

## THE STUDENT SCHOLARSHIP BLOG

“No Artist is Ever Morbid”: How Far are Artistic Creations Protected  
under Current Hong Kong Laws?

*Katherine Tong*

*LLB in conjunction with BA (Literary Studies)*

*Class of 2016*

LLAW3073 Media Law

### Acknowledgements:

I am grateful for the helpful feedback and suggestions of the editors of the Student Scholarship Blog. Their comments have helped improve the coherence and quality of this work.

This article is a publication of the Centre for Comparative and Public Law’s Student Scholarship Blog (SSB). The Student Scholarship Blog ([www.scholarshipblog.law.hku.hk](http://www.scholarshipblog.law.hku.hk)) is an online platform to showcase legal research and knowledge with a searchable index of selected outstanding research papers of students of The University of Hong Kong on issues of law, politics, social sciences, medical ethics and other interdisciplinary scholarship. The SSB is a Knowledge Exchange initiative of the CCPL and is generously funded by under the Knowledge Impact Project Grant in 2015/16 (Project No. KE-IP-2015/16-39), administered by the University of Hong Kong’s Knowledge Exchange Office.

*© 2016 Copyright of this paper remains with the author and all rights are reserved. This article or any portion thereof may not be reproduced or used in any manner whatsoever without the express written permission of the author except for the use of brief quotations with full attribution given to the copyright holder.*



## Introduction

Oscar Wilde once famously defended the artistic value of his hedonistic and homoerotic literature against moral judgment: “[t]here is no such thing as a moral or an immoral book. Books are well written, or badly written. That is all.”<sup>1</sup> Believing that “no artist is ever morbid”, Wilde believed that art could “express everything”. This pinpoints the dilemma between art and morality. More than a century later, modern societies continue to find it difficult to draw a “principled distinction” between art and obscenity as there is a “substantial overlap between these terms. Especially when contemporary art is often intentionally provocative so as to “[co-opt], [reverse] and [destabilise]” existing socio-political systems and standards.<sup>2</sup> In Hong Kong, the line between art and obscenity is statutorily drawn by the Control of Obscene and Indecent Articles Ordinance (Cap 390) (hereafter as “COIAO”). Instead of providing clear guidance to artists, however, the Ordinance is insufficient in protecting artistic creations. To explain the situation, this essay will introduce art in the present Hong Kong, and then evaluate its current laws. It will conclude by suggesting ways to reform the laws, so that a balance can better be struck between protection of artistic creations and regulation of obscenity.

## Art in Hong Kong

Whilst it is the job of an art critic and his aesthetic to tell the difference between good and bad art, this essay adopts a broader approach by simplifying arts as a way to express opinions. Freedom of expression is protected by Article 27 of the Hong Kong Basic Law. In *Leung Kwok Hung v HKSAR*, the Court of Final Appeal explained that Article 27 protects opinions even if they are “disagreeable, unpopular, distasteful or even offensive to others”.<sup>3</sup> In other

---

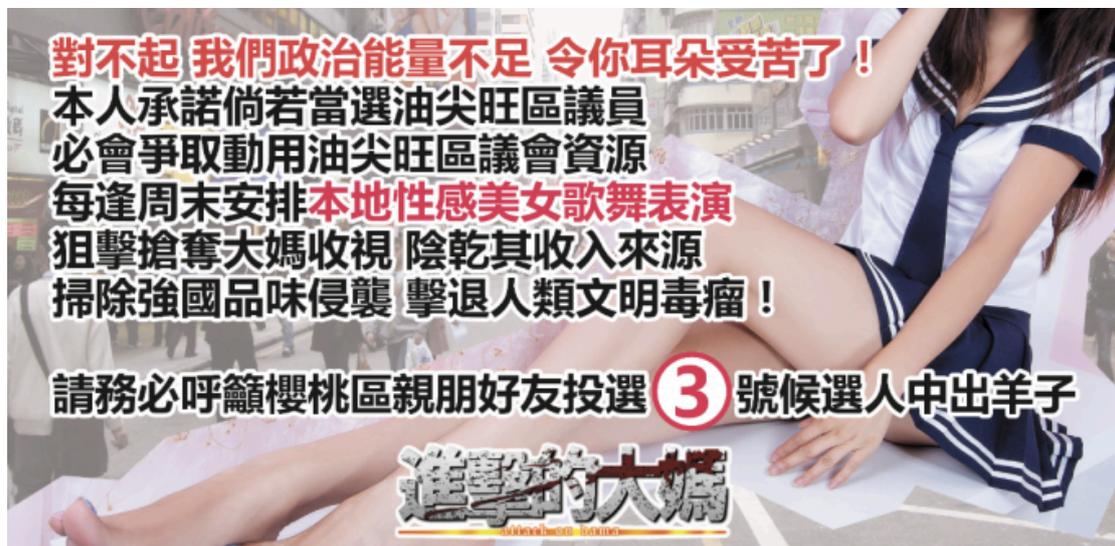
<sup>1</sup> Oscar Wilde, *The Picture of Dorian Gray* (London: Penguin Books, 2003), p 3.

<sup>2</sup> Amy Adler, “What’s Left?: Hate Speech, Pornography, and the Problem for Artistic Expression” (1996) 84.6 *California Law Review* 1507 and 1519.

<sup>3</sup> (2005) 8 CFAR 229

words, constitutionally protected expressions could range from the widely acceptable mainstream opinions to debatable minority viewpoints. This is the same for arts in Hong Kong. At one end of the spectrum, there are less controversial, well-recognised highbrow art, such as classical paintings or canonical literary works. That being said, a picture of the famous statue of David by Michelangelo has once been considered as an indecent article because of exposure of sexual organs.<sup>4</sup> On the other hand, lowbrow or popular arts is also vibrant in Hong Kong, which takes various forms of comic illustrations, parodies, satires, memes and more.<sup>5</sup> These popular arts are usually avant-garde in both its method and idea; which serves as a form of social and political critique. Online writer XX Haruki, for example, is famous for his political satires in form of explicitly erotic “sweet stories”.<sup>6</sup> The election campaign of Nakade Hitsujiko, cyberstar and candidate to the 2015 District Council Election, likewise uses sex and humour as a deconstructive means to challenge social injustice.<sup>7</sup>

An example of an election banner by Nakade Hitsujiko:



<sup>4</sup> This classification was later on overruled by high court in *Eastern Express Publisher Ltd v Obscene Articles Tribunal* [1995] 2 HKLR 290.

<sup>5</sup> Internet meme, or “screen captures” (“Cap 圖”), are images containing catchphrases that can be used as a response in replacement of words. Available at <http://evchk.wikia.com/wiki/%E6%88%AA%E5%9C%96> (visited 5 December 2015).

<sup>6</sup> “Sweet stories” (“甜故”) is a popular internet term for erotica derived from the Cantonese slang “dirty stories” (“咸故”). Available at <http://evchk.wikia.com/wiki/%E7%94%9C%E6%95%85> (visited 5 December 2015). See also 向西村上春樹. Available at <https://www.facebook.com/xxharuki> (visited 5 December 2015).

<sup>7</sup> Nakade Hitsujiko, often cross-dressing, is famous for his sarcastic style in commenting on serious political issues. Available at <http://www.passiontimes.hk/article/11-10-2015/26788> (visited 5 December 2015)

Popular arts in Hong Kong are not definite and readily recognisable. It is “not traditional ‘art’” such as a painting by Monet or Qi Baishi, but “happenings, social action, experiment, behavioral stimulus and politics”.<sup>8</sup> With its subversive nature, popular arts can be teetering on the brink of obscenity. Given the complexity of arts in Hong Kong, there is a pressing need to better define the legitimate interests of it so that the laws do not unjustifiably interfere with the artists’ freedom of expression.

### **A Critical Analysis of the Current Laws**

As mentioned, the COIAO is Hong Kong’s statutory regulation on “obscene” and “indecent” arts. I will discuss on two major issues, which are (1) its unclear definition and (2) its lack of consistency hence certainty. The issues pinpoint the problem of an insufficient space for legally permissible artistic creations.

#### *An Overview of the Laws*

Under the COIAO, the decision of whether an article is obscene or indecent is inevitably a subjective exercise as it is highly dependent on the proper application of the laws by the Tribunal. However, the existing mechanism of the Tribunal is in fact far from satisfactory. Section 2 of the COIAO gives a number of important interpretations. It interprets an “article” as “any thing consisting of or containing material to be read or looked at or both read and looked at, and any film, video-tape, disc or other record of a picture or pictures”.<sup>9</sup> In other words, most common art forms – from writings to images – would fall under the scope of s.2. The section goes on to give definitions to the key terms “obscenity” and “indecent”. According to s.2(2), an indecent article is something “not suitable to be published to a

---

<sup>8</sup> Cara L. Newman, “Eyes Wide Open, Minds Wide Shut”: Art, Obscenity, and the First Amendment in Contemporary America” (2003) 53.1 *DePaul Law Review* 147.

<sup>9</sup> Control of Obscene and Indecent Articles Ordinance, Cap 390.

juvenile” while an obscene article is what “not suitable to be published to any person”. Despite the age difference, both concepts refer to “violence, depravity and repulsiveness”. What exactly would amount to “violence, depravity and repulsiveness”, in turn, is to be decided according to the guidance to the Obscene Article Tribunal given in s.10.<sup>10</sup> Briefly, the 5 factors in the guidance ask the Tribunal to make a decision with regard to the community “standard of morality, decency and propriety”, the dominant effect of the article, the target audience, and the “honest purpose” of the article. In particular, with regard to art, the Ordinance has provided artists with a “defence of public good” under s.28 on the ground that the “publication or display” of the artistic work in question is “in the interests of . . . literature, art . . . or anyother object of general concern”.<sup>11</sup> Despite all the definitions, guidance or defence given, however, the government has admitted in public consultation that the concepts of “obscenity” and “indecenty” are “not matters of exact science capable of objective proof”.<sup>12</sup> This means that, with a defective mechanism, legal interpretations of obscene arts by the Tribunal can be arbitrary.

### *Practical Inadequacies of the Obscene Articles Tribunal*

Currently, the Obscene Articles Tribunal serve two separate functions: administrative classification and judicial determination. In the case of artistic works, artists can send their works to the Tribunal for administrative classification in private at a prescribed fee. There will not be an open full hearing unless the applicant challenges the interim classification. On the other hand, the Tribunal will make a judicial determination in open court as to whether an article is obscene or indecent when the article is referred to it by a court. The Tribunal, in order words, has the “exclusive jurisdiction” in determining the suitability of an artwork for

---

<sup>10</sup> Control of Obscene and Indecent Articles Ordinance, Cap 390.

<sup>11</sup> Control of Obscene and Indecent Articles Ordinance, Cap 390.

<sup>12</sup> “Consultation Document” of the Second Round of Public Consultation on the Review of the Control of Obscene and Indecent Articles Ordinance, para 2.3.3.

the public.<sup>13</sup> However, such an important power to make decisions is held in the hands of a few adjudicators. A magistrate will preside with 2 or more adjudicators in interim classifications, alternatively, with 4 or more adjudicators in full hearings.<sup>14</sup> One may argue that the number of adjudicators in the Tribunal does not really matter so long as they follow the guidance in s.10 of the Ordinance. According to the guidance, these adjudicators are supposed to take into account of the moral standards “generally accepted by reasonable members of the community”. However, despite the guidance, the Tribunal in fact takes a very mechanical approach in making decisions. They may categorise something “as obscene or indecent as long as the sex organ is shown” or when a nipple is exposed.<sup>15</sup> This has resulted in cases in which the Tribunal’s decisions cannot be easily understood with common sense. In 2008, for example, the Tribunal classified a computer-generated image depicting naked ancient Indians in the *National Geographic* magazine as indecent despite its apparent literary, artistic or learning value.<sup>16</sup> The reasons behind this decision is absurd. The defence of public good in favour of artists in s.28 was considered to be inapplicable in administrative classifications. There is also no specific requirement in the s.10 guidance for the adjudicators to take into account the literary or artistic values of an article when making a decision.<sup>17</sup>

The quality of the adjudicators is also an issue. Currently, adjudicators are appointed through self-nomination.<sup>18</sup> One can apply to be an adjudicator so long as he has been an ordinary resident in Hong Kong and has so resided for at least 7 years, and is proficient in written English or Chinese.<sup>19</sup> However, such a self-nomination system can neither “ensure that the

---

<sup>13</sup> Control of Obscene and Indecent Articles Ordinance, Cap 390, s.29.

<sup>14</sup> *Ibid*, s7, s.15(1A).

<sup>15</sup> “Focus Group Summary Report – Legal” of the First Round of the Review of the Control of Obscene and Indecent Articles Ordinance, para 2.2.1.

<sup>16</sup> “Submission from the Hong Kong Human Rights Monitor”, the Second Round of the Review of the Control of Obscene and Indecent Articles Ordinance, para 13

<sup>17</sup> *Ibid*.

<sup>18</sup> Note 12 above, para 3.1.6

<sup>19</sup> Note 13 above, s.5(3).

panel of adjudicators is sufficiently representative nor ensure that the adjudicators have the necessary knowledge” in art and literature “to carry out the adjudication work”.<sup>20</sup> Further, according to the report of the Audit Commission in 2004, 21 adjudicators actively handled 60% of all cases.<sup>21</sup> Currently, the total number of adjudicators in Hong Kong does not exceed 500 persons.<sup>22</sup> In effect, although the morality and decency of artistic works are supposed to be judged by a community standard, the definition of the meaning of the community standard is ironically “concentrated in the hands of a limited group of people who are willing to volunteer their service” to the Tribunal.<sup>23</sup>

A prominent feature of contemporary artworks in Hong Kong is that they are often subversive. The aim of such works are to undermine and deconstruct prevalent standards in the society. To achieve this, the artists often “[work] within the terms of the system but in order to breach it”.<sup>24</sup> In other words, artists may use themes of “violence, depravity and repulsiveness” to expose and attack social norms or phenomena which are in fact of an obscene or indecent nature. As raised by the defendant in the English case of *R v Calder & Boyars Ltd*, an artistic work can be “intentionally disgusting, shocking and outrageous” to make the audience “share in the horror described, thereby so disgusting, shocking and outraging him that, being aware of the truth, he would do what he could to eradicate the evils and conditions of modern society which callously allowed them to exist”.<sup>25</sup> For example, “The Girl’s Private Parts Smelled Like Tear Gas”, one of XX Haruki’s political allegories, explicitly describes non-consensual sex in the Admiralty protest zone during the Umbrella Movement.<sup>26</sup> The detailed description of “a feeling almost like buggery” is intentionally

---

<sup>20</sup> Note 12 above, para 3.1.6.

<sup>21</sup> Note 17 above, para 10.

<sup>22</sup> Note 12 above, para 3.2.9.

<sup>23</sup> *Ibid*, para 3.5.4(c).

<sup>24</sup> Note 2 above, p 1519

<sup>25</sup> [1969] 1 Q.B. 151

<sup>26</sup> Available at <http://www.passiontimes.hk/article/02-06-2015/21035> (visited 5 December 2015)

obscene to make readers feel repulsive towards the involuntariness and humiliation in nonconsensual sex<sup>27</sup>. The artist used nonconsensual sex as a metaphor to express his feelings of the deprivation of democracy and liberty in Hong Kong.<sup>28</sup> If XX Haruki's story was ever sent to the Tribunal, the result is uncertain because a liberal adjudicator may be able to comprehend the artistic function in the work, whilst a conservative one may simply find it repulsive and obscene. Therefore, without a certain and certain standard among adjudicators, whether or not the Tribunal would be able to appreciate the complex values in artworks remains entirely a matter of luck for the artists.

One may argue that, the lack of statutory clarity may be remedied if the provisions are supplemented by case laws. However, the Obscene Articles Tribunal is not required to give any public reasons for interim classifications are made in private.<sup>29</sup> Of course, if the artist wishes to review the interim classification, there will be full hearings and reasons for the decisions. However, adjudicators or artists can still find no precedents or references to guide their decision or creations from the repository of the Tribunal, because the documents in the repository give no reasons or indications as to why and how the respective articles are found to be obscene or indecent.<sup>30</sup> In any event, most cases in Hong Kong involve only interim classifications. In 2014, for example, there were 242 disposed cases of classification but only 2 cases of reviews.<sup>31</sup> Not being able to check if there is proper reasoning behind decisions, the current mechanism can therefore hardly ensure proper compliance of the s.10 guidance.<sup>32</sup> Nor can it protect the artists with the necessary foreseeability, consistency and certainty of law.

---

<sup>27</sup> Ibid

<sup>28</sup> Ibid

<sup>29</sup> Note 13 above, s.14(3).

<sup>30</sup> 莊耀光, “淫審制度有損表達自由” (2007) 106 思. Also available at <http://www.inmediahk.net/node/270690> (visited 5 December 2015).

<sup>31</sup> “Caseload and Case Disposal of the Obscene Articles Tribunal”, *Hong Kong Judiciary Annual Report* (2014).

<sup>32</sup> Control of Obscene and Indecent Articles Ordinance, Cap 390.

Finally, the very function of administrative classification of the Tribunal is controversial because it may be used for censorship. Artists may feel compelled to send their works to the Tribunal for administrative classification because the current laws are too uncertain for them to make a judgment on their own. Any classification, inevitably impacts upon artists' freedom of expression. If an artistic work is found to be indecent, it can be published in a specific and prescribed way with the inclusion of a warning.<sup>33</sup> If a work is found to be obscene, it could not be published. While it is true that freedom of expression is not an absolute right, any restrictions on it must be "provided by law" and "necessary".<sup>34</sup> Yet the current laws lack clarity, foreseeability and consistency because the categorizations of obscenity or indecency are not truly "provided by law" because of the uncertain standards. As for the requirement of necessity, since there are hardly any discoverable reasons behind the Tribunal's decisions, the artists cannot tell whether their freedom of expression is justifiably restricted. There is no way to check if the administrative classification has been misused for political purpose and to censor sensitive artworks. Administrative classification may also be a disincentive for artistic creations because it comes at a fee. There may be many articles in need of classification in a gallery exhibition or book fair, and that could mean a financial burden to the artists. In any event, there is widespread fear of undermined freedom of expression in Hong Kong today. Under such concern, many would reasonably be concerned that the administrative function of the Tribunal may be misused as political censorship.

---

<sup>33</sup> Note 13 above, s.24(1).

<sup>34</sup> Hong Kong Bill of Rights Ordinance, Cap 383, Art 16(3): "The exercise of the rights provided for in paragraph (2) of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary-(a) for respect of the rights or reputations of others; or (b) for the protection of national security or of public order (ordre public), or of public health or morals."

## Suggestions

In the following section, some suggestions will be made for a legislative reform. Given the impact a Tribunal's decision has to an artist whose work is being assessed, the Tribunal must be extremely careful in making classifications or determinations. The existing definition of "obscenity" and "indecent" only includes "violence, depravity and repulsiveness".<sup>35</sup> Reforms, therefore, must provide more clarity to the definitions. It must be noted that it is unrealistic to "stipulate in the Ordinance a precise and comprehensive definition for obscenity", because "accepted standards of propriety in any community [will] change and evolve with time".<sup>36</sup> For this reason, the Ordinance must be able to provide for social developments without having to be amended too frequently. The new definition must be clear and, to a certain extent, flexible.

One way to achieve so is by defining obscenity as a moral bottom line. This can be done by reference to examples from foreign jurisdictions. In Canada, the publication of obscene arts is a criminal offence.<sup>37</sup> The Canadian Supreme Court case of *R v Butler* provides judicial guidance on the application of the meaning of obscenity through three boundaries, or three bottom lines. First, it is explicit sex with violence, which will "almost always constitute the undue exploitation of sex". Second, it is explicit sex without violence but subject people to degrading or dehumanizing treatment. Third, it is explicit sex involving children regardless of the absence of violence, degrading, or dehumanizing treatment. The Canadian approach is similar to United Kingdom. In the UK, extreme pornography is defined in ss.63-67 of the Criminal Justice and Immigration Act 2008. For example, sexual interference with a human

---

<sup>35</sup> Note 13 above, s.2(3).

<sup>36</sup> Note 9 above, para 2.3.2

<sup>37</sup> According to s.163 of the Canadian Criminal Code, for example, obscenity refers to "the undue exploitation of sex, or of sex and any one or more of the following subjects, namely, crime, horror, cruelty and violence".

corpse or an animal would be a bottom line which pornography could not breach. It is believed that these bottom lines would not easily change because they are related to fundamental principles such as human dignity and protection of children. The Tribunal and the artists can therefore know more clearly how far a controversial artistic work can go before becoming obscene. In short, although courts in Hong Kong are not bound to follow foreign case laws and statutes, the laws mentioned above can serve as useful references for legislative reforms in Hong Kong to achieve more comprehensive and effective obscenity laws.

Another approach that can be considered by Hong Kong is to define obscenity in the COIAO according to the impact on the audience. For example, in the UK, an article is obscene if it tends to "deprave and corrupt" the viewer.<sup>38</sup> In other words, an artwork, that depicts sex explicitly, may not necessarily be obscene if it will not "deprave and corrupt" its target audience. Whether something is obscene depends on the accepted standard of the audience. This can better protect the artists in the sense that it takes into account the existence of "different moral standards" in a society.<sup>39</sup>

In Hong Kong, the number of recipients to arts and culture could be very limited. Literary magazines such as *Fleurs des Lettres* only publish about 2,000 copies every two months.<sup>40</sup> In contrast, gossip magazines such as *Next Magazine* could sell up to 60,122 copies in average every week.<sup>41</sup> In other words, there is a substantial difference in both the size and the nature of the target communities of an art magazine and a gossip magazine. What may deprave a reader of *Fleurs des Lettres* may not necessarily corrupt a fan of the *Next Magazine*. The UK

---

<sup>38</sup> Obscene Publications Act 1959, s.1: an article "shall be deemed to be obscene if its effect or (where the article comprises two or more distinct items) the effect of any one of its terms is, if taken as a whole, such as to tend to "deprave and corrupt" the viewer persons who are likely, in all the circumstances, to read, see or hear the matter contained or embodied in it"

<sup>39</sup> "Focus Group Summary Report – Culture & Arts" of the First Round of the Review of the Control of Obscene and Indecent Articles Ordinance, para 1.5.1.

<sup>40</sup> Availble at [http://fleursdeslettres.com/blog/?page\\_id=351](http://fleursdeslettres.com/blog/?page_id=351) (visited 5 December 2015)

<sup>41</sup> Next Media Annual Report 2014-15, p.12.

approach can therefore better provide for existing differences in the society and for future social changes.

It is also important to provide better guidance to the HK Tribunal. To ensure protection and promotion of artistic creations, it is important to specify that “literature” and “art” should include both the highbrow and the lowbrow forms. At present, no defence of artistic or literary merit could be raised in interim classifications. Section 10 of the COIAO Ordinance can be supplemented by including the factors stated in s.28. The proposed supplementations are, when the Tribunal is making interim classifications, it is required to consider whether certain article is beneficial to science, literature, arts, academic or other areas of public concern.<sup>42</sup> Currently, s.28 states that a defence is when something is in the interest of literature or art. As explained at the beginning of this essay, however, the definition of art is just as vague. It can be extremely difficult to tell art from obscenity.

In this aspect, Hong Kong can consider guidance from the US Supreme Court case of *Miller v California*.<sup>43</sup> In *Miller*, it was held that an article should not be found to be obscene if the work, taken as a whole, demonstrates serious literary, artistic, political, or scientific value.<sup>44</sup> Therefore, an article should only be categorised as “obscene” if it “lacks seriousness by a reasonable person applying contemporary, local standards”.<sup>45</sup> Seriousness is not limited to classical art, but should include both lowbrow and popular art. The later case of *Pope v Illinois* has further clarified that, to constitute “serious” value, a “merit in the work” would suffice.<sup>46</sup> These interpretations of a legal defence available to artists in concern would allow

---

<sup>42</sup> Note 35 above, para 1.4.4.

<sup>43</sup> *Miller v California* 413 U.S. 15 (1973)

<sup>44</sup> *Ibid.*

<sup>45</sup> Note 11 above, p 139.

<sup>46</sup> 413 U.S. 497, 504

adjudicators of the Obscene Articles Tribunal a broader understanding of art, and offer better protection to artists at large.

### *Reforming the Mechanism*

The effort to reform the laws would be in vain if the Tribunal could not properly apply them, therefore the mechanism should also be reformed. The first problem is the representation and quality of the adjudicators. It is suggested in the government consultation that the adjudicator system can be replaced by a jury system.<sup>47</sup> At present, there are approximately 690,000 persons on the jury list. Although a jury system addresses the small size and the nomination of the pool of adjudicators, verdicts given by the jurors come without reasons. Yet the jury system is a major defect because it will perpetuate the problem of lack of consistency in the current system. In light of practical constraints, I propose to keep the adjudicator system but to reform it substantially. There should be a wider representation by increasing the total number of adjudicators. While it may be unrealistic for the number of adjudicators to be comparable to that of the jurors, the number of 500 is definitely too small to be ideal. Also, self-nomination is not ideal unless an adjudicator undertakes that he or she would actively participate in handling a certain amount of cases. More importantly, the quality of the adjudicators must be improved.

Also, the presiding magistrate should give more guidance and the government should provide more training to the adjudicators. For example, there should be regular briefing sessions to update the adjudicators about public standards of morality and propriety.<sup>48</sup> There should also be trainings by experts in arts and culture to equip the adjudicators with the necessary knowledge and professionalism to assess artistic works.

---

<sup>47</sup> Note 12 above, para 3.5.4.

<sup>48</sup> Ibid, para 3.6.7.

Alternatively, the panel of adjudicators could also be reformed with reference to the German adjudication system. In the German Federal Review Board for Publications Harmful to Young Persons, additional officials will be appointed to represent sectors such as creative and performing arts and literature.<sup>49</sup> While it is desirable to have experts in the panel, any appointment may cause concerns in society because, under the current political climate, many are skeptical of the impartiality and credibility of the Hong Kong government. I suggest that appointments of adjudicators can be replaced by election or nomination within the arts sector so as to ensure wider representation and authoritativeness of the Tribunal.

Further, as a reference to the prevailing classification standards for the artists and a mechanism to check if the adjudicators have consistently applied the laws, a publicly assessable database of classified cases precedents is needed. It is understandable for the government to refuse online publication of obscene or indecent articles as it is against both the copyright and the obscenity law.<sup>50</sup> The government should improve the repository by providing reasons for classifications and by giving clear indications of the parts of the articles that is decided as obscene or indecent, so that artists can better grasp the nuanced boundary between obscenity and morality, and to ensure the consistency of adjudications.<sup>51</sup>

Finally, there are concerns that the administrative function of the Tribunal may be misused as political censorship. One of the government proposals is to segregate the administrative classification and judicial determination functions. A new statutory classification board should be set up to take over the Tribunal's function in respect of interim classifications.<sup>52</sup>

---

<sup>49</sup> Ibid 78.

<sup>50</sup> Ibid, para 2.4.4.

<sup>51</sup> Note 17 above, para 20.

<sup>52</sup> Note 12 above, para 3.4.3.

However, it remains uncertain if the members of the board can sufficiently represent the wide and diverse background of artists from political censorship.<sup>53</sup> Therefore, unless there are undertakings that the classification board would be independent, the most practical way would be to abolish the function of administrative classification. In any event, an artist does not have to send their work to screening before publication in order to avoid other legal liabilities such as defamation.<sup>54</sup> When in doubt, the artists are always free to consult private lawyers about the legality of their work. In fact, if the laws are fully and truly reformed as in the aforementioned ways, the artists should no longer need to send their work for a classification before publication. With more foreseeable and clear laws, private lawyers or even the artists themselves should be able to make a sensible judgment on their own. After all, for the reforms to take effect, all of the measures above must be implemented so that the new regulatory system will be comprehensive enough and will possess clarity, foreseeability and consistency.

## **Conclusion**

As identified above, there are several problems in the current legal framework regulating obscenity. The current laws are inadequate in providing clear definitions or guidance in deciding what is obscene. With regards to the mechanism of the Tribunal, the representation and the professionalism of the adjudicators are questionable. The absence of a database to ensure consistent application of laws also indicates the problematic lack of foreseeability in existing obscenity laws. The administrative function of the Tribunal is also controversial because of its potentially arbitrary decisions. In light of these problems, suggestions were made to improve the system, so that artistic creations could be better protected. There is currently a distinction between indecency and obscenity based on the difference in age of

---

<sup>53</sup> Note 17 above, para 25.

<sup>54</sup> Note 17 above, para 33.

readers under the laws in Hong Kong. This is justifiable because arts come with complex and at times controversial forms and or meanings. Arts require a mature mind to fully comprehend, and to appreciate, whilst there needs to be a balance between freedom of artistic creation and protection of young minds. Nevertheless, the laws against indecency and obscenity will impose restrictions on artists' freedom of expression. In particular, when an artwork is categorised as "obscene", there would be a total ban on the publication or display of that work. With liberalised education and new ways to communicate and receive knowledge in the Information Age, the concept of arts and morality are evolving very quickly in today's society. No matter how the society changes, nevertheless, artistic creations and moral standards are always inter-related. Morality of a society defines what arts is, and how far artistic creations could go. Arts, on the other hand, teaches a society to be more critical and sophisticated towards controversial moral issues. The law, therefore, must be updated to cater for the dynamic exchange between arts and morality that nurtures every society culturally and ethically.