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Are data protection laws sufficient for privacy intrusions? The case in Hong Kong

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ABSTRACT

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An area of concern which relates to privacy intrusions in Hong Kong is the substantial changes that have taken place in recent years in relation to news gathering and reporting and the activities of local paparazzi. The issue that needs to be addressed is how intrusions of privacy can be protected in Hong Kong. The most significant reform to date has been the enactment of the Personal Data (Privacy) Ordinance which provides rules for the fair handling of information about living individuals. However, the Ordinance is concerned only with data protection and does not provide a general privacy right. This article demonstrates the inadequacies of existing legislation for general privacy protection and examines the possibility of developing a separate action for general privacy via a) an action of extended breach of confidence as demonstrated by the UK model and b) a sui generis cause of action as can be seen in the New Zealand courts.

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1. Introduction

An area of concern which relates to privacy intrusions in Hong Kong is the substantial changes that have taken place in recent years in relation to news gathering and reporting and the activities of local paparazzi. Most of the local papers in Hong Kong are dominated by privately-owned media companies and this has led to the predominance of a flashy and flamboyant style of news reporting and gathering.¹ While some would accept these developments as an aspect of competitive market practices, many would view them as unethical and unduly intrusive. Public concerns about intrusive

and manipulative media behaviour in Hong Kong arise from a number of cases. For example, the Hong Kong media reported the suicide of a schoolboy and one of the newspapers printed a picture of the last moments of this schoolboy as paramedics attempted to revive him.² Another incident which generated heated debate about the ethical standards of the press and led to a massive protest in Hong Kong related to the publication of some photographs of a rising pop singer while she was changing backstage during a concert. The Hong Kong Television and Entertainment Licensing Authority received more than 2000 complaints and the matter was subsequently referred to the Obscene Articles Tribunal for further action.³

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¹ For example, the development of the newspaper *Apple Daily* and the *Next* magazine featured topical news and affairs featuring flashy get-ups and exclusive pictures. Other newspapers like *Oriental Daily* and *The Sun* followed suit.

² See <http://hongwrong.com/oriental-daily-hong-kong/>.

³ German Press Agency, 'Hong Kong Magazine to be Prosecuted in Pop Star Pictures Row', *The Raw Story* (online), 2 November 2006 <http://rawstory.com/news/2006/Hong_Kong_magazine_to_be_prosecuted_11022006.html>.
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Thus it can be seen that intrusive media practices do have an impact on the developments of privacy protection.

The issue that needs to be addressed is how intrusions of privacy can be protected in Hong Kong. A good starting point on the discussion of privacy laws in Hong Kong is the International Covenant on Civil and Political Rights ('ICCPR').⁴ The ICCPR was ratified by the United Kingdom and extended to Hong Kong in 1976. The ICCPR imposes a duty on Hong Kong to give effect to its provisions, including the requirement in article 17 to protect individuals against unlawful interference with their privacy. The Bill of Rights Ordinance ('BORO') was enacted to give effect to the provisions of the ICCPR, but it binds only the government and all public authorities (and also any person acting on behalf of the government or a public authority)⁵ and does not apply more broadly to private organisations (including the press).

The relevant articles of the Basic Law protecting privacy interests are articles 28 and 29. Article 28 states that 'arbitrary or unlawful search of the body of any resident or deprivation or restriction of the freedom of the person shall be prohibited.' Article 29 further states that 'the homes and other premises of Hong Kong residents shall be inviolable. Arbitrary or unlawful search of, or intrusion into, a resident's home or other premises shall be prohibited.' Apart from protecting against intrusion to a person's privacy, the Basic Law also provides for the protection of private communications. Article 30 states that 'the freedom and privacy of communication of Hong Kong residents shall be protected by the law' and 'no department or individual may ... infringe upon the freedom of communication of resident except in accordance with legal procedures to meet the needs of public security or of investigation into criminal offences'. These provisions under the Basic Law are wider than those in the BORO in that the Basic Law is not confined in its application to the government or public authorities and may potentially extend its protection against intrusions by private individuals too, although this is not clearly stated in the Basic Law.

Privacy also receives some measure of protection under various Hong Kong statutes. The protection of privacy via legislation needs to be considered having regard to the work of the Law Reform Commission of Hong Kong ('HKLRC'). Back in 1989 the Governor-in-Council granted the HKLRC a broad reference to consider the subject of privacy, including data and information privacy as well as personal privacy involving intrusion into private premises.⁶ That reference has produced an extensive body of publications and arguably the most significant reform to date has been the enactment of the Personal Data (Privacy) Ordinance ('PDPO') which provides rules for the fair handling of information about living individuals, including restrictions on the collection, use and disclosure of identifiable personal information. It must be noted, however, that the PDPO is only concerned with data protection and does

not provide a general privacy right. The PDPO has, in a significant local case,⁷ been argued to extend protection to intrusions of privacy. It is the aim of this article to see whether data protection laws are sufficient to protect instances of intrusions of privacy and whether further developments in common law are possible.

2. The PDPO and the Eastweek case

The PDPO establishes a statutory regime regulating the handling of personal information but does not sweep away the existing rights of action available at common law.⁸ It regulates how these data are handled, including how they are collected and used. The data protection principles ('DPP'), which are contained in Schedule 1, impose limitations on the manner and purpose of collection of personal data, requirements concerning accuracy and retention, limitations on the use of data for purposes other than the initial purpose of collection, security requirements, transparency requirements and requirements to provide data subjects with access to their own personal information. Data users are required to comply with these DPPs unless an exemption applies. Such data users may also include employers who may be vicariously liable for the acts of their employees or agents.

There are a number of key concepts in the PDPO. The PDPO is concerned with protecting personal data which is defined as 'any data relating directly to a living individual from which it is practicable for the identity of the individual to be directly or indirectly ascertained and in a form in which access to or processing of the data is practicable.' It follows that the PDPO does not apply to information about a deceased person or to information relating to a living individual that is not identifiable or not recorded. The collection of information that is not subsequently put into a recorded form is not subject to regulation under the PDPO.

DPP 1 is of particular significance and relevance in protecting privacy because it deals with the manner in which data is collected. DPP 1 states that personal data must not be collected unless they are collected for a lawful purpose directly related to a certain activity and the data collected must not be excessive in relation to that particular purpose. The manner in which such data is collected must be lawful and fair. In addition, DPP1(3) provides that information of an individual who is the subject of the data can only be collected if the individual concerned has been explicitly informed of the purpose for which the data will be used.

The definition of data includes photographs and the act of taking a photograph constitutes data collection. Journalists often take photographs in contexts where the identities of the individuals in the photographs may not be of any concern to them. This gives rise to the question as to whether a journalist breaches DPP 1(3) if he or she takes a photograph in a public place without informing the subject as to the purpose of taking the photograph and undoubtedly this is an instance of intrusion of privacy. The issue was discussed in *Eastweek*

⁴ Art17 of the ICCPR states that: 1) No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation; 2) Everyone has the right to the protection of the law against such interference or attacks.

⁵ BORO, s 7.

⁶ The Law Reform Commission of Hong Kong, *Regulation of Media Intrusion*, Consultation Paper (2004) 1.

⁷ *Eastweek Publisher Ltd v Privacy Commissioner for Personal Data*, [2000] 1 HKC 692.

⁸ For example, in the area of breach of confidence.

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