasible due to the special nature of 'communication,' that is, anonymity and indiscriminative dissemination. Further, we do not believe that expression of false information will obstruct citizens to acquire right information; will encourage crimes; and will cause social disturbance.

Meanwhile, if there arises a debate resulting from the expression of false information, it will draw the public's attention to the specific information and facilitate participation. Therefore, the false information does not necessarily harm public interest and the development of democracy. Even if one expresses the false

information with the intent to harm the public, one's act does not necessarily create social harm if the expressed contents are such a personal matter that it does not influence the public interest or if the matter of truthfulness of the information is not the public's interest.

As such, we suspect the necessity of state's interference when the state prohibits and punishes false communication in a monatomic and guardianship manner with such an ambiguous and subjective element as 'intent to harm public interest' even if false communication does not result in societal harm per se. A certain expression, the worthiness of information, the harmfulness of the information should be measured by competitive mechanism of individual's idea, opinion and the civil society's self-corrective function not by a state (10-1 KCCR 327, 339-340, 95Hun-Ka16, April 30, 1998; 14-1 KCCR 616, 631-632, 99Hun-Ma480, June 27, 2002). Further, we do not find any legislation in the world which penalizes the dissemination of false information itself.

(3) If false communication poses obviously substantial danger to legal interest, the regulative legislation should clearly enumerate the danger in details. If an act's danger to legal interest is not clear on its face, then the law should preclude the causation leading to the infringement.

(4) We do not find that the Instant Provision restricts a small amount of private interest compared to purported public interest. It is because the Instant Provision discourages people to give up their expressions with the anticipation that they may be subject to criminal penalty as they are not sure whether their expressions will violate the law. It will deter the expression of those who are not sure their expressions violate the law when they seek the truth against the established fact and perspective. If people refrain from expressing their opinion in fear of punishment, then the freedom of expression is infringed.

(5) In conclusion, the Instant Provision infringes the freedom of expression by violating the rule against excessive restriction and therefore is against the Constitution.

#### 7. Dissenting Opinion of Justice Lee, Dong-Heub, Justice Mok, Young-Joon

We find the Instant Provision neither violates the rule of clarity nor the rule against excessive restriction. Thus, we do not find the Instant Provision infringes the freedom of expression.

##### A. Whether the Instant Provision violates the rule of clarity

###### (1) The rule of clarity in the principle of nulla poena sine lege

Under the principle of nulla poena sine lege, people should anticipate what act is regulated by law and what the punishment is so that they are able to decide to act. Unless law is not clear, people may not anticipate whether their acts are permitted. If then, human rights are not warranted. Such principle of clarity is even more seriously required in law regulating penalties.

Even if the elements of penalty provisions is required to be clear, it does not simply meant that lawmakers should elaborate all the elements. Although the elements of penalty provisions are rather overbroad by calling for court's possible supplementary interpretation, the law is not necessarily against constitution principle of clarity in penalty provisions for that reason only. As far as a law sufficiently explains to ordinary person with common legal sentiment about who are regulated by the law and what kind of acts are prohibited in details, it does not violate the principle of nulla poena sine lege. Otherwise, the elements of penalty provisions will be too concrete and standardized to meet ever changing various social relations. This

has been this Court's precedent as well (10-2 KCCR 159, 96Hun-Ba35, July 16, 1998; 13-1 KCCR 1233, 99 Hun-Ba 31, June 28, 2001).

Therefore, it is unavoidable that a penalty provision includes a certain amount of general and common languages. The issue of the rule of clarity should be decided by finding whether a law may be reasonably interpreted in relation with its legislative purpose and other provision in the law (8-2 KCCR 785, 796, 93Hun-Ba65, December 26, 1996; 15-1 KCCR 351, 356-358, 2002Hun-Ka8, April 24, 2003).

## (2) The Instant Provision

(A)As the Instant Provision penalizes "one who does false communication through electric telecommunication facility with the intent to harm public interest," we have to review "intent to harm public interest" as an element of a specific intent crime.

1)The Instant Provision regulates the specific intent crime. In addition to the general intent, it requires additional "intent to harm public interest." Here, we have to review whether the rule of clarity in the principle of *nulla poena sine lege* is strictly upheld on the issue of the requirement of 'intent.'

Once the causation is found evident, the element of specific intent reduces the scope of elements and thus becomes distinguishable from the general intent. In this case, the Instant Provision is applicable to extensive areas of acts although the meaning of "false communication" is clear as discussed in the following (B) section. However, once the element of "intent to harm public interest" as a specific intent is added, the applicable areas of acts are drastically reduced.

Given this, we do not believe that the element of specific intent in the Instant Provision does not require such high level of clarity as the element of general intent.

Additionally, we do not agree with the majority opinion when they propose that the element of specific intent should be reviewed under the same standard with the element of general intent. Here, they fail to consider whether the element of specific intent restricts the scope of punishable acts or whether it constitutes the aggravation of a crime.

2) Theoretically, 'public interest' is defined in various ways including: 1) the quantitative sum of individual's interest; 2) common interest of members of a political community; or 3) reflection of the highest moral principle and value system. Yet, legally, 'public interest' is something different from individual's interest because it represents 'the interest of all or the majority of citizens who live in Korea and the interest of a state composed of those citizens.' This kind of public interest excludes 'the interest of a specific social group and its members.' In many law, this concept of public interest has been manifested. It is often found in state's action against individual's interest such as the object of administrative support and protection; and the basis of restriction of a certain act (for example, public health act, article 9(2)).

3) On the other hand, 'intent to harm' the public interest is not limited to the case where intent is only for harming the public interest only. It also includes case where the major intent of an act is for harming the public interest. We believe this should be the reasonable interpretation reflecting the legislative intent to reduce the scope of an element of the crime. We believe that lawmakers did not attempt to regulate even slightly false communication which might harm the public interest in a large sense. Rather, they must have attempted to regulate the false communication which intends to harm our society's essential public interest.

Further, the presence of such intent should be judged by considering the person's social status, human relation, motive, the manner of the act, the contents of the act, the victim's character and the social circumstances during the commission of act. This issue, after all, falls into the common practice of courts in applying and interpreting a law.

4) For these reasons, we cannot find that ordinary citizens with common sense and legal sentiment have difficulty to predict the meaning of 'the intent to harm the public interest' because the abstract nature inherent in 'the public interest' may be supplemented by judge's common practice of interpretation of law under the circumstances where the concept of 'public interest' is found in our legislations on numerous occasions.

(B) Next, we review "false communication"

1) Generally, "falsity" means something not true or a lie while "false communication" includes both the communication with false contents and the communication with false pretense.

The majority of Japanese scholars also agree with this interpretation as they have the similar provision with our Electric Telecommunication Act, Article 47(2). The Japanese Transmission Act, Article 106(1) prescribes that anybody who transmits false communication through radio communication facility or communication facilities defined in the Article 10(1)(1) with intent to benefit oneself or others or to harm others will be punished with the maximum three years of incarceration or maximum 500,000 yen of fine.

2) 'Falsity' is common language in criminal penalty provisions. It is found in the False Security Act, Article 216; the False Governmental Document Act, Article 233; and the False Medical Document Act, Article 227.

It is a generally accepted theory that 'falsity' implies 'false contents' only. However, it should be noted that the reason is because criminal law regulates the false pretense with the concept of 'forgery' and 'fraud' separately not because the concept of 'falsity' automatically excludes the concept of false pretense.

Under this review, we believe that "false communication" in the Instant Provision cannot exclude 'communication with false information' and further, in practice, the Instant Provision generally applies to 'communication with false information.' Also, in the Korean academic circle, the debate surrounding the Instant Provision is premised by the proposition that 'false communication' includes 'communication with false information.'

3) Three Justices' opinion on the violation of the rule of clarity is based on the assumption that the Instant Provision is originally intended to regulate 'the communication with false pretense.' Such an assumption seriously limits the meaning of legal provision and therefore should be supported by clear legislative purpose and systematic interpretation of the law. Yet, absent historical documents on concrete legislative purpose on the Instant Provision, we show no basis to support such an assumption especially when we find that the former Electric Telecommunication Act's regulation of contents of communication is not against the legislative goal and legal structures by considering the special nature of powerful and quick dissemination through 'electric telecommunication facility.' Therefore, we disagree with three Justices' argument that the Instant Provision has lost its true meaning by different interpretation and application deviated from its original legislative purpose.

4) 'False information' is something incompatible with the truth and its truthfulness can be verified in an objective manner. Therefore it should be distinguishable from 'opinion' and 'suggestion.' Although, in reality, it is not easy to determine whether an expression is the expression of fact or that of abstract decision, the "indication of false information" in criminal law context can be judged by considering the common meaning and the use of the language; probability of provability; and the linguistic and social context where the language was used (Supreme Court, 97 Do 4757, March 24, 1998). When the main idea of false information complies with objective truth, the information may not be found false information even if other minor details of the information are different from the truth and even if there are some exaggeration (The Supreme Court, February 25, 2000, Sungo 99 Do 757).

5) Upon systematic and supplementary interpretation of the Instant Provision, we find the Instant Provision is not a latently ambiguous concept which makes it difficult for ordinary people with reasonable sense and common legal sentiments to know what is prohibited and thus leaves a door to arbitrary interpretation and enforcement of law. Instead, "false communication" in the Instant Provision is about something of which truthfulness can be verified. Thereby, it includes something of false contents and of false pretense.

### (3) Short-conclusion

Therefore, the Instant Provision is not against the rule of clarity in the principle of *nulla poena sine lege*.

## B. Whether the Instant Provision infringes the freedom of expression by violating the rule against excessive restriction

### (1) Standard of review

The Article 21(4) of the Constitution, as prescribed that "speech and the press shall not infringe upon others' pride, rights, public moral and social ethics," sets the constitutional limitation of the freedom of speech and the press which is protected in the Article 21(1) of the Constitution (21-1(B) KCCR 545, 571, 2006Hun-Ba109, May 28, 2009, Concurring Opinion).

Some may argue that even false information should be protected under the freedom of expression because it does not necessarily infringe upon other pride, rights, public moral and social ethics. We disagree. Theoretically, false information is not civil and political expression about idea and knowledge and, therefore, it does not have important effects toward the development of democracy and people's self revelation. Instead, it imposes the high probability of harming the public order. Therefore, in order to review the restriction of the expression of false information, we need to apply a lenient standard of the rule of the least restrictive means to find if the legislation is within the necessary scope to achieve the legislative purpose instead of the strict principle of proportionality.

### (2) The legitimacy of the legislative purpose and appropriateness of means

The Instant Provision is intended to punish those who transmit false information with the intent to harm the public interest. Given that, we find the legislative purpose of the Instant Provision is legitimate as it contributes to the development of democracy by preventing the disturbance of public morality and social ethics and the disorder of the public order.

The means are also appropriate as it prevents false communication to harm the public interest to achieve the legislative purpose especially because: 1) the expression of false information contrary to objective truth

hinders receivers to build thoughtful opinions and; 2) the transmission through electric telecommunication facilities is too quick and powerful to reverse the damages.

(3) Rule of the least restrictive means

(A)The issue of whether state should regulate and penalize a certain act for its illegality and criminality depends on time and place under human relation and societal relation. After all, this issue will be resolved under the historical context of a society and the member's consciousness. Basically, it belongs to legislative freedom because it is the task bestowed to lawmakers (See 13-2 KCCR 480, 486, 2000 Hun-Ba 60, October 25, 2001). Therefore, now we have to review whether the Instant Provision to restrict the freedom of expression resides within the necessary scope to achieve legislative purpose stated above.

(B)It would be ideal that, as five Justices expressed, citizens' mature consciousness and constructive discussion should detect the falsity when there is an issue of false communication. However, in the modern world, it is practically impossible to verify the original source of information because the speed and coverage of transmission are amazingly fast and large owing to the developed technology. Furthermore, variability and complexity of information makes it practically difficult to detect the falsity by discussion through communication and, even if possible, it takes enormous amounts of time which creates serious social chaos and irreversible public damages.

The electric telecommunication show several features such as: 1) the severe ramification from the dissemination of false information, 2) difficulty to correct false information by communication users in a swift manner and; 3) the high social expense for lengthy discussion surrounding false information. Give these features, we believe that, to a certain degree, a stricter restriction should apply to the palpably false information.

(C)The Instant Provision does not prohibit and punish all false information through electric telecommunication facilities. Instead, it limits its applicability within the element of specific intent to harm the public interest. In other words, the Instant Provision punishes only when an act of transmission of false information through electric telecommunication facility is committed with the intent to 'harm the public interest' (based on this reason, the petitioner Park, o Sung was found not guilty after Seoul Central District Court found there was no specific intent to harm the public interest).

The fact that we find no legislation and case law in other countries cannot be the rationale to review the constitutionality of the Instant Provision. Contrarily, the Constitutional Court of Germany found that the act to deliver 'confirmed false information' intentionally is not within the scope of protection under the 'expression of opinion and the freedom of delivery' in the Article 5(1) of the German Basic Law.

(D)As the 'Act on the Promotion of Electric Telecommunication and Data Protection' penalizes anyone who 'defames others by disseminating untrue facts through electric telecommunication facility with the intent to defame others' (Article 70(2)), this provision is in the same line with the Instant Provision except that the protected legal interest is 'individual's fame and human right' and the specific intent is 'the intent to defame others'.

(E)Therefore, the Instant Provision does not violate the rule of the least restrictive means.

(4) Balance of interest



As discussed above, the restricted basic rights is the freedom to disseminate palpably false information both from an objective and a subjective perspective with the intent to harm the public interest while the public interest to be achieved by the Instant Provision is highly important. Since there is no gross imbalance between the protected public interest by the Instant Provision and the restricted basic right, we find that the Instant Provision does not violate the balance of interest.

(5) Short-conclusion

We do not find that the Instant Provision is against the freedom of expression by violating the rule against excessive restriction.

C. Whether the Instant Provision violates the right to equality

Petitioners argue that the Instant Provision discriminates the false communication through electric telecommunication facility from that through written publication and therefore violate the petitioners' right to equality.

We disagree. The false communication through electric telecommunication facility should be differentiated from written publication because it is easily accessible by anybody regardless of recipient's age, sex and social characters with more rapid speed and powerful influence.

D.Short-conclusion

The Instant Provision is not against the Constitution because it neither violates the rule of clarity nor infringes petitioners' freedom of expression by violating the rule against excessive restriction.

Justice Lee Kang-kook (Presiding Justice), Lee Kong-hyun, Cho Dae-hyen, Kim Hee-ok, Kim Jong-dae, Min Hyeong-ki, Lee Dong-heub, Mok Young-joon, Song Doo-hwan