Article 11 of the Constitution guarantees the people’s freedom of speech and publication for the purposes of ensuring the free flow of opinions and giving the people the opportunities to acquire sufficient information and to attain self-fulfillment. Whether it is for profit or not, the expression of sexually explicit language and the circulation of sexually explicit material should also be subject to constitutional protection of the freedom of speech and publication. Nevertheless, the freedom of speech and publication is not an absolute right under the Constitution but, instead, should be subject to a different scope of protection and reasonable restraints based on the nature thereof. To the extent that Article 23 of the Constitution is complied with, the State may impose adequate restrictions by enacting clear and unambiguous laws.

In order to maintain sexual morality and social decency, the constitutional interpreters should, in principle, give due respect to the lawmakers in respect of the latter’s judgment on the common values held by the majority of the society where the legislative organ designs a law to regulate the subject. However, in order to implement the intent of Article 11 of the Constitution guaranteeing the people’s freedom of speech and publication, a minority cultural group’s sense of sexual morality and its cognition of social decency regarding the circulation of sexually explicit language or material, should nonetheless be protected except where it is necessary to maintain the common sexual values and mores of the majority of the society by imposing restrictions through the enactment of laws.

The distribution, broadcast, sale, and public display of obscene material or objects enabling others to read, view or hear same as provided under Article 235-I of the Criminal Code should be so interpreted as to refer to such act where any obscene material whose content includes violence, sexual abuse or bestiality but is lacking in artistic, medical or educational value is disseminated, or where no adequate protective and isolating measure is adopted before any other obscene material or object is distributed to the general public that is so sexually stimulating or gratifying from an objective standpoint that an average person will either find it not publicly presentable or find it so intolerable as to be repulsive. Likewise, the manufacture or possession of obscene material or objects with intent to distribute, broadcast or sell as provided in Paragraph II of said article merely refers to such act where any obscene material whose content includes violence, sexual abuse or bestiality but is lacking in artistic, medical or educational value is manufactured or possessed with the intent to disseminate same, or where, with the intent not to adopt adequate protective and isolating measures before disseminating to the general public any other obscene material or object that is so sexually stimulating or gratifying by objective standards that the average person will either find it not publicly presentable or find it so intolerable as to be repulsive, such material or object is manufactured or possessed. As for the provision that such acts as manufacture and possession are regarded as having the same degree of illegality as distribution, broadcast and sale in determining the requisite elements for the distribution of sexually explicit material or objects, it rightfully falls within the scope of legislative discretion. As to Paragraph III of said article, which provides that the objects and matters to which obscene words, pictures or images are affixed shall be confiscated regardless of whether they belong to the offender, the application thereof is also limited to those objects and matters to which obscene material in violation of the two aforesaid provisions is affixed. In light of the rationale of this Interpretation, the foregoing provisions do not impose excessive restrictions on or discrimination against the expression of sexually explicit language and the circulation of sexually explicit material, and, as such, are reasonable restraints on the people’s freedom of speech and publication, which is consistent with the principle of proportionality embodied in Article 23 of the Constitution. Therefore, there is no violation of the guarantee of the people’s freedom of speech and freedom of publication as provided in Article 11 of the Constitution.

Although the term “obscene” as used in the context of obscene material or objects in Article 235 of the Criminal Code is an indefinite concept of law, it should be limited to something that, by objective standards, can stimulate or satisfy a
Article 11 of the Constitution guarantees the people’s freedom of speech and publication for the purposes of ensuring the free flow of opinions and giving the people opportunities to acquire sufficient information and to attain self-fulfillment. Whether it is for profit or not, the broadcast of sexually explicit language and circulation of sexually explicit material should also be subject to the constitutional protection of freedom of speech and publication. Nevertheless, the freedom of speech and publication is not an absolute right under the Constitution but, instead, should be subject to a different scope of protection and reasonable restraints based on the nature thereof. To the extent that Article 23 of the Constitution is complied with, the State may impose adequate restrictions by enacting clear and unambiguous laws.

Men and women together in a society. The ways they express their views on sex in speech, writing and culture have their respective historical precedents and cultural differences, which existed before the Constitution and the laws were formulated and have gradually shaped the sexual ideologies and behaviors generally accepted by the majority of society and thus represent social decency by objective standards. The concept of social decency constantly changes as society develops and social customs are transformed. Since, however, it essentially embraces the sexual ideologies and behaviors generally accepted by the majority of the society, it should be up to the elected body of representatives to decide whether social decency remains a commonly accepted value of the society and thus part of the social order before it is given any adequate democratic legitimacy. If the legislative organ enacts a law for the purpose of maintaining a sense of sexual morality between men and women and also of social decency, the constitutional interpreters should, in principle, give due respect to the judgment on the common values held by the majority of the society. Nevertheless, depending on the various sexual cognitions of members of the who hear or read any sexually explicit language or material, it may generate different effects on different individuals. An individual social group’s distinctive cultural cognition, physical and mental development may give rise to a distinctive reaction to various types of sexually explicit language and materials. Therefore, in order to implement the intent of Article 11 of the Constitution in guaranteeing the people’s freedom of speech and publication, a minority cultural group’s sense of sexual morality and its cognition of social decency regarding the circulation of sexually explicit language or materials, should nonetheless be protected except where it is necessary to maintain the common sexual values and mores of the majority of the society by imposing restrictions through the enactment of laws or regulations as mandated by law.

Any depiction or publication of, or relating to, sex is considered sexually explicit language or material. Obscene language or an obscene publication is something that, by objective standards, can stimulate or satisfy a prurient interest, generate among average people a feeling of shame or distaste, thereby offending their sense of sexual morality and undermining social decency. To distinguish obscene language or an obscene publication from legitimate artistic, medical or educational language or publications, one must examine the features and aims of the respective language or publications at issue as a whole, and render a judgment according to the contemporary common values of the society.

Article 235 of the Criminal Code provides, “A person who distributes, broadcasts or sells material containing obscene language, or obscene pictures, sounds, images or other objects, or publicly displays or otherwise enables others to read, view or hear same shall be punished with imprisonment not more than two years, detention and/or a fine of not more than thirty thousand yuan.” (Paragraph I) “The foregoing punishment shall also apply to a person who manufactures or possesses the kind of material containing language, pictures, sounds, images referred to in the preceding paragraph and the objects to which they are affixed or other matters with intent to distribute, broadcast or sell same.” (Paragraph II) “The objects and matters to which the words, pictures or images referred to in the two preceding paragraphs are affixed shall be confiscated regardless of whether they belong to the offender.” (Paragraph III) Therefore, if any sexually explicit material, upon being read, viewed or heard, or any sexually explicit object upon being viewed as the case may be, can stimulate or satisfy a prurient interest by objective standards, generate among average people a feeling of shame or distaste, thereby offending their sense of sexual morality and undermining social decency, it then poses a clear danger to the equal and harmonious sexual values and mores of the society. Any act that infringes upon such common values and mores of the society is an act that violates the social order as protected by the Constitution. Thus the lawmakers have a legitimate purpose to regulate such behaviors. (See United States Code, Title 18, Part I, Chapter 71, Section 1460; see also Article 175 of the Criminal Code of Japan) Moreover, as it breaches the sexual values and mores of the society and is thus ethically culpable, it should be considered as a reasonable means to declare by way of criminal punishment that the Constitution shall safeguard the equal and harmonious sexual values and mores so as to implement the constitutional objective to preserve the social order. Furthermore, in order to protect a minority cultural group’s sense of sexual morality and its cognition of social decency regarding the circulation of sexually explicit speech or material, criminal punishment should be imposed only to the extent necessary to maintain the common sexual values and mores of the majority of the society. As such, the distribution, broadcast, sale, public display of obscene material or objects or otherwise enabling others to read, view or
hearing same as provided under Paragraph I of the aforesaid article should be so interpreted as to refer to such act where any obscene material or object whose content includes violence, sexual abuse or bestiality but is lacking in artistic, medical or educational value is disseminated, or where no adequate protective and isolating measure (e.g., no covering, warning, or limiting to places designated by law or order) is adopted before disseminating to the general public any other obscene material or object that is so sexually stimulating or gratifying from an objective standpoint that the average person will either find it not publicly presentable or find it so intolerable as to be repulsive. Likewise, the manufacture or possession of obscene material with the intent to distribute, broadcast or sell as provided in Paragraph II of said article merely refers to such act where any obscene material or object whose content includes violence, sexual abuse or bestiality but is lacking in artistic, medical or educational value is manufactured or possessed with the intent to disseminate same, or where, with the intent not to adopt adequate protective and isolating measures before disseminating to the general public any other obscene material or object that is so sexually stimulating or gratifying by objective standards that the average person will either find it not publicly presentable or find it so intolerable as to be repulsive, such material or object is manufactured or possessed. As for the provision that such acts as manufacture and possession are regarded as having the same degree of illegality as distribution, broadcast and sale in determining the requisite elements for the distribution of sexual material or objects, it rightfully falls within the scope of legislative discretion. As to Paragraph III of said article, which provides that the objects and matters to which obscene words, pictures or images are affixed shall be confiscated regardless of whether they belong to the offender, the application thereof is also limited to those objects and matters to which obscene material in violation of the two aforesaid provisions is affixed. In light of the rationale of this Interpretation, the foregoing provisions do not impose excessive restrictions on or discrimination against the expression of sexually explicit language and the circulation of sexually explicit material, and, as such, are reasonable restraints on the people’s freedom of speech and publication, which is consistent with the principle of proportionality embodied in Article 23 of the Constitution. Therefore, there is no violation of the guarantee of the people’s freedom of speech and freedom of publication as provided in Article 11 of the Constitution. As to the issue of whether any expression of sexually explicit language or circulation of sexual material is harmful to the sexual ideologies or sense of sexual morality generally accepted by the majority of the society, the answer may differ as it changes as the society develops and social customs are transformed. At any given trial, a judge should, based on the intent of this Interpretation, consider the relevant facts of the case at issue and decide whether any obscenity exists and whether or not it is punishable. Additionally, it should be pointed out that Articles 27 and 28 of the Child and Juvenile Sexual Transaction Prevention Act are special provisions in the context of Article 235 of the Criminal Code and, as such, the application of said provisions should not be affected by this Interpretation.

Where the lawmakers adopt an indefinite concept of law to seek general application of the norm, there should be no violation of the principle of clarity and definiteness of law so long as the meaning of the term is not incomprehensible to the general public and the relevant facts of a given case connoted by the term are not incomprehensible to those who are subject to regulation after the legislative purposes and the regulatory legal system as a whole have been considered, which may be made clear through judicial review. This Court has consistently elaborated on the foregoing in its earlier interpretations, including J.Y. Interpretations Nos. 432, 521, 594 and 602. Thus, although the term “obscene” as used in the context of obscene material or objects in Article 235 of the Criminal Code is an indefinite concept of law, it should be limited to something that, by objective standards, can stimulate or satisfy a prurient interest, whose contents are associated with the portrayal and discussion of sexual organs, sexual behaviors and sexual cultures, and that may generate among average people a feeling of shame or distaste, thereby offending their sense of sexual morality and undermining social decency (See J.Y. Interpretation No. 407). Since the meaning of the term is not incomprehensible to the general public or to those who are subject to regulation and, as it may be made clear through judicial review, there should be no violation of the principle of clarity and definiteness of law.

*Translated by Vincent C. Kuan.

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Opinion
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Chinese only

Interpretation