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**J.Y. Interpretation No. 617 (October 26, 2006)\***

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**Criminal Offence of Disseminating Obscene Material Case**

**Issue**

Is Article 235 of the Criminal Code unconstitutional?

**Holding**

[1] Article 11 of the Constitution guarantees the people's freedoms 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 of the speech and publication. To the extent that Article 23 of the Constitution is complied with, the State may impose adequate restrictions by enacting clear and unambiguous laws.

[2] In order to maintain sexual morality and social decency, the constitutional interpreters should, in principle, give due respect to the lawmakers in respect to the latter's judgment on the common values held by the majority of the society when 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 sexual group's sense of

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sexual morality and its cognition of social decency, which are embodied in 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.

[3] The distribution, broadcast, sale, and public display of obscene material or objects, or otherwise enabling others to read, view or hear the same as provided under Article 235, Paragraph 1 of the Criminal Code should be so interpreted as to refer to such act where any obscene material or objects whose content includes violence, sexual abuse, bestiality etc. 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 disseminated to the general public 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. Likewise, the manufacture or possession of obscene material or objects with the intent to distribute, broadcast or sell as provided in Paragraph 2 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 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 is manufactured or possessed, with the intent not to adopt adequate protective and isolating measures before disseminating to the general public such material or object. As for the provision that such acts as manufacture and possession, which are in themselves preparations to distribution, broadcast and sale, are regarded as having the same degree of illegality as distribution, broadcast and sale in determining the requisite elements for the dissemination of

sexual material or objects, it rightfully falls within the scope of legislative discretion. As to Paragraph 3 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 freedoms of speech and freedom of publication as provided in Article 11 of the Constitution.

[4] Although the term "obscene" as used in the context of obscene material or objects in Article 235 of the Criminal Code is an indeterminate legal concept, 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 the 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 neither incomprehensible to the general public nor unforeseeable 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 the void-for-vagueness doctrine.

## **Reasoning**

[1] 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 expression of sexually explicit language and the circulation of sexually explicit material should also be subject to the 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.

[2] Men and women live 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 developed into 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 the 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 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 and 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 sexual minority 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.

[3] 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 and 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 social conventions. The foregoing has been made clear by J.Y. Interpretation No. 407 of this Court.

[4] 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 the same shall be punished with imprisonment for not more than two years, short-term imprisonment, and/or a fine of not more than thirty thousand yuan." (Paragraph 1) "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 the intent to distribute, broadcast or sell same." (Paragraph 2) "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 3) 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, 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 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 sexual minority group’s sense of sexual morality and its cognition of social decency regarding the circulation of sexually explicit language 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 hear the same as provided under Paragraph 1 of the aforesaid article should be interpreted so 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 regulation) is adopted 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. Likewise, the manufacture or possession of obscene material with the intent to distribute, broadcast or sell as provided in Paragraph 2 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 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 is manufactured or possessed, with the intent not to adopt adequate protective and isolating measures before disseminating to the general public such material or object. As for the provision that such acts as manufacture and possession, which are in themselves preparations to distribution, broadcast and sale, are regarded as having the same degree of illegality as distribution, broadcast and sale in determining the requisite elements for the dissemination of sexual material or objects, it rightfully falls within the scope of legislative discretion. As to Paragraph 3 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 freedoms of speech and 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 sexual morality generally accepted by the majority of the society, the answer may differ 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.

[5] Where the lawmakers adopt an indeterminate legal concept to seek general application of the norm, there should be no violation of the void-for-vagueness doctrine 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 unforeseeable 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 indeterminate legal concept, 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 neither incomprehensible to the general public nor unforeseeable



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 the void-for-vagueness doctrine.

[6] Finally, with regard to the claim of petitioner LAI that the final judgment, the Taiwan High Court Criminal Judgment 94-Shang-Yi-1567 (2005), violates the constitutional safeguard of the freedom of speech and the freedom of development of the individual personality, it is not subject to constitutional review under the current legal system. This part of the petition is thus inconsistent with Article 5, Paragraph 1, Subparagraph 2 of the Constitutional Court Procedure Act and, under Paragraph 3 of said article, shall be dismissed.

### **Background Note** by Ya-Wen YANG

The two petitioners of J.Y. Interpretation No. 617 were both bookstore owners who were convicted of the offence under Article 235 of the Criminal Code (“Article 235”) and sentenced to fifty days of short-term imprisonment. One of the petitioners, HSIEH, was prosecuted for displaying, selling and possessing adult comics and novels. The other petitioner, J.J. LAI, is an LGBT+ rights activist who founded Gin Gin, the first LGBT+ bookstore in Taiwan. Gin Gin imported gay magazines from Hong Kong. The Keelung Customs Office confiscated the magazines for gay-sex contents therein. The police then raided the store, seizing several hundred copies of magazines. In both petitioners’ cases, the judges cited the test for obscenity established in J.Y. Interpretation No. 407 to determine whether the books and magazines at issue constituted obscene objects under Article 235. In both cases, protective and isolating measures (*e.g.*, plastic film seal, R-rated labels and warnings for sexually explicit contents) had been adopted before the books or magazines were displayed and sold to the general public. Yet, neither of the courts found adopting such measures a relevant defense.

HSIEH and LAI argued in the petitions that, *inter alia*, Article 235 should have been found to be void for vagueness. They believed that the provision failed to constitute the least restrictive alternative to regulate sexually explicit material, and hence violated Articles 11 and 23 of the Constitution, infringing upon the freedom of speech. LAI further contended that heightened scrutiny should be adopted in cases involving sexually explicit material relating to the LGBT+ people because the material plays a critical role in shaping their self-identity and subculture. All sexually explicit material and objects displayed and sold in Gin Gin are deliberately chosen in view of the strategic positioning of the store in the LGBT+ social movement. Displaying and selling gay magazines thus represented high-valued political speech in the context of advocacy of rights for the sexual minority group.

The Constitutional Court, importantly for the first time, explicitly recognizes that expression and circulation of sexually explicit material are protected by the freedom of speech and publication. However, the Court does not review the case with heightened scrutiny for sexual expression related to the LGBT+ community, as LAI urged. Instead, it undertakes a rational basis review regarding regulations on obscenity, following J.Y. Interpretation No. 407. It finds maintaining the mainstream idea of sexual morality and social decency, which is likely heterosexual and cisgender, a legitimate ground to regulate sexually explicit material and is ready to be deferential to the legislature's judgment in this regard. This approach is strongly criticized as inherently discriminatory against sexual minorities in the dissenting opinion of Justice Yu-Hsiu HSU.

While holding Article 235 to be a reasonable means to the legitimate interest of maintaining social order, the Constitutional Court nevertheless narrows the scope of punishable offenses under Article 235. It distinguishes obscene material into two categories: one being subject to a total ban, and the other that is publishable if adequate protective and isolating measures are

adopted before dissemination. hardcore and non-hardcore, Justice LIN Tzu-Yi, in his dissenting opinion, calls the first category “hardcore” and the second “non-hardcore.” While disseminating the former is always punishable, the latter can be disseminated without violating Article 235, provided that appropriate protective and isolating measures are taken. Accordingly, the petitioners of this Interpretation should have been exempted from the criminal responsibility of Article 235 since such measures were in place. However, the Constitutional Court’s approach to constitutionalize Article 235 with a narrower reading means that the petitioners regrettably could not enjoy the “petitioner’s bonus,” *i.e.*, access to an extraordinary judicial remedy (retrial of an already-finalized court case). The dissenting Justices HSU and LIN, on the other hand, do not find narrowing the law a desirable approach, arguing that Article 235 is vague and disproportionate and thus should be invalidated rather than constitutionalized.

J.Y. Interpretation No. 617 is the second time that the Court dealt with the issue of constitutional protection for sexual expression. The first case, J.Y. Interpretation No. 407 (issued on July 15, 1996), remains highly relevant here. The Interpretation was made in an era when censorship for publications remained in Taiwan. Article 32 of the Publication Act placed a ban on any publication that violated Article 235 of the Criminal Code. The Information Office, namely the authority in charge of the Publication Act, issued an interpretive administrative directive in 1992 (“Directive”), stipulating the criteria for obscene publications. According to the Directive, publications containing pictures of breasts, buttocks, or genitals, not for academic research or artistic exhibition, were obscene.

The petitioner, CHEN, published the Mandarin Chinese version of two sex guides containing nudity, “Making Love” and “Sensual Massage,” originally published by the UK publishers Hamlyn and DK, respectively. The Taipei City Government, however, taking exposed breasts, buttocks, or genitals to be *ipso facto* obscene according to the Directive, banned the books. CHEN sought to

overturn the ban in the court of law, but the Supreme Administrative Court ruled against him. He then filed a petition to the Constitutional Court, contending that the Directive imposed restrictions not prescribed by law, thereby violating Article 23 of the Constitution and infringing the freedom of publication enshrined in Article 11 of the Constitution.

Notice that the petitioner did not directly challenge the constitutionality of the censorship and its legal basis, Article 32 of the Publication Act. J.Y. Interpretation No. 407, therefore, does not review Article 32. It appears to not consider the censorship particularly problematic, stating “anyone who enjoys the freedom of publication must be self-disciplined, undertake the associated social responsibility and refrain from abusing the freedom.” Therefore, in spite of the constitutional safeguard of the freedom of publication, the state may regulate publications that undermine social mores, social harmony or public order, including obscene publications.

Significantly, J.Y. Interpretation No. 407 sets up the test for obscenity, arguably under the influence of the Miller test in U.S. constitutional law: “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.” As shown in J.Y. Interpretation No. 617, the test has become the prevailing standard for the legal concept of obscenity ever since, in the contexts of both constitutional and criminal law.

J.Y. Interpretation No. 407 takes the Directive to be merely illustrating examples of obscenity, rather than outlawing any text or picture involving sex or nudity. It is indicated that the Directive provided further criteria as to what could be considered as “appealing to the prurient interest,” such as sufficient to arouse [erotic desire], intentional exposure [of breasts, buttocks, or genitals], over-detailed depiction [of sexual conducts], etc. Therefore, the Directive did not

impose stricter restrictions on the freedom of publication than the Publication Act and not violate the *Gesetzesvorbehalt* principle.

The Constitutional Court, however, does reinforce the idea that the criteria of obscenity should be updated as the social mores shift, and that judges should decide independently as to whether the case at hand qualifies as obscenity. A similar dictum about the task of judges in deciding punishable obscenity can also be seen in J.Y. Interpretation No. 617. This denotes the division of labor between ordinary courts and the Constitutional Court and hints that ordinary courts have an active role to play in honoring the freedom of speech and publication. The censorship underlying the Directive was finally repealed as the Publication Act ceased to be effective on January 25, 1999.

Soon after J.Y. Interpretation No. 617, the Constitutional Court considered regulations on solicitation for prostitution in J.Y. Interpretation No. 623 (issued on January 26, 2007). Article 29 of the Child and Juvenile Sexual Transaction Prevention Act (“Article 29”) made spreading via advertisement, computer network, etc. the information which may induce a person to engage in an unlawful sexual transaction an offense punishable by imprisonment up to five years and a fine up to TWD 1,000,000. Notably, Article 29 is wide in its coverage. It punished solicitation information of any kind, for people of any age, regardless of whether there were minors involved. Also, the liability was triggered once the information was disseminated, regardless of whether a sexual transaction occurred in actuality. In situations involving only adults, the provision might appear harsh if compared with the legal consequence of adult prostitution. At the time of this case, selling sex was a petty offense incurring a penalty of short-term imprisonment up to three days, or a fine up to TWD 3,000 whereas buying sex was not punishable at all, pursuant to Article 80 of the Social Order Maintenance Act.

Five petitioners challenged Article 29 for, *inter alia*, being overbroad and

off-balance, thereby contradicting Articles 23 and 11 of the Constitution. Four of them were charged with the offense under Article 29 in various scenarios. Petitioner HSIAO (a juvenile) and KAO were arrested for posting messages allegedly seeking *enjo kōsai* (compensated dating) on a gay dating and adult site respectively. Petitioner CHIANG was arrested for being hired to attach flyers, reading “sexy babies” and a phone number, on people’s car windows. Petitioner WANG, a manager of an erotic “skincare” shop, was found liable for giving out business cards of the shop that read “passionate, romantic, pretty girls...” Finally, Judge Ming-Huang HO of the Taiwan Kaohsiung Juvenile Court filed a petition during the trial of juvenile cases. He pointed out the phenomenon that the police relied on the cyber sting operations to lure unsuspecting Internet users, many of whom were minors, into conversations about commercial sex and then made the arrests. The problematic practices, ironically, rendered minors more vulnerable before the law.

J.Y. Interpretation No. 623 categorizes solicitation for prostitution as commercial speech. Commercial speech concerning a lawful business is protected by the freedom of speech, with the proviso that the content is neither false nor misleading. Yet, since prostitution is not legal, solicitation for this unlawful business hence may be reasonably restricted to achieve the public interest. Accordingly, Article 29 is upheld as a reasonable and necessary means for the significant purpose of protecting minors from sexual exploitation, notwithstanding its extensive scope and severe consequence. The law is a reasonable means because, the Court explains, once information of solicitation is widely distributed, even if the solicitation does not pertain to or is not addressed to minors, there still exists the danger that minors may be exposed to the information and seduced into the sex business. Article 29 penalizes such endangerment of minors to eliminate the hazard of sex exploitation.

However, similar to J.Y. Interpretation 617, the Court proceeds to limit the

scope of Article 29. Referring to the legislative aim of minor protection, the Court takes Article 29 to mean that disseminating information of solicitation is not punishable if the defendant can prove that (1) the distributed information “neither contains child or juvenile sexual transaction nor is intended to induce children or juveniles to engage in sexual transaction”; and that (2) necessary precautionary measures have been taken to ensure the information is only accessible to adults. By way of this purposive restriction, the Court lessens the limiting impact that Article 29 inflicts on the freedom of speech. Nevertheless, both Justice Tzong-Li HSU and Justice Yu-Hsiu HSU criticize in their opinions dissenting in part that the narrower reading runs counter to the legislature’s intent and wrongly shifts the burden of proving one’s innocence to the defendant. Justice Tzi-Yi LIN further criticizes that Article 29 remains a vague and disproportionate means to the aim of protecting minors, despite the narrower reading of the majority opinion.

In 2015, Article 29 was later overhauled to become Article 40 of the Child and Juvenile Sexual Exploitation Prevention Act. The amended provision incorporates the restrictive legal reading of the Constitutional Court and decreases the penalty of the offense.

In short, the three cases in this vein, J.Y. Interpretations Nos. 407, 617 and 623, share commonalities in the approach of review. While it is confirmed that expression related to sex is protected by freedom of speech and publication, the Court displays reluctance to override the legislature’s judgments when obscenity and minor protection are involved. It takes the standard of rational basis review and relies on the approach of restrictive interpretation to negotiate the constitutional tension caused by the broad legislation. The tendency to constitutionalize the regulations through reading them narrowly, rather than invalidate them for being broad or vague, deprives petitioners the benefit of seeking further remedies, even though their arguments appear to be substantively

accepted by the Constitutional Court. It is yet to be observed whether the Court will take a stricter standard for sexual expression in other contexts so that the doctrine that sexual expression is constitutionally safeguarded will have real bite.