

J. Y. Interpretation No.407 (July 5, 1996) *

ISSUE: Is the directive issued by the Government Information Office setting up certain specific criteria based upon Article 32, Subparagraph 3, of the Publication Act for defining the offenses of obscenity so stipulated by Article 235 of the Criminal Code in conflict with the spirit and intent of the constitutional protection of free speech?

RELEVANT LAWS:

Articles 11 and 80 of the Constitution (憲法第十一條、第八十條) ; Article 235 of the Criminal Code (刑法第二百三十五條) ; Articles 7, 32, Subparagraph 3, 37, 39 and 40 of the Publication Act (出版法第七條、第三十二條第三款、第三十七條、第三十九條、第四十條) ; Article 5, Paragraph 1, Subparagraph 2, of the Constitutional Interpretation Procedure Act (司法院大法官審理案件法第五條第一項第二款) .

KEYWORDS:

obscenity (猥褻) , obscene publications (猥褻出版品) , freedom of press (新聞自由) , freedom of publication (出版自由) , freedom of speech (言論自由) .**

HOLDING: For the purpose of implementing the rule of certain laws, an

解釋文：主管機關基於職權因執行特定法律之規定，得為必要之釋

* Translated by Nigel N.T. Li.

** Contents within frame, not part of the original text, are added for reference purpose only.

agency may issue interpretive rulings, so as to provide a necessary basis for future action by the same agency or its subordinate agencies. The letter ruling at issue, (81) Chiang-Ban-Tze-02275 (February 10, 1992) is considered constitutional, as it exemplifies a reading of the prohibitive provision of Article 32, Subparagraph 3, of the Publication Act in the context of determining whether a publication would, in its content, be considered in contravention of Article 235 of the Criminal Code which prescribes the offenses of obscenity. The letter ruling containing specific requirements for discerning obscene materials, including the requirement of whether or not they appeal to prurient interests, does not simply apply to nor thereby outlaw all written or pictorial publications under challenge; it therefore conforms to the referenced purpose of the Publication Act and is not in conflict with the Constitution. Obscene publications are those publications that, by objective standards, can stimulate or satisfy a prurient interest, generate among common people a feeling of shame or distaste, thereby offending their sense of morality, and un-

示，以供本機關或下級機關所屬公務員行使職權時之依據。行政院新聞局中華民國八十一年二月十日（八一）強版字第○二二七五號函係就出版品記載內容觸犯刑法第二百三十五條猥褻罪而違反出版法第三十二條第三款之禁止規定，所為例示性解釋，並附有足以引起性慾等特定條件，而非單純刊登文字、圖畫即屬相當，符合上開出版法規定之意旨，與憲法尚無牴觸。惟猥褻出版品，乃指一切在客觀上，足以刺激或滿足性慾，並引起普通一般人羞恥或厭惡感而侵害性的道德感情，有礙於社會風化之出版品而言。猥褻出版品與藝術性、醫學性、教育性等出版品之區別，應就出版品整體之特性及其目的而為觀察，並依當時之社會一般觀念定之。又有關風化之觀念，常隨社會發展、風俗變異而有所不同，主管機關所為釋示，自不能一成不變，應基於尊重憲法保障人民言論出版自由之本旨，兼顧善良風俗及青少年身心健康之維護，隨時檢討改進。至於個別案件是否已達猥褻程度，法官於審判時應就具體案情，依其獨立確信之判斷，認定事實，適用法律，不受行政機關函釋之拘束，乃屬當然。

determine societal cultural ethics. To distinguish obscene publications from legitimate art, medical or educational publications, one must examine the features and aims of the publications at issue as a whole, and adapt them to the contemporary common values of society. In addition, cultural ethics often vary subject to social development and changing customs. Any rulings of the agency in-charge must be flexible rather than rigid, and should be improved and adjusted from time to time, in light of both the true intent of the Constitution to safeguard freedom of speech and press, and the government's interest in maintaining a moral social fabric and the welfare of children and youth. As to determining whether in any individual cases the definition of obscenity has been met, it goes without saying that the judge shall make his decision in light of concrete factual situations, pursuant to his independent judgment, in both fact-finding and law application, without being bound by the interpretive ruling of the executive branch.

REASONING: That the

解釋理由書：法官依據法律

judges shall, in accordance with law, try cases independently is set forth in Article 80 of the Constitution. The judges, when trying cases, are not bound by interpretive rulings of law made by various administrative agencies based upon their respective authorities. However, if a judge applies a ruling to a case, the parties to the case may in turn petition for this Yuan's interpretation pursuant to Article 5, Paragraph 1, Subparagraph 2, of the Constitutional Interpretation Procedure Act. The final and binding judgment in the case at issue relies on the letter ruling of the Government Information Office, Executive Yuan, (81) Chiang-Ban-Tze-02275, as the basis for its fact-finding. The applicant specifically challenges the letter as being constitutionally questionable, and as stated above, we shall take the case for review.

Freedom of the press is one of the foundations of constitutional democracy. Publications are an important medium in which people can express their thoughts in writing, through which public opinion may be reflected, democracy strength-

獨立審判，憲法第八十條設有明文。各機關依其職掌就有關法規為釋示之行政命令，法官於審判案件時，並不受其拘束。惟如經法官於裁判上引用者，當事人即得依司法院大法官審理案件法第五條第一項第二款規定聲請解釋，業經本院釋字第二一六號解釋闡釋在案。本件確定終局判決係以行政院新聞局（八一）強版字第○二二七五號函為其認定事實之論據，經聲請人具體指陳上開函件有牴觸憲法之疑義，依上說明，應予受理。

出版自由為民主憲政之基礎，出版品係人民表達思想與言論之重要媒介，可藉以反映公意，強化民主，啟迪新知，促進文化、道德、經濟等各方面之發展，為憲法第十一條所保障。惟出版品無遠弗屆，對社會具有廣大而深遠

ened, and cultural, moral, economic development nurtured, and for these reasons, are protected by Article 11 of the Constitution. However, given the vast and deep influence upon society that widely disseminated publications may bring about, anyone who enjoys the freedom of press must be self-disciplined, undertake the associated social responsibility and refrain from abusing his freedom. Therefore, anyone whose publications lower moral values and customs, jeopardize social harmony and public order may be subject to legal sanctions imposed by the state.

What laws may prescribe are often abstract norms. For the purpose of implementing the rule of certain laws, an agency may issue interpretive rulings, so as to provide a necessary basis for future action by the same agency or its subordinate agencies. The standard for judging whether a publication constitutes a crime of obscenity by instigating obscene conduct may vary because of differences in customs and ethics in various nations, but one thing in common among different nations is the governmental regulation of

之影響，故享有出版自由者，應基於自律觀念，善盡其社會責任，不得有濫用自由情事。其有藉出版品妨害善良風俗、破壞社會安寧、公共秩序等情形者，國家自得依法律予以限制。

法律所定者，多係抽象之概念，主管機關基於職權，因執行特定法律，就此抽象概念規定，得為必要之釋示，以供本機關或下級主管機關作為適用法律、認定事實及行使裁量權之基礎。出版品是否有觸犯或煽動他人觸犯猥褻罪情節，因各國風俗習慣之不同，倫理觀念之差距而異其標準，但政府管制有關猥褻出版品乃各國所共通。猥褻出版品當指一切在客觀上，足以刺激或滿足性慾，並引起普通一般人羞恥或厭惡感而侵害性的道德感情，有礙於社會風化之出版品而言。猥褻出版品與藝術性、醫

obscene publications. Obscene publications are those publications that, by objective standards, can stimulate or satisfy a prurient interest, generate among common people a feeling of shame or distaste, thereby offending their sense of sexual morality, and undermining societal cultural ethics. To distinguish obscene publications from legitimate art, medical or educational publications, one must examine the features and aims of the publications at issue as a whole, and adapt them to the contemporary common values of society.

The Government Information Office of the Executive Yuan, under Article 7 of the Publication Act, is the agency in the Central Government in charge of implementing the said Act. Having considered the social environment and customs of this nation, its issuance of the letter ruling at issue, (81) Chiang-Ban-Tze-02275 (February 10, 1992), stating that whether a publication in its content contravenes, or instigates others to contravene, the obscenity offenses prescribed in Article 32, Subparagraph 3, of the Publication Act, is

學性、教育性等出版品之區別，應就出版品整體之特性及其目的而為觀察，並依當時之社會一般觀念定之。

行政院新聞局依出版法第七條規定，為出版品中央主管機關，其斟酌我國社會情況及風俗習慣，於中華民國八十一年二月十日（八一）強版字第〇二二七五號函釋謂「出版品記載觸犯或煽動他人觸犯出版法第三十二條第三款妨害風化罪，以左列各款為衡量標準：甲、內容記載足以誘發他人性慾者。乙、強調色情行為者。丙、人體圖片刻意暴露乳部、臀部或性器官，非供學術研究之用或藝術展覽者。丁、刊登婦女裸體照片、雖未露出乳部、臀部或性器官而姿態淫蕩者。戊、雖涉及醫藥、衛

to be judged according to the following criteria:

- (1) if its content appeals to prurient interests;
- (2) if the emphasis is on sexual, prurient conduct;
- (3) if pictures of the human body intentionally reveal breasts, buttocks, or genitals, not for the purpose of academic studies or art exhibitions;
- (4) if it is a publication containing pictures of naked females, making sexually suggestive gestures, while not revealing breasts, buttocks or genitals;
- (5) if it overtly depicts sexual behavior while relating to medical, hygienic, or health matters;

is considered constitutional, as it exemplifies a reading of the prohibitive provision of Article 32, Subparagraph 3, of the Publication Act in the context of determining whether a publication would, in its content, be considered in contravention of Article 235 of the Criminal Code prescribing the offenses of obscenity, and therefore subject to the rulings set forth in Articles 37, 39, Paragraph 1, Subparagraphs

生、保健、但對性行為過分描述者」，係就出版品記載內容觸犯刑法第二百三十五條猥褻罪，違反出版法第三十二條第三款之禁止規定，應依同法第三十七條、第三十九條第一項第三款及第四十條第一項第四款處罰所為例示性解釋，並附有足以誘發、強調色情、刻意暴露、過分描述等易引起性慾等特定條件，非單純刊登文字、圖畫即屬相當，以協助出版品地方主管機關認定出版法第三十二條第三款有關刑法妨害風化罪中之猥褻罪部分之基準，函釋本身未對人民出版自由增加法律所未規定之限制，與憲法尚無牴觸。又有關風化之觀念，常隨社會發展、風俗變異而有所不同，主管機關所為釋示，自不能一成不變，應基於尊重憲法保障人民言論出版自由之本旨，兼顧善良風俗及青少年身心健康之維護，隨時檢討改進。

3 and 40, and Paragraph 1, Subparagraph 4, of the same Act. The letter ruling containing specific requirements for discerning obscene materials, including the requirements of whether or not they appeal to prurient interests with emphasis on prurient conduct, are intentionally revealing or overtly suggestive, etc., does not simply apply to nor thereby outlaw all written or pictorial publications under challenge. It helps establish the criteria for judging offenses of obscenity under Article 32 of the Publication Act and Criminal Code, by the agencies of local government, but does not create more restrictions than what the said Act has prescribed over people's freedom of publication. It therefore does not conflict with the Constitution. In addition, cultural ethics often vary subject to societal development and changing customs. Any rulings of the agency in-charge must be flexible rather than rigid, and should be improved and adjusted from time to time, in light of both the true intent of the Constitution to safeguard freedom of speech and press, and the government's interest in maintaining a social moral fabric and the welfare

of children and youth.

Administrative offenses and criminal offenses contain different constituent elements. Criminal adjudication and administrative adjudication must function differently in terms of fact-finding. To determine whether in any individual cases a certain pictorial or written publication has met the legal definition of obscenity, the judge shall make his decision in light of concrete factual situations, pursuant to his independent judgment, in both fact-finding and law application, without being bound by the interpretive ruling of the executive branch. It is to be noted here that this interpretation is made upon the referenced ruling of the Government Information Office of the Executive Yuan only, and is not dispositive on any other issues about the Publication Act.

Justice Geng Wu filed concurring opinion.

Justice Sen-Yen Sun filed dissenting opinion.

Justice Jyun-Hsiung Su filed dissenting opinion.

行政罰與刑罰之構成要件各有不同，刑事判決與行政處罰原可各自認定事實。出版品記載之圖文是否已達猥褻程度，法官於審判時應就具體案情，依其獨立確信之判斷，認定事實，適用法律，不受行政機關函釋之拘束。本件僅就行政院新聞局前開函釋而為解釋，關於出版法其他事項，不在解釋範圍之內，併此說明。

本號解釋吳大法官庚提出協同意見書；孫大法官森焱、蘇大法官俊雄分別提出不同意見書。