

Review of the Control of Obscene and Indecent

Articles Ordinance

Focus Group Summary Report – Sexual Minorities

Date: 6 Jan, 200
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Location: Room 229, 2/F, Murray Building, Garden Road, Central, Hong Kong

Attendants:

Mr. Shum Tsz-kit Rainbow of Hong Kong
Mr. Chan Nok-yi Rainbow Action
Mr Wayne Rainbow Action
Raymond Lai Rainbow Action
Wai-wai Women Coalition of HKSAR
Mr. To Chung Chi Heng Foundation
Mr. Joseph, Cho Hong Kong Ten Percent Club
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Mr. Chan Phenomenon Speculation
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- I. A briefing on the consultation documents of the Review of the Control of Obscene and Indecent Articles Ordinance (COIAO) by Mr. Gregory So, Under Secretary for Commerce & Economic Development of HKSAR. He also invited all attendants to express their opinions.

II. Thirteen attendants shared general comments towards COIAO:

Invitation to consultation

- Attendant believed that the sexual minorities were hit the hardest by COIAO. The government should have invited them to express opinions at the early stage of consultation, and handled the harm suffered by the homosexual group and sexual minorities in a responsible way;
- Attendant pointed out that when inviting people for consultation, the bureau should take reference to the list of Home Affairs Bureau, which is more comprehensive and include organizations that are more active and have been communicating with the government

Attitude of the Papers

- Certain information in the society tends to be treated discriminatorily by the OAT (e.g. homosexuality, sex workers, sex education, information of sexually transmitted disease, transsexual organization, transsexual operation and transsexual identities etc.) yet there isn't a specific chapter in the consultation paper to discuss about it, it is also uncertain whether there will be a mechanism in the upcoming legal review to ensure that such information will not be treated discriminatorily. Those information are not commonly accepted by the society and faces difficulty in publication;
- A very strong reason is required in order to ban the distribution of certain articles, e.g. promotion or provocation of hatred, encourage extreme behavior etc. Those items are already covered by ordinance on criminal offenses.
- It is suggested that in the next round of consultation, different organizations should get together and discuss about the definition of child protection; should children be able to absorb diverse information in order to distinguish between right and wrong, or should information be strictly prohibited? Some may say that restricting information will only stimulate greater desire. For example, there must first be a boundary before it is crossed. When the boundary disappears, we can go back to some meaningful social discussions, e.g. how everybody

comment about various types of information. This is the appropriate form of public education. The increase of penalty and expansion of the system is only a mean of the cruel majority, it also hamper the ability of distinguishing between right and wrong of the children;

- Attendant believed that there's a presumption within the consultation and questions in the papers are directional. With the term 'healthy information', it is hinted that pornography is unhealthy, problematic and harmful to the next generation. Whether in the past or present, in Hong Kong or afar, pornography's existence is undeniable. It can also be interpreted as a mental pleasure of people. The fact that pornography is now simplified as something harmful indicates that the government lack the self-awareness in reflecting on this issue, they are close-minded and prejudiced against sex culture;
- Hope the government can include the concerns of the sexual minorities when reviewing the ordinance;
- The government should post advertisement on the porn section of newspaper. They are people who enjoy sex and would consume pornography. Their needs should be taken care of by the government;
- The consultation paper appears to be some educational materials of Liberal Studies. There is neither basic background information nor detailed description of the current situation. Attendants doubted the sincerity of government in consulting the public.

Whether pornography is harmful or not

- An attendant quoted a research of 1973 which shows that sex crime is less frequent in society where pornography is more popular. For instance, since Denmark loosened its regulation on pornographic articles, sex crimes (e.g. indecent body exposure and child sex abuse) have not increased but decreased. Dr. Wong Kit-mui in Hong Kong has conducted a survey on youth from 1990-2005 and discovered that there was no upslope trend in number of criminals arrested for sex crime. 1990-2005 is the time when internet gained its popularity and information circulation became easier, yet there was no increase in juvenile sex crime at that time. To what extent does pornographic information induce sex crime? In another survey, over half of the

respondents admit that pornographic articles help enhance their sex knowledge;

- Suggested to change the name of COIAO and abolish moralistic wordings like obscene and indecent.

III. Suggestions for the review raised by the attendants are summarized as follows:

Opinions raised and areas of concern:

1 Definition

- 1.1 The concept of obscene and indecent keeps evolving and no one should have the authority to define it. The Story of the Stone was once banned because it advocates freedom of love; yet all universities have specific stream of studies investigating this masterpiece of Chinese Literature. If we label certain shorts, images or phrases as obscene and negate its rights of circulation, we are posing harm to our culture and the society as a whole;
- 1.2 The ordinance should treat homosexual pornography and heterosexual pornography in an equal way;
- 1.3 Agreed that adults should be able to receive information without any governmental control, thus the category of obscenity is controversial;
- 1.4 To ban the circulation of certain article is in violation of a person's rights to receive certain information. A strong and convincing reason is required in order to execute such supervision;
- 1.5 If the ordinance is ambiguous, the law-abiding population will fail to follow the law. On the other hand, circulation of information will be limited if the ordinance is too specific. Attendant tended to take this ordinance as guidance for the parents. If child protection is the objective of the ordinance, the articles should be classified according to its suitability to children, parents should have the option to accept or reject it;
- 1.6 Opinions can be given only after the government has amended the definition. Relevant organizations should reserve the rights of rejecting it if the amendments are unsatisfactory;
- 1.7 Attendant believed that articles of sex education and minority sex education should be eligible for exemption or should be included in Clause X of COIAO;

2 Adjudicating System

Whether the adjudicating system should be retained

- 2.1 To fully abide all human rights laws, the government may only need to provide a set of guidelines instead of legislation. Yet attendants also believed that other people in the society see the needs of legislation; the groups understand that a balance of needs is necessary;
- 2.2 Attendants worried that adjudicator might treated certain sectors unequally during adjudication;
- 2.3 The representation of adjudicators is being questioned. Attendant challenged whether the government is being maneuvered by the conservative groups and to suppress the freedom of speech of the sexual minorities through this system. If the adjudicating system decides according to the general public (as understood by the government now), the expression of the minorities are very likely to be suppressed;
- 2.4 Existing ordinance has already include a clause of considering whether the article is beneficial to science, literature, arts, academics or other publicly concerned issues to ensure that the adjudicating system is in line with clause 27 of the Basic Law and other human rights law. Attendant objected to include the phrase ‘according to the general reasonable public’.

The adjudicator system

- 2.5 Wish to know the backgrounds of the existing adjudicators – such as their religion, sectors, organizations, sex, age and period of office. No discussion is possible without background information. If we are expected to discuss about ways of improving representation of the adjudicators, we should first start with reviewing the existing framework;
- 2.6 Wish to know the criteria for applying to be an adjudicator;
- 2.7 Qualifications of the adjudicators have to be clearly defined. If there are certain number of retired and conservative adjudicators, particular types of value will be overly stressed; if the wordings of the ordinance is ambiguous, their personal opinion will easily overrule the value of the society as a whole. This will end up hampering basic freedom of communication.

Submitting articles for classification

- 2.8 Worried that people might abuse the complaint mechanism. The legal sector also shares the same concern – over burden or the overwhelming of bad cases. Otherwise, if there are too many complaints, a case might have to wait for long before adjudication or the tribunal might rush to decide a case. We have balance all these factors. If the complaint is too unreasonable, the court should reserve the rights to penalize those parties;
- 2.9 Because of the lack of transparency of the system, articles or films of homosexuality faces more restrictions than that of heterosexuality. When the case is publicly discussed, it is usually at the appeal stage. Certain fees have to be paid for appeal and it is unfair to an ordinary citizen who wishes to distribute information. It is uneasy for the defendant to apply for legal assistance, if the government penalty is not heavy, they might prefer paying the fines to the lawyers and court fees after losing the case¹;
- 2.10 For all regulations about COIAO, the control and penalty should be minimized. The best approach would be to assume that all articles carries certain values for distribution, and the agency should adjudicate whether it is obscene or indecent when a complaint is filed.

The court

- 2.11 Suggested to abolish the OAT and handover the authority to the court. However, attendants disagreed that the court should determine the morality of the general public. Morality should not be determined by votes or the majority, such moral standards should also consider factors of human rights and the rule of law;
- 2.12 Non-public preliminary classification paves way for secret operation.
- 2.13 If somebody submits an article without notifying the defendant, he/she will be unable to protest and have to wait for the notification before filing for appeal. It is different from the assumption of ‘innocence until proven guilty’ in normal courts. Furthermore, since the adjudication is not conduct publicly,

¹Lots of minority organizations lack financial support. According to experience, if certain organization spends \$5000 on publication and have to submit it for adjudication, they will end up spending a double of the original budget. They will not submit articles for adjudication at such a high cost, yet if they are found guilty because of this, they are very likely to go bankrupt.

it is also in violation with the principle of common law;

- 2.14 On the court, the prosecutors need to prove with evidence that certain article does not carry sufficient literary or artistic values. If the prosecution fails to prove or raises a doubtful point, the defendant can enjoy the benefit of doubt. It is unlike the existing system in which the defendant has to defend him/herself;
- 2.15 Reference can be taken to the Taiwanese practice in which self-classification is applied. If in doubt, a non-binding assessment can be sought from an independent commission.

3 Classification system

- 3.1 All articles can be classified as Class I and II. Class III can be abolished altogether. The existing ordinance prohibit all circulation of an obscene article, such control is much greater than that of indecent articles. Very strong reason is required to entirely prohibit the circulation of certain object. However, the definition of obscene article is still highly controversial now. Would normal sexual intercourse be taken as obscene? Can normal sexual activities be presented in videos or literature?

4 New Forms of Media

- 4.1 Oppose any forms of internet supervision. Tremendous resources would be required for the government to regulate information that could leak into Hong Kong from different locations or to distribute from Hong Kong. It is unrealistic and there exist no strong reason for such execution;
- 4.2 In respect of children protection, attendant pointed out that there are numerous filtering software available in the market and it should be something that's done by the parents instead of the government;
- 4.3 The minorities usually rely on online resources to understand one's own mentality or the communal needs. Who has the authority to censor this online resources platform?

5 Enforcement

- 5.1 The level understanding towards the ordinance of the enforcement personnel

shall be reviewed;

6 Penalty

- 6.1 Pornography can be valuable. There is not strong evidence asserting the necessary harm of pornography. The only cause remain is that pornography is in violation of public morality, yet should a person who violates public morality be jailed or penalized for several million dollars?
- 6.2 Media are more likely to self-censor if penalty is increased. It will pose negative impact on the society.

7 Publicity and public education

- 7.1 Attendants stated that if the sex education or pornography of the minority was being suppressed, negative effect would be resulted;² ;
- 7.2 Workers of public health worried that public health might be harmed if a particular kind of sex education information is being filtered; it might even lead to the spread of AIDS. Anal sex is a high risk behavior of AIDS and it is an issue of public health. Similarly, if brochures of sexually transmitted disease, AIDS or skills of having anal sex are being restricted by the government, the society might be harmed;
- 7.3 Attendant worried that certain progressive civil education information might 'cross the line' because of the COIAO;
- 7.4 Parents, students and teachers shall be educated to distinguish different information. For example, what kind of tool is a knife? It all depends on how you use it, likewise is pornography.
- 7.5 Parents can be educated to make use of the software and filter some so-called unhealthy information; while the students can be educated to use the new forms of media correctly. With this in mind, more resources should be allocated to schools and NGOs to host workshops;
- 7.6 A real education is to educate different parties about the true understanding of sex;
- 7.7 Sex education at school is still male-dominant and contraception always focuses on the use of condom. However, there is no mentioning of the risk of

² Attendant stressed that if the laws of Hong Kong restrict the circulation of information or articles about anal sex, some people in the society might fail to understand the bodily injury it has on the participant. It is also a kind of cultural repression.

AIDS from oral sex in sex education. It shows that sex knowledge of teachers are extremely weak;

- 7.8 Sex education of the sex minorities cannot be neglected. If there is no information telling them about proper ways of anal sex, how are they supposed to have sex in a correct way? The government should not only allocate resources to schools for sex education, but also invite sexual minorities groups to conduct workshops for them;
- 7.9 The government is basically fighting against pornography through means of education. Attendant believed that the government should encourage more people to tolerate a variety of conditions and tastes for sex, also to treat pornography in a more lenient way.

8 Conclusion

8.1 Two important principles were concluded in the meeting:

8.1.1 Freedom of information circulation;

8.1.2 Pornography carries certain intrinsic value.

8.2 The ordinance and the adjudicating system should be reviewed upon these principles;

8.3 Attendants have reached consensus on the following details:

8.3.1 To abolish Class III in the classification;

8.3.2 Prefer not to regulate the operation on the internet;

8.3.3 Regulation of information circulation on the internet should not be done in the name of children protection;

8.3.4 The perspectives of the sexual minorities should be cared for in real times in the next round of consultation.