

Policing Obscenity in Hong Kong

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Abstract: The term '*obscurity*' has no universal definition. It is often ill-defined, subjective and highly dependent on the culture of the communities in question and between communities. Nevertheless, the aim of the law on obscenity is to prevent publication and distribution of materials, which are potentially harmful to its readers, viewers and audience. The purpose of this paper is three fold. Firstly, it briefly considers the law on obscenity in the United Kingdom, and in the United States. Secondly, the paper discusses and evaluates the law relating to obscenity in Hong Kong in the light of the recent publication and distribution of materials which could be argued to fall within the realm of obscenity. Finally, it considers whether the law on obscenity would ever be able to fit into an "acceptable community standard".

1. Introduction

The law on obscenity is usually concerned with regulating the publication and distribution of materials which are considered inappropriate for a certain segment of society with the aim of protecting readers or its audience from potential harmful effects caused by the materials. The term 'obscene' comes from the Latin term 'obscenus' meaning 'foul, repulsive, detestable'. However, the term normally poses various problems since it is often ill defined, subjective and highly dependent on the culture of the communities in question and between communities. In other words, there is no one acceptable definition what constitutes 'obscurity'. Most states have laws on what is considered acceptable and appropriate and censorship is often used to control and regulate materials within the definition provided. Thus the first part of this briefly examines what constitutes obscenity in the United Kingdom and the United States. It then discusses and evaluates the law relating to obscenity in Hong Kong with reference to a number of recent events. The paper concludes with whether 'an acceptable community standard' can ever be achieved?

2. Obscenity in the U.K and the U.S

The terms "obscene" and "indecent" are often viewed as synonymous although these terms bear different meanings. Perhaps the use of these terms together is intended to reflect the degree of gravity in relation to the level of repugnance and distaste that is attributed to the material in question with obscenity being reserved for a higher degree of repulsiveness. It is helpful to provide a reference point as to what constitutes obscenity. As Hong Kong was under the British rule before the handover in 1997, it might be useful to briefly refer to what is obscenity in the United Kingdom. The current effective Act in the U.K the *Obscene Publication Act of 1959 and 1964*. The *1959 Act* provided the legal test for obscenity as 'a tendency to deprave and corrupt'. This is seen in section 1 of the Act which states

that "an article is to be deemed obscene if its effect or (where the article comprises two or more distinct items) the effect of any one of its items is, if taken as a whole, such as to tend to deprave and corrupt persons who are likely, having regard to all the relevant circumstances, to read, see or hear the matter contained or embodied in it".

It is worth noting that the predecessor to the *1959 Act* was the *Obscene Publication Act 1857* which was introduced by Lord Campbell, the Lord Chief Justice. In support of the Act, Lord Campbell stressed that the 'the act was intended to exclusively apply to works written for the single purpose of corrupting the morals of youth and of a nature calculated to shock the common feelings of decency in an well regulated mind...'. In addition to the test of obscenity, the *1959 Act* introduced a defence against the charge of obscenity on the grounds of literary merit. This defence of public good specifically exempts works in 'the interests of science, literature, art or learning, or of other objects of general concern'.

It is clear that the term "a tendency to deprave and corrupt" is wide and seems to provide the courts in the United Kingdom with great discretion. The courts however, have been careful not to extend the meaning it was intended beyond the test provided for in the Act. This can be seen for example, in the case of *R v Anderson & Others* where the Court of Appeal did not agree with the trial judge's direction to the jury in their suggestion that

'obscene' included in its meaning the dictionary sense of repulsive filthy, loathsome or lewd. Notwithstanding *Anderson, R v Hicklin* provided some light as to how the test might be applied. In *Hicklin*, pamphlets written by a militant Protestant, entitled 'The Confessional Unmasked: Shewing the Depravity of the Romanish Priesthood', the 'Iniquity of the Confessional', and the 'Questions Put to Females in Confession' were seized as being 'obscene'. The pamphlets dealt mainly with the author's views of the dangers of the confessional, illustrated by the type of questions Roman Catholic priests allegedly asked young ladies.

R v Hicklin is important in that it laid down the test for determining obscenity. It held that the test should reside in the material's "tendency to deprave and corrupt those whose minds are open to such immoral influences and into whose hands a publication of this sort may fall". The test applies whether or not the 'obscene part' of the work was based on isolated passages taken out of context. The Act's first test was that against Penguin Books for the publication of D.H Lawrence's book entitled *Lady Chatterley's Lover*. The publishers' not guilty verdict was seen as a major milestone as far as publication of explicit materials is concerned. In that case, Byrne J said

"To 'deprave' means to make morally bad, to pervert, to debase or corrupt morally. To corrupt' means to render morally unsound, rotten, to destroy the moral purity or chastity, to pervert or ruin a good quality, to debase, to defile ..."

In the United States, the issues concerning obscenity, sexual and pornographic content have always required a delicate balance to be maintained between the advocates of the First Amendment freedom of speech and the more conservative segment of American society. It is apparent that the First Amendment right to enjoy freedom of speech is strongly supported even where the right strays into potentially destructive areas of obscenity, pornography, race and hate speech. The test of obscenity in the United States is provided by *Miller v California* which established the three part test. The Supreme Court held that to be obscene, the judge and/or the jury must determine:

- a) that the average person, applying contemporary community standards, would find that the work, taken as a whole appeals to the prurient interest; and
- b) that the work depicts or describes in a patently offensive way, as measured by contemporary community standards, sexual conduct specifically defined by the applicable law; and
- c) that a reasonable person would find that the work, taken as a whole, lack serious literary, artistic, political and scientific value.

The Supreme Court in subsequent cases such as *Jenkins v Georgia* and *Pope v Illinois* provided much needed guidelines with the aim of providing State and Federal Courts with the tools to delineate the boundary between protected expression which portrayed sexual conduct and unprotected obscene expression (Murray, 2007).

In comparison to the position in the United Kingdom, the United States seems to provide a clearer stance as to what might constitute obscenity. It should be noted however, that although it is not uncommon for obscenity to be linked to materials of explicit sexual nature such as pornography, it can be argued that obscenity is not restricted to sexual materials or matters affecting sexual morality. On the contrary, in more recent times it has been accepted in *John Calder (Publications) Ltd v Powell* that the term has been extended to include materials that advocates drug taking by highlighting the favourable effects of drugs and so providing "a real danger that those into whose hands the book came might be tempted at any rate to experiment with drugs"; and acts of extreme violence such as acts of mutilation and beheading are not only regarded as repulsive but can have a very disturbing effect on viewers.

However, it is apparent that the underlying objective of the law against obscenity is the protection of contemporary community standards. Thus as with the American test of obscenity, it can be said that the English test of obscenity- "the tendency to deprave and corrupt"- is also aimed at some form of deviation from contemporary community moral standards. Consequently, individuals who are in the position to deliberate on what is legally obscene, are in an unenviable position to evaluate the strength of the conjunctive terms "deprave and corrupt" using the filter of what they consider ordinary decent people's standards. These individuals also have to be able to distinguish between what might only mildly lead someone morally astray, on the one hand, and what is sufficiently serious to be depraving and corrupting on the other. This raises questions such as is there an agreed community standard? Who decides on the standard and which body enforces such a standard? We intend to examine this issue from Hong Kong's perspective.

3. Obscenity in Hong Kong

In Hong Kong, the publication and display of obscene articles in the printed and electronic media is governed by the *Control of Obscene and Indecent Articles Ordinance (Cap. 390)* (the *COIAO*). The exhibition and publication