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A Brief Discussion on the Criteria for Identifying Obscene Materials

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Abstract. Research on the identification of obscene materials in China focuses on the current state of legislation, judicial practice, and potential improvements. At the legislative level, China's definition of obscene materials is governed by multiple regulatory frameworks, including criminal law, administrative regulations, and departmental rules. Criminal law establishes the core criterion of "obscenity" , while administrative regulations and departmental rules provide detailed behavioral norms and appraisal procedures, balancing the suppression of criminal activity with the protection of cultural rights.In judicial practice, however, challenges arise due to the abstract nature of key criteria such as "obscenity" and "explicit depiction of sexual conduct," leading to blurred boundaries in identification. The author analyzes the legal interests infringed upon by obscene materials and draws on the experiences of the UK, the US, and Canada, where the protection of public morality is central. These jurisdictions have developed objective assessment systems—such as the community standards and the triple standard—to determine obscenity, offering valuable insights for China's legal framework.The conclusion suggests that China's legislation should clearly define the core characteristic of "obscenity," while the judiciary should establish a dual-review mechanism combining professional appraisal with societal consensus. The assessment should be based on social harm, striking a balance between public decency and cultural prosperity.

Keywords: obscene goods, legal interest, obscenity

1. Introduction

Art is all-encompassing and unrestricted by form, requiring a sufficiently fertile soil to thrive. However, for the sake of maintaining basic social stability, the law inevitably designs certain regulations and rules to restrict the disorderly development of art, such as preventing it from becoming vulgar or even disguising itself as obscene materials. How to strike a balance between the two, that is, to maintain the vitality of the artistic environment while preserving social harmony and stability, is the issue the author intends to discuss. In this article, the author focuses on the laws and regulations in China mainly concerning criminal law that involve obscene materials, analyzes their relationships, and summarizes the criteria for judging obscene materials in China. While analyzing the laws and regulations, the author also studies the current judicial situation of obscene material identification in China to discover the problems existing in this area, analyzes the legal interests

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violated by obscene materials, and examines the criteria for judging obscene materials in foreign countries (with the development of the times, obscene materials are not limited to books but have taken on many diverse forms, making the criteria for judgment ambiguous).

2. The current legislative and judicial situation of the definition of obscene materials in China

2.1. The evolution of legal norms for the definition of obscene materials

The legal norms for the definition of obscene materials in China are mainly composed of a multi-level and multi-field rule system including laws, administrative regulations, departmental rules, judicial interpretations, and normative documents. These norms jointly clarify the legal definition of obscene materials and form a diversified regulatory pattern centered on the Criminal Law, with administrative regulations specifying industry supervision requirements, departmental rules and normative documents detailing operational procedures, and judicial interpretations unifying judicial judgment standards.

On May 20, 1955, the Central Committee issued the "Instructions on Handling Anti-Revolutionary, Obscene, and Absurd Books, Periodicals, and Pictures and on Strengthening the Management and Transformation of Private Cultural Enterprises." On January 1, 1980, China's first Criminal Law was implemented, listing the production and sale of obscene books and pictures as criminal offenses. However, neither the "Instructions" nor the 1980 Criminal Law defined obscene materials.

The earliest definition of obscene materials can be found in the "Regulations on Prohibiting Obscene Materials" issued in 1985. The first point of the "Regulations" defined obscene materials as items containing specific descriptions of sexual acts or blatant promotion of pornographic and lewd images. Subsequently, the "Provisional Regulations on the Identification of Obscene and Pornographic Publications" issued by the China Press and Publication Administration in 1988 clarified the identification standards and management framework for obscene and pornographic publications. Article 2 of the "Provisional Regulations" listed seven typical types of obscene materials. Articles 3 to 5 stipulated the methods for identifying obscene materials. In judicial practice, the identification of various obscene materials has referred to the identification standards for obscene publications.

Article 367 of the 1997 Criminal Law continued the definition of obscene materials in the above-mentioned documents and defined obscene materials at the legal level. Article 367 of the Criminal Law has three paragraphs. The first paragraph is the basic provision, which clearly defines the scope of obscene materials and explicitly states that the essential attribute of obscene materials is their obscene nature. The second and third paragraphs exclude the scope of obscene materials from the opposite direction, that is, scientific works related to human physiology and medicine are not obscene materials. Literary and artistic works with artistic value that contain pornographic content are not regarded as obscene materials.

With the rapid development of the Internet and mobile communication technologies, the forms of expression of obscene materials are no longer limited to books, fine arts, and sculptures, but have emerged in new forms such as obscene electronic information and obscene voice information. Based on this, on September 6, 2004, the "Two Highs" issued the "Interpretation on Several Issues Concerning the Application of Law in Handling Criminal Cases of Making, Replicating, Publishing, Selling, and Disseminating Obscene Electronic Information via the Internet, Mobile Communication Terminals, and Sound Information Services" (hereinafter referred to as the "Interpretation"), which defined "other obscene materials" as including video files, audio files, electronic publications,

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pictures, articles, short messages, etc. (6 types) of obscene electronic information and voice information via the Internet, mobile communication terminals, and sound information services.

From the above-mentioned legal provisions, it is not difficult to find that China mainly defines obscene materials from two aspects: 1. The content is obscene, that is, it specifically depicts sexual acts, blatantly promotes pornography, and is obscene in nature; 2. The obscene content and the carrying item are two aspects of the same thing, interdependent and inseparable.

2.2. The current judicial situation of the definition of obscene materials

In judicial practice, the identification of obscene materials is handled by specialized appraisal institutions. Appraisal institutions mainly conduct appraisals based on the "Provisional Regulations." In the case of Zhang et al. for making and disseminating obscene materials for profit, the parties organized female models to take nude photos in multiple public places and uploaded the photos to overseas websites for profit. The defense counsel mentioned that the work had received professional recognition from a university photography professor and had won awards in various photography competitions, arguing that the photographs were works of body art rather than obscene materials. However, in this case, works such as "suddenly stripping in front of a bus stop in a public place" and "stripping completely in a private residence with a male repairman present" clearly violated the common understanding of Chinese society. Especially the second work, which emphasized the "male repairman" and focused on the female stripping, its purpose of openly promoting a pornographic and lewd image is hard to deny, and it is suspected of leading ordinary people to corruption and degeneration. Therefore, the appraisal institution identified the above-mentioned photographs as obscene materials. The definition of obscene materials also requires a credible appraisal agency to guarantee it. In this case, the defense counsel appealed on the grounds that the first-instance appraisal institution did not have the appraisal qualifications, the appraiser had a conflict of interest and should have recused themselves, and the appraisal standards were chaotic. However, the appeal was rejected. The reason is that the first-instance court entrusted the appraisal group jointly formed by the Municipal Bureau Appraisal Center and the Shanghai Municipal Press and Publication Bureau to conduct the appraisal, which conformed to the regulations of the Press and Publication Administration and the Ministry of Public Security, and had the appraisal qualifications. The appraisal standards and procedures also conformed to the regulations. There is no doubt that this administrative determination has the qualification of evidence and should be reviewed by the judge in terms of form and content as the basis for judging the nature of obscene materials.

However, in the Shanghai obscene figurine case, some self-media accounts compared the obscene figurines to adult products such as silicone dolls, claiming that ordinary people would also hide the products after purchasing adult products like the buyers in the case, and the sale of adult products is legal, but the sale of obscene figurines is judged as illegal. These self-media accounts believe that the above determination is extremely unreasonable. The main reason for the controversy in this case is that the Shanghai Baoshan District Court mainly relied on the opinions of two minors they interviewed that the figurines were "shameful to display and could not be placed in public places" to prove their "obscene and pornographic" nature, rather than taking the determination result given by the public security organ as the main evidence.

From the above two cases, it can be seen that in the judicial field, the appraisal process of obscene materials is overly subjective and lacks professional guidance. The subjectivity of the appraisal will lead to situations where the court's opinions are inconsistent with the appraisal opinions of the appraisal institution, which will harm the public interest.

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2.3. Problems in the identification of obscene materials in China

2.3.1. The definition of obscene materials has flaws

Article 367, Paragraph 1 of the Criminal Law stipulates that "obscene materials as referred to in this Law mean books, periodicals, films, video tapes, audio tapes, pictures and other obscene materials that specifically depict sexual acts or openly promote pornography and lewdness." This definition has the error of tautology, defining "obscene materials" with "obscene materials", which is not beneficial to the definition of the concept and violates the principle of clarity of the Criminal Law. It is worth noting that the first paragraph explains obscene materials with pornography and lewdness. However, pornography and lewdness, like "obscene", are highly abstract. The purpose of concept definition is to explain the essence of things and clarify their scope. Explaining the concept of obscenity with abstract concepts will only make the concept of obscene materials more difficult to understand.

In daily language, obscene and pornographic are usually regarded as synonyms and can be used interchangeably. What is pornographic and what is lewdness depends on individual subjective judgment. Due to the influence of factors such as the social environment, education received, and events encountered, each person has different standards for judging whether an object is pornographic or lewd. The definition of obscene materials for the connotation of "obscene" is logically confused, the meaning is vague, and lacks operability.

2.3.2. Unclear identification standards

As mentioned above, the identification standards for obscene materials in China are found in the "Provisional Regulations on the Identification of Obscene and Pornographic Publications". The Interim Provisions seem to offer us a very detailed and standardized criterion for identification, and it elaborates on the harmfulness of obscene publications by stating that they "can lead ordinary people to corruption and degeneration." However, using the Interim Provisions as the standard for identifying obscene materials has the following problems:

First, the Interim Provisions were issued by the State Administration of Press and Publication in 1988, which is 37 years ago, and its content is somewhat outdated. The Interim Provisions are at a relatively low level, and it is unreasonable to use them as the criminal identification standard for obscene materials. For instance, in the sixth item, it regards homosexual sexual behavior as a form of sexual perversion and thus classifies it as obscene material. This is clearly inconsistent with current social values. Second, the Interim Provisions apply to "obscene and pornographic publications," and this scope is necessarily smaller than that of "obscene materials." Therefore, the identification criteria for "obscene and pornographic publications" are completely inapplicable to the identification of "obscene materials.".

3. Analysis of the legal interests involved in the definition of obscene materials and reference to foreign experience

3.1. Analysis of the legal interests involved in obscene material crimes

As the essence of a crime, the infringement of legal interests is the sole reason for a behavior to be subject to criminal punishment. Clarifying the legal interests infringed by obscene materials crimes is conducive to understanding the reasons why the law prohibits obscene materials and the standards for their identification. Obscene materials crimes are located in Chapter VI of the Criminal Law,

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"Crimes of Disrupting Social Order," which can be considered to have infringed upon the abstract social interest of social order. In judicial practice, courts also hold that obscene materials are detrimental to the physical and mental health of the public at large and seriously disrupt social order. However, the concept of social order is too abstract, and it is necessary to further explore the specific legal interests infringed by obscene materials.

3.1.1. The theory of social morality

Obscene materials, through explicit sexual descriptions or pornographic content, on the one hand, are detrimental to social morality and ethics, and may shake the consensus of social members on the privacy and ethics of sexual behavior, leading to a decline in public morality [1]. The essence of social morality is the sexual concepts and behavioral patterns generally recognized by the majority of society. If a specific social morality is determined by the majority through the people's representative body to be part of the common values of society and becomes part of social order, then the legislative body has the right to formulate laws to regulate it in order to maintain social life order.

Long-term exposure to obscene materials may cause individuals to imitate the behaviors in obscene materials and commit crimes. Obscene materials can affect their understanding of sex in the real world, viewing it as the control and possession of the subject over the object, and objectifying others [2]. This is not groundless. In long-term law enforcement, law enforcement officers often find obscene materials around sexual crime offenders. Therefore, it is believed that there is a positive correlation between obscene materials and sexual crimes. Based on this, the law needs to regulate obscene materials to protect the interests of the people and reduce their negative impact on the public, maintaining social morality.

3.1.2. The theory of the physical and mental health of teenagers and children

The state has the responsibility to ensure the physical and mental health of teenagers and children and create a good social atmosphere for them [3]. Due to the one-sided description of the pleasure brought by sex in obscene materials and the emphasis on the pursuit of sexual stimulation without showing the harm of bad sexual behavior, minors may blindly pursue the satisfaction of sexual desires and engage in sexual behavior easily. Teenagers, due to their inherent physical differences and the development of their values, are in a disadvantaged position in terms of sex. If obscene materials are allowed to distort social morality, it will pose an undeniable threat to their safety, and obscene materials may induce early sexual maturity, incorrect sexual concepts, or imitation of bad behaviors in teenagers, causing great harm to society.

3.1.3. The theory of sexual autonomy

Sexual autonomy is the right that should be enjoyed by individuals as subjects with independent personalities. The infringement of sexual autonomy means that individuals do not exercise their own sexual rights but fulfill sexual obligations in sexual behavior and relationships. The sexual subject enjoys sexual pleasure and satisfies sexual desires, while the sexual object is a tool for the sexual subject to vent desires, and their personal dignity is not respected [4].

Obscene materials infringe upon the sexual autonomy of others. Obscene materials treat people as objects, as tools to satisfy sexual desires. Sexual autonomy not only includes the right to choose whether to have sexual behavior and with whom, but also the right to choose whether to watch

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sexual behavior or sexual organs. For others, people have the freedom to accept information and the freedom not to accept it. The dissemination of obscene materials is a form of forcing others to watch or display sexual organs or sexual behavior, infringing upon the sexual autonomy of others. For example, when people use the Internet, obscene materials information may appear without the consent of the actor; when people visit bookstores, they may unexpectedly see obscene books and periodicals; when watching videos, they may unexpectedly watch obscene videos. The dissemination of these obscene materials goes against the will of the recipients.

3.2. The definition of "obscene materials" in different countries and regions

How to determine what constitutes "obscene materials" and establishing a relatively reasonable and feasible judgment standard is a major issue in the legal practice of various countries.

In the United Kingdom, the Victoria Queen v. Hickling case was the first legal standard for determining "obscene materials" [5]. The chief judge of the Queen's Court, Alexander Coburn, proposed the famous "Hickling Principle": This principle states that the determination of obscene materials should be based on the individual determination of relevant parts, whether "it has a corrupting and corrupting effect on those who are susceptible to immoral influence or those who can obtain such publications" [5]. In the "Hickling Principle" of the United Kingdom, whether there is a tendency to "corrupt and corrupt the thoughts of those who are easily influenced", the degree of influence on "the most easily influenced group" (such as teenagers), and the accessibility (whether it can be accessed by the target group) are all the basis for judging whether the involved materials are obscene.

In judicial cases in the United States, the Ross case officially determined the community standard for testing obscene materials, that is, for ordinary people, based on the contemporary social general standards, whether the overall main theme of the item caters to low taste. However, due to the differences in regional cultures in each community in the United States, this judgment standard exacerbated the confusion in the definition of obscene materials, and this lack of consensus eventually led to the emergence of the "Redrup Decision" (that is, when the five justices unanimously agreed that the relevant items should be prohibited, regardless of the respective standards they relied on, the decision on obscene cases was made through a brief court opinion), and the subsequent judgments not only had almost no guiding value for lower courts, but also failed to clarify the standards for defining obscene content and the role that the court should play in such determinations [6]. Eventually, the Miller case abandoned the national unified community standard and acknowledged regional cultural differences, and established a triple standard: whether an ordinary person, using contemporary social standards, would consider the work as a whole to be provocative; whether the work depicts or describes the applicable state law-defined sexual behavior in an obviously obscene way; whether the work as a whole lacks important literary, artistic, political or scientific value). This view returned to the initial understanding of the community standard first proposed in earlier cases by Kenally and others.

In Canada, the Supreme Court's comprehensive re-evaluation of its obscenity standards was carried out after major amendments to the national criminal law. In the Brodie v. Canada case, the court, in pursuit of the objectivity of the judgment standard, established two standards - the first is whether it exceeds the reasonable demand of serious works by overusing sexual elements, and the second is whether it conforms to the tolerance limit of contemporary Canadian society (focusing on the community standard) [7]. In the "R v Butler" case, the court attempted for the first time to integrate these tests and added a third test, that is, whether the sexual content is accompanied by the devaluation of people (especially women), causing harm to the society as a whole [8].

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Countries and regions around the world have formally defined the concept of "obscene materials" and established determination standards. Although the judgment of obscene materials is relatively subjective and judges have broad freedom for measurement. However, from the continuous changes in the determination standards of obscene materials in these countries, it can be seen that each country focuses on protecting public morality, but the emphasis is different. The United Kingdom focuses on the impact on teenagers, the United States focuses on protecting freedom of speech, and Canada focuses on whether it constitutes social harm.

4. Suggestions for determination standards of obscene materials

From the above analysis, it can be seen that the basis for punishing obscene materials is diverse, and currently each country has its own emphasis. Then the determination standard of obscene materials should be able to reflect these characteristics, rather than being arbitrary. According to Article 367 of the Criminal Law, obscene materials have two characteristics: one is having pornographic nature; the second is having no scientific or artistic value.

4.1. Indecent content

The judgment of indecency should be based on the values of the average person in society. Indecency aims to arouse people's sexual desires. Therefore, if it is impossible to arouse people's sexual desires, it cannot be regarded as indecent. In terms of form, it is specifically and blatantly depicting sexual acts, and in form, it belongs to pure pornography [4]. The fundamental purpose is to arouse people's sexual desires.

The controversial situation at this point is whether certain items can still be regarded as indecent if the objects of their sexual arousal are not the general public but specific groups, such as Danmei novels and picture albums. The answer is yes. Regardless of whether it is based on the theory of social morality, the theory of the physical and mental health of teenagers and children, or the theory of human sexual autonomy, these items all infringe upon the interests protected by the law. For example, according to the theory of social morality,Danmei novels and picture albums have undermined the concept that sex should be private, and sex should be conducted by two parties with a legitimate relationship in the traditional Chinese concept and social morality. It is reasonable to consider Danmei novels and picture albums as obscene items. Therefore, indecency only requires that the items arouse the sexual desires of a specific group.

It is worth noting that if in order to completely avoid such situations, all items involving sexual descriptions are uniformly classified as obscene items, the definition of "indecency" is too broad. It may stifle artistic creations with social critical value and may lead to an unstandardized identification procedure, resulting in judicial judgments losing credibility and being detrimental to the construction of a legal society.

4.2. No scientific or artistic value

The Criminal Law clearly stipulates that "scientific works related to human physiology and medical knowledge are not obscene items. Literary and artistic works with artistic value that contain pornographic content are not regarded as obscene items [9]. Whether a work or a piece of art has scientific or artistic value should be judged as a whole, and not just based on individual paragraphs. Otherwise, many literary and artistic works may be deemed obscene items.

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In practice, there are disputes over whether certain items are obscene items or literary and artistic works. Since the judgment of artistic value largely depends on different people's value orientations, some experts and scholars, due to their training in art and other reasons, may recognize the pornographic nature while also seeing the artistic value behind it. However, in front of most ordinary people who have not received specialized art education, they can hardly see the so-called "the depression and loneliness of young people in the noisy city" behind the work, and can only see the pornographic nature that goes against social rules in the work. Both science and art are not absolute values, and value balance still needs to be carried out in a pluralistic society. The guarantee of artistic freedom is closely related to human dignity. However, if this freedom seriously conflicts with other important principles, especially when it conflicts with human dignity, artistic freedom should be restricted. Artistic freedom is not absolute freedom. If the fundamental purpose of a work or a piece of art is to promote the pleasure of obscenity or pornography and use this as a unique "artistic" value, then this value that desecrates human dignity is obviously unacceptable. At this time, it is particularly important to determine whether an item has scientific or artistic value.

Regarding this issue, this article believes that it can be resolved by establishing a professional appraisal committee. The participation of the professional appraisal committee in the process of identifying obscene items can not only reduce the flow of obscene items into society, leading to social moral deterioration, but also avoid some excellent works being brutally suppressed due to involving pornographic content. For example, the famous pornographic novel "Jin Ping Mei" uses explicit sexual descriptions to expose the darkness of the Ming Dynasty society. Among the Ming Dynasty literati, historian Wang Shizhen had a precious edition of "Jin Ping Mei" in his collection, and Yuan Hongdao and Feng Menglong, these big names, also highly praised "Jin Ping Mei". Its literary value was praised by Lu Xun as "the same as the best works", and Chairman Mao also affirmed the literary value of "Jin Ping Mei", writing five evaluations of "Jin Ping Mei", allowing "Jin Ping Mei" to be partially decriminalized in China, and those above the ministerial level can purchase and read it. Now China has broken the tragic experience of this book being repeatedly banned since its birth, where Ding Runchang even listed it as the top "pornographic novels" in the Qing Dynasty. It has become the tragic fate of this book. Chinese ordinary people can also have the opportunity to read this timeless classic through various channels.After all, some excellent novels incorporate their understanding of the absurdity of the world into the details of sexual activities in an unobtrusive manner. Their purpose for depicting sexual behavior is not to satisfy people's primitive sexual needs, but to be a powerful tool for exposing the darkness of society, causing a spiritual impact on readers and thereby triggering their deep reflection. In contrast, the situation in the Japanese "Chattley Incident" is that merely because the book contains extensive descriptions of sexual acts, yet in this book, this description is the best manifestation of the unified theme of sexual love in the book, and the avoidance of some pornographic descriptions not only hinders readers' understanding of it, reduces its literary quality and the depth of its thought, but also makes the attempt to cover up even more obvious. These artistic creations need to deconstruct social contradictions through these sexual descriptions, reflect the complexity of human nature, and thereby achieve the purpose of inspiring the audience to think.

5. Conclusion

The boundary between obscene materials and artworks does not have an absolutely clear demarcation. Instead, it requires a comprehensive consideration of the content purpose, social value, and public impact in specific cases to achieve a dynamic balance. China should clearly define the core characteristics of "erotic content" in legislation, establish a dual review mechanism of

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professional assessment and social consensus in judicial practice, and always take "social harmfulness" as the ultimate judgment criterion. This will effectively combat genuine obscene materials while preserving sufficient freedom for artistic creation, ultimately achieving the legal goals of "maintaining public order and good morals" and "promoting cultural prosperity".

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