

Sex and Lies in Asia Pacific: A Comparative Study of Fraudulent Sex Criminalisation in Singapore, Taiwan and Hong Kong

Report on a research seminar by Associate Professor Chen Jialin from Melbourne Law School (30 January 2019)

A/P Chen first noted that the criminal laws of Singapore, Taiwan and Hong Kong were derived from three different sources: Singapore's from the Indian Penal Code, Hong Kong's from English criminal law, and Taiwan's from the German Penal Code.

A/P Chen then compared how Singapore, Taiwan and Hong Kong treated fraudulent sex crimes, with focus on the issue of consent. He also highlighted how underlying societal attitudes could sometime transcend (or ignore) ostensible legal differences.

Consent

A/P Chen explained that in Singapore, consent is defined under section 90 of the Penal Code (Cap 224, 2008 Rev Ed), which states that:

[A] consent is not consent ... (a) if the consent is given by a person (i) under fear of injury or wrongful restraint to the person or to some other person; or (ii) under a *misconception of fact*, and the person doing the act knows, or has the reason to believe, that the consent was given in consequence of such fear or misconception”.

This term, “misconception of fact”, was explained in *PP v Koh Nai Hock* [2016] SGDC 48, where the accused performed several inappropriate sexual acts on the victim, on the pretext of treating the victim's infertility problems. The judge found that the victim was acting under a misconception of fact, hence her consent was vitiated. Conversely, in *Siew Yit Beng V PP* [2000] SGHC 157, where the victim agreed to have sex with the doctor in exchange for certain medical treatment, the judge ruled that consent was not vitiated. For consent to be vitiated, the misconception had to be related to the “*nature of the act*” (ie the act of having sex). And there, the victim knew that she would be having sex with the doctor in exchange for treatment.

As Singapore's Penal Code was derived from India's, A/P Chen drew a further comparison with India. In *U.P. v Naushad*, the Supreme Court of India gave an even broader meaning of “*misconception of fact*”, where even a false promise to marry sufficed to vitiate consent.

In contrast, consent was not defined in the Hong Kong Crimes Ordinance (Cap 200, 1971 Ed). However, A/P Chen noted that section 120(1) of the Hong Kong Crimes Ordinance stated that procurement by “false representations” to do an unlawful sexual act could constitute an offence. Conversely, in Singapore, under section 373A of the Penal Code false representations can only be prosecuted if they are made for the purposes of prostitution.

As for Taiwan, the prosecution of fraudulent sex crimes (under Article 221 of the Taiwanese Criminal Code) does not involve proving or disproving consent. A/P Chen mentioned that “as long as the sexual intercourse occurs under the influence of “force, threat, intimidation, hypnosis, or other means against the person's will”, it can be criminalised. And sexual intercourse is considered “*against a person's will*” if a) the person is in a state of psychological helplessness, b) the defendant induces sexual intercourse with means that are not verifiable by science e.g. supernatural power and religion; and c) the utilized means objectively are contrary to prevailing social norms.

Observations

A/P Chen made a number of observations, both directly and in response to audience observations. First, there seemed to be a lack of effort, across these jurisdictions, to utilise existing laws to prosecute people who had committed fraudulent sex crimes. Indeed, the protection against fraud in sex crimes was much less than the protection against fraud in crimes involving contractual and property rights.

Second, he suggested that the criminal laws in Hong Kong should be amended to include wider categories of fraudulent sex crimes which would constitute rape. He mentioned that in 2013, the meaning of consent was expanded in certain cases, where deception relating to either the nature or the purpose of the act would vitiate consent.

Third, there was an overemphasis on the term “*sex*” in fraudulent sex crimes, which often resulted in sex workers not getting adequate protection under the law. On the other hand, deception which involved medical profession was prosecuted more often.

Fourth, A/P Chen discussed fraudulent sex crimes in the context of religious rituals, noting that Hong Kong, Taiwan and Thailand often prosecuted offenders who used religious rituals as a disguise for performing sexual acts.

Finally, A/P Chen raised some interesting questions as to whether the three jurisdictions had any provisions which could be used to punish false claims made in the context of dating, such as the statements: “I love you”, “I am not attached” and “I am not married”.

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