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A Study on the Improvement for Problems of ICT-related laws system in Korea

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Abstract

Korea's laws regarding ICT must follow the Void for vagueness doctrine, the Principle of forbidden general delegation, the Principle of justification of system and the Principle of balancing test in the Constitution. The Act for the Promotion and Convergence and so on of Information and Communication in the Future should be improved as follows. It is desirable to improve the part where the principle of system justification of the Constitution is problematic in relation to existing laws. It is desirable to improve the ICT's policies on industry and convergence technologies so that they are well balanced between promotion and regulation of ICT's industries. It is desirable to improve the information service policy and legislative makeup relationship between various government agencies related to ICT. It is therefore desirable to improve the institutional complement to the post-regulatory framework for the protection of users of ICT in the future. It is desirable to create a device to replace the functions of the Information Service Budget Council in the special law of ICT.

Keywords: *ICT-related legislative system, Void for vagueness doctrine, Principle of forbidden general delegation, Principle of justification of system, Principle of balancing test, Act for the Promotion and Convergence and so on of Information and Communication*

1. Introduction

Recently, the Korean government is making great efforts to boost the nation's economy by combining creative ideas and science and technology with the invention of radical electronic information and communication technologies. In other words, the Korean government has a number of laws related to ICT to increase new markets and jobs in the era of the fourth industrial revolution, and to achieve economic growth and national development through investment in high value-added industries such as IT, culture, content and service industries. However, there are some systematic problems with various legal systems related to ICT. Therefore, in this paper, I will study and present the improvement plans for these problems.

2. Constitutional provisions and means for ICT-related laws of the Korean government to be observed

First of all, if we look at the constitutional provisions that the nation's ICT-related laws should basically comply with, ICT industry accounted for 8.0% of total GDP as of 2011 and 24.5% of exports, which is responsible for 20 % of GDP growth as a driving force for our economy. As such, ICT-related laws are closely linked to the nation's economic and economic growth. Therefore, the 1 Clause of Article 119 of the Constitution, "Korea's economic order is based on respect for the economic freedom and creativity of individuals and

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businesses," are applied fundamentally to ICT-related laws. Therefore, various ICT-related laws in Korea should minimize regulatory action by various ICT-related laws only as necessary so that they can realize business activities freely and creatively as much as possible. In other words, the Korean government should reduce the excessive and unnecessary intervention and regulatory measures for ICT-related industries as much as possible, allow ICT-related businesses and markets to form themselves actively, and implement market-oriented policies that give maximum respect to the freedom and creativity of individuals and businesses.

Next, the 2 Clause of Article 119 of the Constitution stipulate that "the state can regulate and coordinate the economy to maintain the growth and stability of a balanced national economy, prevent market dominance and abuse of economic power, and democratize the economy through harmony among economic actors." and the 3 Clause of Article 123 of the Constitution states that "the state should protect and foster small and medium-sized enterprises." In accordance with these constitutional provisions, the Korean government should, in principle, implement free market economic order for the activities of companies related to ICT. And the Korean government should protect and nurture ICT-related small and medium-sized businesses from the rampant spread of large companies related to ICT and the phenomenon of extreme maldistribution of wealth by this free market economy system. In addition, the Korean government should reasonably adjust various problems of the free market economy by preventing monopolistic phenomenon in the market related to ICT, and various regulations of laws related to ICT should be implemented only to the minimum necessary to overcome these problems in order to realize the nation's social welfare or economic justice.

In the future, laws related to numerous ICTs in Korea should be formulated and revised in accordance with the ideology and principles of these constitutional provisions. Thus, laws related to ICT should be enacted to minimize involvement and regulation or interference in ICT-related entities, to reflect policies that actively help ICT-related entities cultivate their workforce, and to improve the profits of ICT-related entities through active overseas advancement in ICT-related laws.

In addition, Article 96 of the Constitution stipulates the establishment and organization of administrative departments and the scope of their duties by law. The 1 Clause of Article 2 of the Government Organization Act, a law embodying the Constitution, stipulates "The scope of tasks and installation of central administrative bodies shall be prescribed by law." In Article 5 of the Government Organization Act, an agreement-making administrative body, such as the Committee, may be established by law if it is necessary to carry out some of its subordinate affairs independently.[1] The external framework of these government organizations should be guaranteed by the democratic legitimacy of the Constitution, and its contents should be made suitable for public welfare in principle.[2]

Therefore, it is desirable for government organizations related to ICT, which are newly established or improved through laws related to ICT in Korea, to clearly specify their roles and functions in the law, to reasonably distribute roles among various government departments, and to specify matters that need to be clearly stipulated in the laws related to ICT in order to prevent inefficiency of tasks among various government departments, rather than in the lower statutes. And in Korea's ICT-related laws, the government departments responsible for ICT related tasks and the action laws on which it is based should be improved in detail to ensure that the contents of the ICT-related laws are properly matched, so that they do not violate the principles of the rule of law.[3]

3. Content of compliance with the various principles of the Constitution of laws related to ICT

Korean ICT-related laws must comply with are the Void for vagueness doctrine, the principle of forbidden general delegation, the principle of justification of system and the principle of balancing test in the Constitution. Each of these is to be examined as follows.

3.1 Content of compliance with the Void for vagueness doctrine in the Constitution of laws related to ICT

If the meaning and content of the legal provisions relating to ICT are uncertain, they cannot secure legal

stability and predictability and make arbitrary legal interpretation and enforcement of the law-enforcing bodies, infringing on the economic basic rights of the people and enterprises and ruining the market and economy regarding ICT. Thus, laws related to ICT should adhere to the void for vagueness doctrine in the Constitution. The Void for vagueness doctrine in this Constitution means that the contents of various legal provisions related to ICT, which restricts basic rights, should be clear enough for the public to know its meaning.[4]

However, the wording of the legal provisions relating to ICT is bound to use some general normative concepts to keep up with rapidly changing electronic information and communication technologies. Thus, the wording of the provisions of the law relating to ICT basically requires minimal clarity. And the provisions of the law relating to ICT can be ascertained through the supplemental value judgment of the judge, and if the interpretation of such a judge's supplementary law is not likely to be altered by the individual taste of the person interpreting the provision of the law, then it will not violate the void for vagueness doctrine of the Constitution.[5]

3.2 Content of compliance with the principle of forbidden general delegation in the Constitution of laws related to ICT

Article 40 of the Korean Constitution stipulates that "the legislative power belongs to the National Assembly," while Article 75 of the Korean Constitution stipulates that "the President may order the Presidential Decree on what is specifically delegated in the law and what is necessary to enforce the law," which provides the basis and limitation of the mandate legislation. Thus, the laws relating to ICT already specify the basic points for the content and scope to be defined in the lower legal norms, so that anyone can roughly predict what will be defined in the lower legal norms related to the ICT from the legal provisions relating to that ICT.[6] Such 'possess of predictability' shall not be determined solely by the specific provisions of the provisions of the law relating to the ICT, but by organizational and systematic summation of the provisions relating to that ICT. And in accordance with the nature of the provisions of the laws relating to the ICT, specific and individual review shall be made to determine and determine whether the principle of forbidden general delegation violate the provisions of the laws relating to that ICT.[7]

And the degree of demand for specificity and clarity of delegation in Article 75 of the Korean Constitution depends on the type and nature of the subject of the discipline. In laws that have the potential to directly restrict or infringe upon the basic rights of the people, such as the punishment law or the tax code, the need for this specificity and clarity should be further strengthened, so that the requirements and scope of delegation in those clauses are more strictly limited than in the case of general beneficial administration. In other words, if the subject of discipline in the provision varies greatly or varies from time to time, the requirements for the specificity and clarity of delegation to that provision should be interpreted in a relaxed manner.[8] The legal provisions relating to numerous ICTs are for electronic information communication technologies whose discipline is rapidly changing,[9] and therefore correspond to extremely diverse or frequently changing characteristics. Therefore, the requirements for the specificity and clarity of the delegation of legal provisions relating to ICT should be interpreted in a relaxed manner.

3.3 Content of compliance with the principle of justification of system in the Constitution of laws related to ICT

The principle of justification of system in the Constitution means that it should not be interposed or contradictory to each other in the structure or content of such legal norms or in the principles underlying those legal norms. That is to say, it is a constitutional principle that constrains the legislator so that the structure and content of the applicable legal norms do not contradict and maintain the system and balance of the laws

regulations relating to ICT. The reason why it is required among the various legal norms related to ICT to comply with the principle of system justification in the Constitution is to prohibit arbitrary legislation by the legislator to ensure trust and legal stability through clarity and predictability of the legal norms related to ICT, but generally, certain actions of public power are not unconstitutional even if they violate the principle of system justification in the Constitution. And such violations can be justified if the rules of law relating to ICT exist for public good reasons that would violate the constitution's principle of system justification. Furthermore, for violations of the constitution's principles of system justification to be justified, discretion in legislation related to ICT should be granted. This is because it is within the discretion of the legislator concerned with the original ICT as to which of the various legislative means to choose. Thus, no matter of unconstitutionality arises unless the discretion of the legislator with respect to the ICT has deviated significantly from that limit. [10]

3.4 Content of compliance with the principle of balancing test in the Constitution of laws related to ICT

The 2 Clause of Article 37 of the Constitution, provisions related to ICT, which restricts individuals' basic rights, must abide by the principle of balancing test of the Constitution. The principle of balancing test in this Constitution consists of three principles. [11]

First, according to the principle of conformity of means, the provisions of laws relating to ICT, which restricts the basic rights of individuals, are constitutionally so that the means chosen by the legislator to achieve the purposes of national security, maintenance of order or public welfare must contribute or assist in realizing the objectives of these legislation. [12] Second, the principle of minimum infringement makes it constitutional for a legislator to choose the least appropriate means of limiting the basic rights of an individual among these various suitable means if there are several means of law related to ICT to achieve national security or order maintenance or public welfare purposes. [13] Third, the principle of legal benefit balance requires that the public benefit to be greater or equal to the private benefit infringed upon by means of restricting the basic rights of the individual to the provisions of the law relating to ICT is constitutional. [14]

Therefore, if the provisions of laws relating to ICT limit the basic rights of individuals, legislation should be adopted to select the means by which the objectives of national security, maintenance of order or public welfare can be realized while minimizing the basic rights of individuals so that they do not violate the principle of balancing test of this Constitution. [15]

4. Problems and Improvement Plans of the Act for the Promotion and Convergence and so on of Information and Communication

The Act for the Promotion and Convergence and so on of Information and Communication in the Future should be improved as follows.

First, it is desirable to improve the part where the principle of system justification of the Constitution is problematic in relation to existing laws. Because the basic law of national informatization and the Act for the Promotion and Convergence and so on of Information and Communication (Hereafter decrease from below to 'the special law of ICT') are different areas of application. However, because the information and communication strategy committee is required to deliberate and decide matters concerning the promotion of national information service, there are issues where the relationship or system of these two laws is ambiguous or inconsistent. [16]

Second, various support of the special law of ICT and negative system and temporary licensing system can

expect short-term effects on the development of ICT-related enterprises. However, in the long term, the disruption of the ICT-related entities and the non-confirmed permission may lead to market confusion related to ICT. It is therefore desirable to improve the ICT's policies on industry and convergence technologies so that they are well balanced between promotion and regulation of ICT's industries. [17]

Third, there is still a problem of confusion among various government agencies related to ICT, such as the Ministry of Science and Technology, the Korea Communications Commission, and the Ministry of Public Administration and Security. Therefore, it is desirable to improve the information service policy and legislative makeup relationship between various government agencies related to ICT in the future. And while the special law of ICT constitutes a variety of promotion systems, most of them have declarative meaning or limited policy means. For example, in Article 19 of the special law of ICT, the content of support for ICT-related promising technologies, designation of services, and notice systems provides only the necessary support for commercialization, but specific details are delegated to the Presidential Decree. In other words, the promotion or support measures set by the special laws of ICT are mostly subject to the support of the budget under the provisions of the law. Therefore, for support measures not provided by the special law of ICT, it is necessary to prescribe them in individual laws related to ICT rather than in the special law of ICT, and it is desirable that the special law of ICT provides a legal basis for subsequent legal support. [18]

Fourth, The special law of ICT does not provide policies to protect users of ICT's businesses by violating the competition law, which is a post-regulatory method, or violating the competition law, which is a violation of the ICT's competition law, for new operators of ICT that have been granted temporary permission. There is a problem that may cause a gap in the protection of ICT's users. It is therefore desirable to improve the institutional complement to the post-regulatory framework for the protection of users of ICT in the future. [19]

Fifth, it is desirable to create a device to replace the functions of the Information Service Budget Council in the special law of ICT. This is because there is a problem with how to solve the problem of compilation of existing information service budget. [20]

5. Conclusion

In the future, the Korean government and legislators should improve the systematic convergence of ICT-related legal norms as a consideration for the establishment of ICT-related legal systems, advance legal norms related to Korea's ICT for overseas advancement in a global society, and improve them in the form of avoiding regulations for the continued economic development of future Korean society. And they should improve the legal norms associated with ICT so that the basic spirit of openness, neutrality, participation, sharing and autonomy can be harmoniously reflected in each legal norm so that ICT can develop in the right direction within the framework of government organizations. [21] and create an underlying environment that can induce innovation in human-centered ICT. In addition, they should prepare a legal system to improve welfare through ICT so that people can be treated as the most important values, improve the legal system necessary to build a social safety network through ICT so that people can live safely and develop a stable economy and society, enhance the ability to eliminate unnecessary duplication and adjust between legal systems for ICT promotion, and to ensure the freedom and specialization of individual areas of ICT in Korea through further development.

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