

Review of the Control of Obscene and Indecent Articles Ordinance

Town Hall Discussion Sessions Report – Public Forum, Hong Kong Island

Date: 21st November, 2008 (Friday)
Time: 1930-2130
Location: Leighton Hill Community Centre, 133 Wong Nai Chung Road, Happy Valley

- I. A power-point presentation 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. Attendants shared general comments towards COIAO:
 - Attendants challenged the criteria of choosing participating groups of the focus group, challenged whether religious and moral concern groups were invited;
 - Attendants hoped this review would not repeat the history of that of 2000 which died out quietly, there are people who support and object the ordinance in the society, the government should not terminate the review because of the stance of some particular persons;
 - On the other hand, attendants also worried that the distribution of articles will go entirely out of controlled, even if it is not posing great influence on people around 18 or secondary school students, it is doubtful whether a 4-year-old child is well protected or not; the consultation period is not ended yet and the society cannot reach consensus on the new forms of media, the ordinance of printed matters and the new forms of media should be separated so that the battlefield could be narrowed down and the existing ordinance can properly regulate the printed media, otherwise, it is inappropriate for a 3-year-old child to read the Student Press of CUHK;
 - The other object that a 4-year-old child would be influenced by reading

- CUHK Student Press, because a 4-year-old child has not sense of obscenity and would not understand its content;
- Another attendant expressed opinions on age, among all international metropolitan in the world, is there any law preventing people under 18 to get hold of sex information, while allowing them to have sex at the age of 15 and to get married at 16? It is inconsistent for the society allows teenagers below 18 to have sex-related action but prohibit them to receive sex information;
 - The consultation paper sets a good direction for review as there are numerous detailed items and it is clear that the government seeks to strike a balance between the freedom of information and speech and the protection of children and youth;
 - In order to protect children and youth, we should first find out what media has greatest access to them, e.g. the internet at home, newspaper and magazines that are sold everywhere; the government should pay more attention to the printed and online media;
 - Suggested to organize monitoring organs by the press, it will be more effective and acceptable; legal advice can be provided to the press organizations, the authority of the organization can be enhanced as well;
 - Expected that the government can listed out the standards of the society and citizens' attitudes toward sex through academic research, it can also enrich the content of the consultation papers and provide framework for discussion;
 - It is difficult to introduce moral standards from overseas into Hong Kong, as there are cultural differences and local characteristics in Hong Kong;
 - Some moral groups pointed out that they were rejected when they wrote to the government and requested to participate in the focus group discussions;
 - Some social services organizations hosted promotional programs of COIAO sponsored by the government, but there are rooms for improvement in the governmental procedures;
 - Media are over exaggerating the problem of sex overabundance, e.g. there's a survey stating that the marginal youth are open about sex, but the press reported it as teens below 14 are open about sex and created misunderstandings;
 - The government should have particular stance on this, if the objective of

the ordinance is to protect children and youth, some freedom must be lost while regulating, the government is embarrassing itself by softening its stance; some magazines published overseas are relatively loosely regulated, the government should define obscene and indecent then reconsider it in details with an international perspective;

- Another attendant stressed that the government should have particular stance on this, the citizens should know how much the government is interfering in our daily lives, e.g. citizen might wish to buy a magazine and enjoy it with his/her another half, if that is magazine not available in the market, the public should be notified explicitly ('to what extent does the government wants to have its hand in people's lives'). It is understood that some citizens do not wish to see some information everywhere, but it is doubtful whether such rights are part of human rights;
- Another attendant said that the government should not have any stance on it as it is about personal standards.

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

1 Definition:

- 1.1 The government should invite more different organizations to express their opinions about definition;
- 1.2 A scientific research on the definition should be conducted and have the results released;
- 1.3 The ordinance can list explicitly what are included in the definition of obscene and indecent, e.g. 'rape' is considered as 'obscene' while sexual intercourse or intention of sexual intercourse is 'indecent', it should not clarified whether sex organs are exposed; if the ordinance is clear, then no matter who is invited to be the adjudicator, personal opinions would not affect the results; foreign countries like New Zealand would list clearly that it includes rape, animal sex, sexual intercourse with or without consent, the Hong Kong government shall make it more detailed so that the definition of COIAO can also be applied on relevant media ordinance;

- 1.4 The existing ordinance is ambiguous so that different adjudicators would have different judgment when adjudicating the same article; there isn't a clear definition other than some guidance for considerations, some factors can also be ignored during adjudication and it is confusing, ordinance of this kind will control citizens' lives deeply in certain ways and it is dangerous;
- 1.5 Another attendant pointed out that although it is difficult to clarify definitions in the ordinance, it is still a possible way of regulation; a complete database system would be an even better method as the jury can take reference to precedents during adjudication instead of judging with a moral standard determined by the majority, this will only lead to some unfair and awkward results;
- 1.6 if sufficient sex education is provided in the society, it is unnecessary to define what is 'obscene' and 'indecent', even if the children are in touch with unhealthy information, they will be able to make appropriate judgment, as long as the teens are not violating laws, it is fine for them to receive unhealthy information;
- 1.7 Unless the article involves obvious offenses, otherwise no article should be regarded as 'obscene';
- 1.8 *Supplementary guidelines*
- 1.8.1 Attendants hoped that the ordinance could be as clear as possible, supplementary guidelines will turn out to be ambiguous, why doesn't the government made it proper legislature? Although the existing mechanism requires adjudicators to judge according to the social moral standards, they would inevitably refer to their own moral standards and each of their standards might differ greatly from one another, hence different adjudicators will come up with different decisions on the same article. The existing system still allows such happenings. The objective of COIAO is to prohibit some articles from appearing in the market and to penalize the lawbreakers, so this review should aim at equipping the ordinance to meet its target, with that in mind, would it be

possible to allow differences in adjudication?

- 1.8.2 Special attention should be paid to the literary and artistic values of the articles, in criminal cases, the burden of proof is on the prosecutors, if this consideration is included, the defendants might have to shoulder the burden of proof and list evidence that supports the literary and artistic value of the articles, does it comply with the idea of the law?

2 Adjudication System

2.1 *Adjudication Body*

- 2.1.1 The decision and reasons of preliminary hearing should be publicized partially or appropriately;
- 2.1.2 It is inappropriate to adjudicate with a committee comprises 30 citizen representatives (a new, independent adjudication board should be established);
- 2.1.3 Some objected to have 30 citizens classifying the articles and doubted whether ‘some representative sectors’ are really suitable for adjudication, attendants also worried that they might be doing classification with their own interest in mind or in order to secure a higher set of moral standards; the criteria of selecting the 30 citizens are related to the moral standards of the society, e.g. is it appropriate to choose a citizen who has years of experience reading pornography? These issues require more comprehensive discussions;
- 2.1.4 Attendant agreed to expand the list of adjudicators and oppose the adoption of the jury system; during the judgment of court cases, judges can base on the evidence available, make use of his/her legal knowledge and guide the jury to the decision of guilty/innocent with questions; if the jury system is adopted, the list of adjudicators might seem to be expanded, but in reality, it would be difficult for the judge to guide adjudicators to reach a decision because there’s no absolute right or wrong in moral standards and cannot be guided; the two systems are incomparable; the government cannot select adjudicators randomly and allow

- them to adjudicate articles simply with personal moral standards;
- 2.1.5 Another attendant stated that the government can consider adopting the jury list system.

2.2 *Articles submission for classification*

- 2.2.1 Some agreed to allow different people submitting articles for the OAT to adjudicate; apart from the internet, newspaper and magazines, articles in comic books are also very common; if more people are allowed to submit articles for adjudication, more people can concern for this and the whole society can monitor it together, it is a good public education;
- 2.2.2 The press can publish any articles without any pre-adjudication, the government can consider requiring repeated offenders to submit their articles for adjudication before publishing; it is understood that freedom of speech and the workload involved in this process are factors to be considered, yet such measures can target only at the organizations and institutions which offend the ordinance repeatedly in order to enhance the deterrence;
- 2.2.3 Another attendant also agreed to submit articles for adjudication before publication, but stated that it needed not to be mandatory, it would be good as long as it could deter the distribution of unhealthy articles;
- 2.2.4 Attendant believed that it is impossible for the newspaper to submit before publication as there are numerous adult magazines in Hong Kong, the freedom of speech also hinders such practice;
- 2.2.5 Attendant objected to allow the general public to submit articles for adjudication as it would become a negative freedom for certain groups of people and would only paralyzed the OAT; citizens should file complaints through the enforcement bodies or other departments so that those authorities can decide it should be submitted or not, it should be conducted by an administrative body, not the citizens;

- 2.3 The aim of the adjudication system is to ensure certain social moral standards; however, do they belong to the majority? If the objective of

certain information is to discuss whether such standards are questionable, would it be classified as obscene or indecent, and therefore banned? In short, the discussion of the adjudication system is about whether the government wishes to set some standards for the society and to what extent does it want to interfere the private sphere;

- 2.4 In terms of the administrative and judiciary function, the most important task is to improve the existing mechanism, so that equal opportunity for judiciary review would be available to both sides even if a procedural problem occurs.

3 Classification System

- 3.1 Obscenity and indecency includes violence, depravity and repulsiveness, only Class II articles belong to indecent, obscenity and indecency are two different levels, the existing classification provides no clear differentiation of them; the government should further consider the definition and differences of 'obscene' and 'indecent', it should not be classified with IIA, IIB, or IIC only;
- 3.2 It is not significant to categorize IIA and IIB;
- 3.3 The IIB and III class of the Film Censorship Ordinance are often criticized and it will only make definition more difficult; the exposure of sex organs should not be the basis of classification;
- 3.4 Age should not be the determining factor of classification; foreign countries are adopting this approach for the ease of administration, but there is no evidence proving that a 18-year-old would think differently from a 21-year-old;
- 3.5 Regardless to the classification, enhancement of transparency is essential, definition of judgment should be stated and the number of adjudicators should also be increased;

4 New Forms of Media

- 4.1 The government is unable to regulate overseas servers, up to this moment, the prosecutions against local ISP or servers have no deterring effects at all; the control of Hong Kong servers distributing obscene and indecent information should be strengthened;

- 4.2 Parents should be free to choose whether they want to install filtering software, if it is made mandatory, it might infringe freedom of information; parents should be free to choose and be able to update it annually, the government should not be push the ISP to regulate on it;
- 4.3 To encourage the first-time computer buyers (parents or children alike) to install filtering software, they should be given a trial software for free;
- 4.4 The control of the internet in other countries worth referring, the government should learn from the others; there are tremendous pornographic and violent information on the internet and blogs which influence the youth greatly, it must be regulated and the government should conduct more researches on this aspect;
- 4.5 The government cannot force ISP to provide filtering software through legislation as it would be an extreme paternalistic protection; the suggestion of giving out free software with the purchase of computer would arouse issues of benefits transportation; the filtering of obscene and indecent articles cannot be done by computers alone, for example, there's a user who failed to upload some baby photos because the nude color sections comprise of 70% of the photos, and the filtering software provided by the ISP identified them as obscene; on the other hand, the Japanese AV producers thin the squares in the porn (so that the obscene sections would become more apparent) to challenge the bottom line of Japanese Police, the police ended up confiscating the AV and required them to adjust the thickness of the squares; to allow the industry setting their own standards is what we called as 'to allow subtle changes', it is something that worth in-depth discussion;
- 4.6 Filtering software is only supplementary, the government cannot prevent the youth from avoiding the filtering through other means; ISP has the freedom to choose whether they'd like to provide filtering software or not, while the citizens should be allowed to make on own choice on the purchase or installation; it shall be fine as long as options are available; the reliability of the filtering software are questionable; if parents are unfamiliar with the filtering software, the government can encourage ISP to provide related services;
- 4.7 The ordinance regulating printed and new forms of media should be separated, even if we cannot control an American server, we can at least regulate those in Hong Kong;

- 4.8 It is not preferred to legislate on something that are technically problematic or unfeasible; lots of people are unfamiliar with the techniques and operation of the internet, if they set up controlling laws upon their own understanding, we would be left in the same trap as Australia, the ISP in Australia are now criticizing those laws as ‘evil laws’ which create false security in the society;
- 4.9 It’s uncertain whether the distribution of obscene and indecent articles are now out of control as there is no consensus in the society, it should be handled with an objective and technical methodology, the new forms of media should not be regulated by a separate ordinance.

5 Enforcement

- 5.1 Oppose the police enforcement, previous cases revealed the selective enforcement of the police, some enforcement departments even challenged the bottom line of the law while those incidents should not be handled with such procedures;

6 Penalty

- 6.1 Agreed to increase penalty, especially for the repeated offenders;
- 6.2 Minimum penalty could be established, penalty should be determined according to the times of offense, sales of such distribution, readership, influence etc, newspaper have great impact and thus able to earn more advertising fees, yet it is uncertain whether it is legally feasible.

7 Publicity and Public Education

- 7.1 Education is an important element in the ordinance;
- 7.2 Education is important; the government could support the parents with information, since children began to be curious about sex, parents should nurture them with positive sex knowledge and information, so that even when the children get in touch with unhealthy information, they will be able to judge whether it is a fact or just some fantasies, teenagers should not be controlled by a set of standards in the society, as long as they did not violate the law, even if the youth get hold of unhealthy information, it is still just a private act; if the youth have no chance to get hold of unhealthy information,

how could they distinguish one from another?

- 7.3 Education should be the foremost task so that the 'immunity' of the youth will be enhanced.

8 Summary

- 8.1 Transparency of the classification should be enhanced and the ideology and grounds of the classification should be provided;
- 8.2 Education is the most important task, if it is handled properly, the government may not have to work so hard on the other aspects;
- 8.3 The importance of protection should be emphasized, although the target and object of protection might differ, e.g. protection of the freedom of speech or the others, but the idea of 'protection' is of public concern; attendants also pointed that maturity comes at different times for different people, more in-depth discussions are required in order to determine which method is more effective and targeted: shall churches, schools and families implement education, or the government block unhealthy information?
- 8.4 Worried about the government control, people concerned about governmental interference no matter how far-reaching is the regulation;
- 8.5 Different people have different opinions about the definition, some believed that concrete ordinance should be established, while the others believed that it is impossible to come up with a flawless version, some supplemented that the existing definition is too broad and a clearer content is required, further discussion in the society is also necessary; it is better to stand from the point of view of youth protection than human rights. Definition will be infinite if it is based on the point of view of human rights. Taking South Africa as an example, if the ordinance is overly detailed, people might take advantages of the loopholes. The government may also consider the perspective of monitoring, for example, in UK, obscenity includes sex abuse, animal sex, sexual intercourse with corpse, rapes etc, flexibility should also be maintained, 10 years of effectiveness can be allowed for the ordinance.
- 8.6 Opinions varied over the suggestion of voluntary submission by the general public, some agreed that it is positive to allow such rights for citizens, while the others believed that it would influence the whole system;
- 8.7 Opinions varied over the mandatory filtering software;
- 8.8 Opinions varied over the suggestion of separating the control of tradition

media and new forms of media into different ordinances.