Abstract

This paper will examine the conclusion given by the Hong Kong Law Reform Commission in 2004, that Hong Kong should set up a statutory Press Council with legal power, to resolve the issue of privacy invasion. However, the Government has not responded to this proposal. Precedents, the current regulating systems and Press Councils from other parts of the world would be examined through a comparative approach, with specific reference to Hong Kong law, to explore whether there is a necessity to do so. If so, since there is a dearth of discussion on this subject matter, suggestions on the composition and the powers given would be provided as to the future development of the Press Council in Hong Kong.
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I. Introduction

Today, Hong Kong people are grateful that they enjoy the freedom of press so that there are different mass media to monitor the Government, preventing its policies from deviating from wishes of the majority of the citizens. Media has long been regarded and referred as the Fourth Estate, besides legislative, executive and judiciary. Thomas Jefferson, a leading figure in the independence of the United States (U.S.) who was also the third President of the U.S., further argued that he would not hesitate even a moment to choose press if he has a choice between the government and the press.² Louis Brandeis, the famous leading judge for freedom of speech commented on the importance of free speech in *Whitney v. California*³:-

‘…the greatest menace to freedom is an inter people…that it is hazardous to discourage thought, hope and imagination…the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies; and that the fitting remedy for evil counsels is good ones.’

Perhaps the best definition of press freedom is found in the British Royal Commission on the Press in its Final Report:-

‘We define freedom of the press as that degree of freedom from restraint which is essential to enable proprietors, editors and journalists to advance the public interest by publishing the facts and opinions without which a democratic electorate cannot take responsible judgments.’⁴

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³ 274 U.S. 357, 375 (1927) (Supreme Court).
However, there are situations when the press would infringe another fundamental human right when they are conducting their business, and that is the right to privacy. It was first mentioned in common law not until 1890 when Warren and Brandeis raised the need for common law to recognize the right to privacy to protect individual’s life when his/her life ceased to be public and protection is required for those information before consideration is made for publication.\(^5\) Even so, English law, including England, Australia and Ireland did not recognize such a right while most American states and civil law countries, like France and Germany, coded this right.\(^6\) It has then received propounding effect from countries worldwide and finally, the right of privacy was entrenched into various international human right treaties, including the *International Covenants of Civil and Political Rights (ICCPR)*,\(^7\) which is incorporated as the *Bill of Rights Ordinance* (BORO)\(^8\) in Hong Kong.

In Hong Kong, there have been occasions to draw an assumption from the reactions of the citizens that the right of privacy seems to prevail over the freedom of press.\(^9\) In March 2010, a magazine published some photos of a leading figure in the student movements, about her daily life at home and the reporter even interviewed her neighbor in relation to her private life with her friends. Soon after its publication, protests are held against the magazine’s conduct of infringement of privacy.


\(^7\) Art. 17. See also *Universal Declaration of Human Rights Art. 12* and *Convention for the Protection of Human Rights and Fundamental Freedoms, Art. 8*.

\(^8\) Art. 14, s. 8 (Cap. 383).

\(^9\) For example, the Edison Chen incident.
As a matter of fact, a Report of Law Reform Commission of Hong Kong in relation to media and privacy intrusion was published in 2004. It stated with a majority support from citizens in Hong Kong that a statutory but independent press council should be established to condemn press which has serious privacy intrusions against any person.\textsuperscript{10} Nevertheless, since people are concerned with the mean of appointment of members into the Council,\textsuperscript{11} the Government has not responded to any suggestions by the Commission till now in 2010.

This research starts by providing an updated account of the current legal regime and the development in Hong Kong on the relationship and balancing exercise between press freedom and privacy intrusion, including the legal authorities and the route for the formation of a press council in Hong Kong. It will then go further to determine the best form to tackle privacy intrusion in Hong Kong through examination of the existing legal regimes in other jurisdictions, both legal authorities and also their Press Councils. Further, if we have decided that there should be a reform or a new Press Council in Hong Kong, which is the author’s stance, we will also discuss the formation and the powers of the press council, if any, should have to address the concerns in the society. The research will then be concluded by the writer’s proposals to the best solution to the current press intrusion in Hong Kong.

While the focus is on Hong Kong, it is disappointing to find that Hong Kong is lagging behind with case authorities and relevant texts, including legal authorities and academic discussions, therefore, the writer will also resort to materials and experience from other common law jurisdiction, including the United States, United Kingdom, Australia and New Zealand, where they have set up their Press Councils.


\textsuperscript{11} Ibid, [2.14].
II. The Laws in Hong Kong

Currently, the Basic Law of Hong Kong SAR and the local legislation provide protection of press freedom as well as the right of privacy.

(i) Laws in relation to press freedom

Article 27 of the Basic Law of the Hong Kong SAR contains general support for press freedom. It declares ‘Hong Kong residents shall have freedom of speech, of the press and of publication…’12 Further, it can also be found in local legislation. Article 16 of BORO gives effect to Article 19 of the ICCPR, which grants right to persons to freely express their opinion ‘regardless of frontiers, either orally, in writing or in print … through any other media of his choice.’ However, it is subject to exceptions when it either fails to respect the rights or reputation of others,13 or for the protection of national security or of public order, or of public health or morals.14 It opens the gate for private tortuous actions, such as libel and trespass, provided that privacy or reputation is affected.

(ii) Privacy Laws in Hong Kong

Meanwhile, it seems more protection for privacy is to be found in our legal system. Articles 29 and 30 of the Basic Law strengthen the support for privacy as protecting the personal data, both in domestic household and communication. Article 29 prohibits arbitrary or unlawful or intrusion into, a resident’s home or other premises. Article 30 proclaims:

‘The freedom and privacy of communication of Hong Kong residents shall be protected by law. No department or individual may, on any grounds, infringe upon the freedom and privacy of communication of residents except that the relevant authorities may inspect

12 Basic Law of HKSAR Art. 27.
13 BORO, Art. 16(3)(a).
14 Ibid, Art. 16(3)(b).
communication in accordance with legal procedures to meet the needs of public security or of investigation into criminal offences.’

Article 14 of the BORO gives effect to Article 17 of the ICCPR, which provides protection against unlawful or arbitrary interference with privacy and people are entitled to protection of law against such interference.

In addition to the Basic Law, privacy protection is also entrenched in local legislation through the introduction of the Personal Data (Privacy) Ordinance (PDPO).\(^\text{15}\) It was enacted in 1995 and came into force in 1996.\(^\text{16}\) Personal data is defined in section 2 as any data:
(a) relating directly or indirectly to a living individual;
(b) from which it is practicable for the identity of the individual to be directly or indirectly ascertained; and
(c) in a form in which access to or processing of the data is practicable.

Currently, the scope only covers personal data recorded in documents but not oral communications or sign language.\(^\text{17}\) Further, it does not aim to protect legal persons, such as corporations.\(^\text{18}\) It has been confirmed by courts in two occasions in Hong Kong that PDPO only protected privacy of information, but not other forms of privacy, such as personal intrusion.\(^\text{19}\)

\(^{15}\) Cap. 486.
\(^{16}\) Mark Berthold & Raymond Wacks, *Data privacy law in Hong Kong : professional guide* (Sweet & Maxwell, Hong Kong 2000) 1.
\(^{17}\) Ibid.
\(^{18}\) Ibid.
\(^{19}\) *Eastweek Publisher Ltd. & Anor v. Privacy Commissioner for Personal Data* [2000] HKCA 442 (CA). See also *Yuen Sha Sha v. Tse Chi Pun* [1999] 2 HKLRD 28 (DC).
It is to note that news activities are exempted under this ordinance provided that the data is collected solely for one purpose – news activities.\textsuperscript{20} News activities are defined as journalistic activities which include gathering of the news, preparation or compiling articles for news or observations on news or current affairs for the dissemination to the public\textsuperscript{21} or the dissemination to the public any articles or observations on news or current affairs.\textsuperscript{22}

\textit{Concluding remarks}

There exists legislation to protect both press freedom and privacy in Hong Kong, though there are some deficiencies in our privacy laws. Therefore, people wish there could be a body, which works as an alternative, to regulate the press industry. The next chapter will deal with the historical development of the urge for a press council in Hong Kong.

\textbf{III. Historical Development of the urge for a Press Council in Hong Kong}

The idea of setting up a press council in Hong Kong was first proposed in 1980s by Mr. Michael Thomas, the Attorney-General of Hong Kong at that time, with prominent figures participating in the proposal, including Mrs. Selina Chow, a former member of the Legislative Council in Hong Kong.\textsuperscript{23}

It was further elaborated by the LRC in 1989 when it appointed its sub-committee on privacy to review the legal regime related to privacy and make recommendations so as to increase

\textsuperscript{20} \textit{PDPO s. 61 (1)}.  
\textsuperscript{21} Ibid, s. 61(3)(a).  
\textsuperscript{22} Ibid, s. 61(3)(b).  
\textsuperscript{23} Emily Lau’s speech, Legislative Council Hong Kong Vol. 2 1999/2000 (17 November 1999) 1421.
individual privacy rights.⁴ It turned solid when it issued a consultation paper named ‘The Regulation of Media Intrusion’.⁶ After ‘concluding there is no self-regulation in the media industry’, it recommended the setting up of a press council with statutory power to regulate the press.⁷ This proposed council also has the power to impose fines on any newspaper that fails to respond to the council’s judgment by publishing an apology or correction.⁸ After publishing the consultation paper, the media responded strongly by objecting to the proposal. The main concern was based on the rationale that the Chief Executive would use the council as a tool to limit press freedom when he has the power to appoint the Chairman and the members of the council⁹ which would govern all newspapers and magazines in Hong Kong.¹⁰ This furthered the industry’s worries when the sub-committee proposed that harassment of a person for his personal life might amount to a criminal offence with imprisonment up to 2 years in 1998.¹¹ On this basis, pro-Chinese political parties also allied with pan-democratic councilors and voted 39-0 in the Legislative Council in November 1999 against this proposal.¹²

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⁵ Ibid.
⁸ Ibid, Recommendations 32 and 33.
⁹ Ibid, Recommendation 8.
Meanwhile, a group of newspaper professionals and eminent figures discussed the possibility of forming a self-regulatory body to impede privacy intrusion. A preparatory committee was set up in March 2000 to raise funds and drafts rules and constitution for the Council. This was finally done in July 2000 and the executive committee has adopted the Journalists’ Code of Professional Ethics as a code of ethics and guidelines for local journalists in carrying out their professional duties. The voluntary council started handling complaints for privacy intrusion in September 2000 and would publish the results of the complaints.

There are currently only 10 newspapers who are members of the Press Council Limited while the 3 top-selling newspapers, Apple Daily, Oriental Daily News and The Sun, are not members. Hong Kong Journalist Association is not a member as well. As of 25th April, 2010, there are 23 public members, including the Chairman, and also 12 industry members. The Chairman must not be employees in newspaper industry, claiming to ensure the independence of the council.

It was criticized in the HKLRC report that it lacks financial resources to support its operation. Furthermore, it was not effective in dealing with privacy intrusion when major newspapers are not members of this Limited. For example, in the first few months of its

34 Ibid.
35 Ibid.
37 Ibid.
38 Ibid.
39 Ibid.
41 Ibid, 99-100.
operation, about 70% of the complaints were directed against non-members of the press council limited in which the council has no jurisdiction.\footnote{Ibid.} Even if it has jurisdiction over its members, the council has no power to compel the offending press to publish the directives and has no follow-up powers.\footnote{Ibid, Chapter 8.}

The HKLRC, nevertheless, revived the dream of forming a statutory press council in December 2004 by issuing the Report of ‘Privacy and Media Intrusion’. This time, they tried to gain support by withdrawing the power of the council to impose fines and any governmental intervention in appointment of the members. It also cited surveys conducted by various organizations to create an impression that unlike the proposal 5 years ago, its proposal this time received a majority support from the citizens, acknowledging the urgent need of setting up a press council in Hong Kong to regulate privacy intrusion.\footnote{Ibid, Chapter 2 for the results of the surveys conducted by different organizations.}

The Government has been acquiescent in doing follow-up of the proposal to set up the council. It was explained by a government source that it needs to strike a good balance between privacy and press freedom when the views from the media industry and the community were at two extremes upon whether tougher measures should be introduced.\footnote{Hong Kong Journalists Association, Shrinking margins: Freedom of expression in Hong Kong since 1997: 2007 Annual Report, 36.}

Nevertheless, the Government has been, in several attempts, trying to restrict the press freedom. In 2006, the sub-committee once again called for the enactment of a legislation barring individuals, including journalists, from trespassing into private premises to obtain
information in whatever form and this would be made a criminal offence.\textsuperscript{46} A year later, following a record complaints about the photos of a pop star changing in a room in Malaysia, Chief Executive Donald Tsang called for the prospect of tougher privacy laws and adopting the proposals from the HKLRC as a basis for better protection.\textsuperscript{47} In 2009, the controversy came again following the publication of nude photos on internet with some famous figures in the entertainment business. The Chief Executive once again referred this as ‘serious issue which demanded further follow-up’.\textsuperscript{48}

\textbf{Concluding remarks}

From looking through the development of the press council in Hong Kong, we can see there is a tendency that while ignoring the call for a press council to preserve a certain degree of press freedom to media intrusion, the Government seems to favour stricter privacy laws to protect citizens but at the same time, pushing press freedom to the corner of the wall. The next chapter will give the view of judiciary in the society on these two apparently conflicting rights.

\textbf{IV. Important local and overseas cases}

While prominent figures often ask for more space for their personal life, which creates lots of discussions among the society and the idea of setting up a body to halt those invasions, there are rarely cases brought to the court for determination. Nevertheless, there are two notable cases in which the court deals with these two apparently conflicting rights, namely (i)

\begin{itemize}
\item[\textsuperscript{46}] Hong Kong Journalists Association, \textit{Hong Kong Government takes on the Public Broadcaster: 2006 Annual Report}, 20.
\item[\textsuperscript{47}] Hong Kong Journalists Association, \textit{Shrinking margins: Freedom of expression in Hong Kong since 1997: 2007 Annual Report}, 35.
\item[\textsuperscript{48}] Hong Kong Journalists Association, \textit{Rising nationalism: A potential threat to Hong Kong’s freedom of expression: 2008 Annual Report}, 23.
\end{itemize}
Eastweek Publisher Limited & Anor v. Privacy Commissioner for Personal Data\(^{49}\) and the different decisions of (ii) Campbell v. MGN Ltd. \(^{50}\) The former case is the first case in Hong Kong that the exercise of Privacy Commissioner for Personal Data’s power was challenged. \(^{51}\) The second case is cited by almost every textbook in England and Hong Kong, in relation to privacy and media intrusion.

(i) The Eastweek case

In this case, a female complained to the Commissioner that Eastweek has published a photo of her, without her consent, in its article about fashion sense of women seen on Hong Kong streets. While most comments about other girls were relatively positive, the complainant was referred as ‘Japanese Mushroom Head’ and criticized of her fashion sense. The photo concerned was large enough for the complainant to be recognized. She then made a complaint and the Commissioner adjudged the complaint to be valid. He notified the magazine's solicitors of his decision, referring to his power under section 50(1) of PDPO to serve an enforcement notice on the publisher. He requested the publisher to provide him with an acceptable undertaking about its future conduct, and deferred his decision on whether to serve an enforcement notice for the time being. Eastweek was not satisfied with the decision and filed a judicial review.

In the first instance, \(^{52}\) Keith JA dismissed the action. He was of the view that firstly, the complainant was not notified with the purpose of taking the photo. Furthermore, the photographer had no practical reasons to believe the complainant would have given her

\(^{49}\) [2000] HKCA 442 (CA).

\(^{50}\) [2002] EWHC 499 (QBD); [2002] EWCA 1373 (CA) and also [2004] UKHL 22 (HL).

\(^{51}\) Liu Jintu and Huang ZhiCheng, Chuan bo fa shou ce (Xianggang xin wen xing zheng ren yuan xie hui 2006) 172.

\(^{52}\) [1999] HKCFI 433.
consent, especially when she would be criticized.\(^{53}\) Secondly, he found that the Applicant did not take every practicable reasonable step to obtain the consent of the complainant to publish the photos and also does not have a policy to ensure the identity of the person in photos not to be revealed.\(^{54}\) He also agreed with the Commissioner’s finding that even if the photo taking falls within the definition of ‘news gathering’ under section 61(3) of \textit{PDPO}, there was a contravention since the article was ‘only a commentary on dress sense and criticism of individual taste of a few individuals based on the random thoughts of the reporter, rather than a report on fashion trends or street fashion.’\(^{55}\) Keith JA also doubted whether photos of a person can amount to ‘data’ under section 2(1) of \textit{PDPO} when it superficially refers to information about someone.\(^{56}\) The applicant appealed to the Court of Appeal.

The Court of Appeal reversed the decision and allowed the appeal.\(^{57}\) Firstly, it held that some photos would fall within the ambit of ‘Data’. Secondly, it was of the view that while the trial judge and the Commissioner has placed their focus on the principle of ‘fairness’ under the \textit{Data Protection Principles 1(2)(b)}, they have ignored its first limb that whether this is a lawful collection of personal data.\(^{58}\) The Court of Appeal also decided that the effective operation of \textit{PDPO} is based on data collection of an identified object or an object in which it seeks to identify.\(^{59}\) The complainant’s anonymity and the irrelevance of her identity so far as it is concerned do not trigger the operation of the Ordinance.\(^{60}\) Thus, a newspaper might freely publish photographs to illustrate a social phenomenon in which persons who are

\(^{53}\) Ibid, [21].
\(^{54}\) Ibid, [19].
\(^{55}\) Ibid, [17-18].
\(^{56}\) Ibid, [28].
\(^{57}\) [2000] HKCA 442 (CA).
\(^{58}\) \textit{PDPO Schedule 1: Data Protection Principles (1)(2)(a)}
\(^{59}\) [2000] HKCA 442 (CA) [14].
\(^{60}\) Ibid.
unknown and irrelevant to the publisher, even if their faces are clearly depicted.\textsuperscript{61}

The court, however, did not deal with the use of hidden cameras, which is a common means employed by reporters in news investigation.\textsuperscript{62} It is to be noted that it could be violating ‘unfair collection’ under the \textit{DPP} of \textit{PDPO} unless parties could demonstrate a public interest.\textsuperscript{63}

\textbf{(ii) Naomi Campbell case}

A British newspaper \textit{The Mirror} published an article revealing Naomi Campbell, who is a famous model and celebrity, contrary to her denials as a drug addict, was attending meetings in specialists centres in an attempt to overcome her addiction. She did not dispute the argument of ‘public interests’. However, she argued that by publishing those photos of her attending those classes, as such would amount to breach of confidence and contravention of the \textit{British Data Protection Act 1998}.

The trial judge gave judgment for Naomi but the Court of Appeal reversed the decision and allowed the appeal. Finally, in the House of Lords, the appeal by Naomi was allowed by a bare majority of 3 to 2 and Naomi was awarded damages. Breach of confidence provided an alternative to invasion of privacy. The majority struck a balance between freedom of expression and respect of right of privacy and they gave judgment to Naomi for two reasons. Firstly, right of privacy is vital to encourage addicts to attend those meetings. The effectiveness of the therapy is jeopardized if the contents are made public. The correct test is

\begin{itemize}
\item \textsuperscript{61} Ibid, [21].
\item \textsuperscript{62} Weissenhaus, \textit{Hong Kong media law: a guide for journalists and media professionals} (Hong Kong University Press, 2007) 113.
\item \textsuperscript{63} Ibid.
\end{itemize}
whether publication of the information would be highly offensive to a reasonable person of ordinary sensibilities. Further, the majority decided that freedom of expression was not dominant over the right of privacy. In this scenario, there was no political or democratic social needs that the benefits for revealing her treatment are disproportionate to the harm caused to Naomi.

This case changed the classic formulation of breach of confidence that it must rely on the existence of a confidential relationship. England now imposed a duty of confidence on the media when they receive information which they know or ought to know that such information is confidential or private. This was further developed in Douglas v. Hello! when the Court of Appeal held that they would develop this cause of action to give effect to Articles 8 and 10 of the ECHR, following the Strasbourg jurisprudence involving Princess Caroline of Monaco and her family. Nevertheless, the court did recognize the potential for invasive photographs to cause distress and the nature of privacy rights. It is unknown whether courts in Hong Kong would follow such practice.

**Concluding remarks**

The *Eastweek* case revealed the weakness of *PDPO* in protecting a citizen’s privacy which the Government has not addressed on it till now. While the *Naomi Campbell* case was only

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64 [2004] UKHL 22 (HL), [H7].
68 [2005] 3 W.L.R. 881 (CA), [47-53] (Lindsay J.).
decided on a bare majority, it would be subject to debates if a similar case came up, but it is the writer’s view that courts in Hong Kong would adopt the majority rule.

V. Existing current regime and its effectiveness in the Balancing exercise

Notwithstanding the fact that certain countries setting up their press councils, their national courts also recognize different causes of actions and this section aims at examining other jurisdictions. This section aims at examining legal regime of other jurisdictions in balancing the right of privacy and press freedom. Particular attention will be paid to the American tort of invasion of privacy and other means such as self-regulation and press councils in other countries.

(i) United States

After Brandeis and Warren argued that the common law in U.S. implicitly recognized a right to privacy, the American courts have recognized four causes of civil actions for individuals to sue for privacy intrusion, namely (a) misappropriation of name or likeness for commercial purposes; (b) public disclosure of private facts; (c) unreasonable intrusion upon seclusion and (d) putting someone in a false light in the public eye. All of that have been codified into Restatement (Second) of the Law of Torts.69

(a) misappropriation of name or likeness for commercial purposes70

A person would be liable under this tort if he appropriates to his own use or benefit the name or likeness of another. An individual is able to determine how he wishes to exploit his name

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70 Restatement (Second) of the Law of Torts §652C.
or image commercially. In New York, it has been confined to advertising for ‘purposes of trade’.\textsuperscript{71} This tort has often been commented that it has more connections with a proprietary interest rather than a protection of a general ‘right to privacy’.\textsuperscript{72} In 1986, Woody Allen received a settlement after a video rental franchise firm used his look-alike in an advertisement when there was no disclaimer and Allen was not mentioned by name in the advertisement.\textsuperscript{73}

\textit{(b) public disclosure of private facts}\textsuperscript{74}

A person is liable under this tort if he makes private information of another person’s life public provided that the information is highly offensive to a reasonable person and it is not of legitimate concern to the public. The term ‘public’ must be construed strictly that the information must be fairly widespread that what is jotted down in a reporter’s notebook would not be sufficient to meet the publication requirement.\textsuperscript{75}

\textit{(c) unreasonable intrusion upon seclusion}\textsuperscript{76}

A person is liable under this tort if he intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns provided that it is offensive to a reasonable person. Prosser and Keeton added that there must be an actual prying in which disturbing noises or bad manners will not suffice and there must be an intrusion into

\textsuperscript{71} New York Civil Rights Law 1921, titles 50-1.
\textsuperscript{73} Roy Moore and Michael Murray, \textit{Media Law and Ethics} (3\textsuperscript{rd} edn. Lawrence Erlbaum Associates, New York 2008) 528.
\textsuperscript{74} \textit{Restatement (Second) of the Law of Torts} §652D.
\textsuperscript{76} \textit{Restatement (Second) of the Law of Torts} §652B.
something private.\textsuperscript{77} Journalists can never have court authority to commit intrusion, no matter how they can justify, including working with authorities.\textsuperscript{78}

\textit{(d) putting someone in a false light in the public eye}\textsuperscript{79}

A person is liable under this tort if he, either with knowledge or recklessly, makes public an opinion that is attributable to another person that places the other in a false light amount the public, provided that it is highly offensive to a reasonable person. For example, a person would be liable if he uses B’s photo or name to illustrate a film or a play in which B has no connection. It has been commented that there might be some overlaps with the tort of defamation.\textsuperscript{80}

The phrase ‘highly offensive’ appears in three of the four torts as a requirement and it has been held previously that trespasses into places where people have reasonable expectations of privacy, such as a dog catcher entered the plaintiff’s property without authorization,\textsuperscript{81} or unjustified searches of employee’s personal locker.\textsuperscript{82} In Galella v. Onassis,\textsuperscript{83} the court held that paparazzi behavior towards the family of former U.S. President, John F. Kennedy, after his assassination, was beyond the reasonable boundary of the interference allowed to protect the overriding public interest.\textsuperscript{84}

\textsuperscript{78} Dietemann v. Time Inc. 449 F.2d 245 (C.A. 9 1971) (CA).
\textsuperscript{79} Ibid, §652E.
\textsuperscript{81} Gerard v. Parish of Jefferson 424 So. 2d 440 (La. App. 1982).
\textsuperscript{82} K-Mart Corp. v. Trotti 677 S.W.2d 632 (Tex. App. 1984).
\textsuperscript{83} 487 F.2d 986 (2d Cir. 1973) (CA).
\textsuperscript{84} Abstract of ibid in Daniel J. Solove & Paul M. Schwartz, \textit{Information Privacy Law} (3\textsuperscript{rd}}
It should be noted that the four aforesaid causes are not recognized in all States in the U.S.. An example is that California accepts all four claims but New York only recognizes the tort of misappropriation of name or likeness for commercial purposes.\(^8^5\)

California also took the first step in deterring the paparazzi when it passed an anti-paparazzi Act in 1997\(^8^6\) and it was strengthened in 2009.\(^8^7\) It defined two forms of invasion of privacy, physical invasion of privacy and constructive invasion of privacy. A person is liable for physical invasion of privacy when he knowingly enters onto the land of another person without permission to capture any type of images of a plaintiff engaging in a personal or familial activity and the physical invasion occurs in a manner that is offensive to a reasonable person.\(^8^8\) Similarly, a constructive invasion of privacy is someone attempting to commit a similar act as for the physical invasion of privacy or using visual or auditory enhancing device to intrude others’ privacy.\(^8^9\) ‘Personal or familial activity’ is defined as including, but is not limited to, intimate details of the plaintiff’s personal life, interactions with the plaintiff's family or significant others, or other aspects of the plaintiff's private affairs or concerns, excluding criminal offences.\(^9^0\)

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85 Weissenhaus, *Hong Kong media law: a guide for journalists and media professionals* (Hong Kong University Press, 2007) 105.
89 Ibid, (b).
90 Ibid, (l).
Offenders might be subject to up to three times the amount of any general and special damages, disgorgement and also a civil fine between USD $5,000 and $50,000.\textsuperscript{91} It does not supersede any national privacy laws but acts as an addition to any other rights or remedies provided by law.\textsuperscript{92} It is, therefore, arguments like public interests and press freedom are still available even if journalists are sued under this section. It is also interesting to note that part of the civil fines will be used to support Arts and Entertainment Fund, which is hereby created in the State Treasury.\textsuperscript{93}

Under the new amendment which takes effect in January 2010, people can file lawsuits against media outlets that pay for and make first use of material they knew was improperly obtained. Media now might be liable to pay millions of U.S. dollars to celebrity as damages.

(ii) England

(a) Legal development of the tort of privacy and its remedies

Besides the usual causes of actions and also remedies given in courts, the English courts have shown its willingness in accepting the American tort into its common law. In Kaye v. Robertson,\textsuperscript{94} Leggatt LJ argued that the right to privacy is the solution to the abuse of freedom of press.\textsuperscript{95} However, he also recognized the fact that the right of privacy in England ‘can only be recognized through the legislature [and I hope] the government can make reference to the wealthy experience of the enforcement of right of privacy in the U.S., both in common law and statues, such that the shortcoming would not be long delayed.’\textsuperscript{96} The

\begin{itemize}
\item \textsuperscript{91} California Anti-paparazzi Act Cal. Civ. Code §1708.8 (a)-(d).
\item \textsuperscript{92} Ibid, (i).
\item \textsuperscript{93} Ibid, (m)(2)(b).
\item \textsuperscript{94} [1991] FSR 62 (CA).
\item \textsuperscript{95} Ibid.
\item \textsuperscript{96} Ibid.
\end{itemize}
British Government responded to the call when it enacted the Data Protection Act 1998.

In these years, the courts also developed a habit of giving a gagging order, better known as ‘super injunctions’. ‘Super-injunctions’ prevent news organisations from revealing the identities of those involved in legal disputes, or even reporting the fact that reporting restrictions have been imposed. Courts impose such orders to ensure that the trial is conducted on a fair basis. After a series of evolvement in high court rulings, Max Mosley, who is the Formula One chief, won damages from News of the World when it revealed details about his sex life. 97

The potential infringement of freedom of expression was brought to public discussion in the Trafigura incident. 98 A law firm representing Trafigura, a British oil trading firm, was accused of infringing the supremacy of parliament after it insisted that the super-injunction obtained against the Guardian prevented the paper from reporting a question tabled by a Parliamentary member. His questions were initially about the implications for press freedom of an order obtained by Trafigura preventing the Guardian and other media from publishing the contents of a report related to the dumping of toxic waste in Ivory Coast. But overnight details of his question and by the next morning the full text had been published. 99

finally withdrew its gagging attempt. British Prime Minister, Gordon Brown, described the incident as unfortunate and would call for debates in the House of Commons about the increasing number of super-injunctions granted and the Justice Minister claims that she is considering whether new guidelines should be issued to the judiciary.100

Lawyers were diverse on the view of the serious impact of super-injunctions, arguing that courts only grant it rarely and describing that as unusual.101 Newspapers, in particular the Guardian, cite statistics in support of its argument that British judges are reluctant to depart from the judgment of Strasbourg decision on Princess Caroline of Monaco, leading to predominance of right of privacy over the right of freedom of expression.102

British courts seem to have changed their direction when Mr Justice Tugendhat lifted the super-injunction to allow the media to report the extra-marital affair between John Terry, former captain of the England national football team, and the ex-girlfriend of his former teammate,103 in January 2010. The judge said that an injunction was not proportionate having regard to the level of gravity of interference with Terry’s private life, criticizing that the nub of Terry’s complaint is not to protect his private life but his reputation, in particular with sponsors.104 The judge further added, ‘Freedom to live as one chooses is one of the most valuable freedoms, but so is the freedom to criticise’.105 This decision came two days after

101 Ibid.
104 Ibid.
the Supreme Court had lifted a ban on naming suspected terrorists when it criticised its colleagues in granting such orders without ‘the slightest justification’.\(^{106}\) Lord Rodger argued rich and powerful people should refer the matter to the Press Complaints Commission, the English model of press council which will be dealt with later in this research, but not the courts.

Whether the case involving John Terry has substantially changed the court’s direction to the grant of super-injunction is still subject to debate. Nevertheless, what is clear is the right to privacy is now given a heavier weight against the freedom of expression than before and this situation is likely to continue unless a clear direction, either from the Government or a decision from the House of Lords, is given in relation to this matter.

\begin{section}{b) Press Complaints Commission}

The present Press Complaints Commission (PCC) was formed by the press in response to the ultimatum given by the *Calcutt Report on Privacy and Related Matters* in 1990. It proposed to set up a new Press Complaints Commission to replace the existing Press Council, which it considered not independent.\(^{107}\) The new Commission had eighteen months to demonstrate a non-statutory self-regulation can work effectively and if it fails, the Government would step in and establish a statutory system for handling complaints against the press.\(^{108}\)

\end{section}


\(^{108}\) History about the PCC, PCC’s website <http://www.pcc.org.uk/about/history.html>
A Press Standards Board of Finance was established and charged with raising a levy upon the newspaper and periodical industries to finance PCC. This arrangement secures financial support and independence for the PCC when the Commission is not itself responsible for obtaining funds directly from newspapers and magazines. Currently, there are seventeen members and a majority of them have no connection with the press. This ensures the independence of the PCC from the newspaper industry. There are three classes of members, namely the Chairman, lay members and industry members. The Chairman must not be engaged in or, otherwise than by his office as Chairman, connected with or interested in the business of publishing newspapers, periodicals or magazines.\(^\text{109}\)

Complainants need not sign a written waiver for legal proceedings but it has been commented that PCC would not actively pursue a claim while it is the subject of legal proceedings.\(^\text{110}\) If the complaint is upheld for breach of the British Code of practice, the concerned press is obliged to publish the critical ruling in full and with due prominence.\(^\text{111}\) However, its ‘effective’ redress was challenged by the European Court that when it found PCC lacks legal power to award damages points to the fact that those bodies could not provide an effective remedy to the victim in cases of violations of privacy and the need to develop a privacy law


\(^{111}\) ‘Making a Complaint’, PCC’s website `<http://www.pcc.org.uk/complaints/makingacomplaint.html>` (accessed on 25\textsuperscript{th} April, 2010).
to provide damages.\textsuperscript{112}

While it has been subject to various criticisms,\textsuperscript{113} this voluntary independent PCC seems to have gained support from the Government and no statutory measures have been proposed in relation to this issue.\textsuperscript{114}

\textit{(iii) Australia}

Australia has basically followed the common law counterparts in retaining the causes of actions of tort of invasion of privacy. It also enacted the \textit{Privacy Act 1988 (Cth)}, which is similar to our \textit{PDPO} with a similar establishment of the Privacy Commissioner Office. It also established the Australian Press Council (APC) in 1976\textsuperscript{115} to deal with complaints by citizens. It consists of industry members appointed by their respective constituent bodies, journalist members, and also members from the public. The Chairman must have a legal background, but with no previous connection with the press.\textsuperscript{116} There must be more industry members in the Council than the total of the number of the public members and the journalist members.\textsuperscript{117}

\begin{itemize}
\item \textsuperscript{113} For a detailed account, see Hong Kong Law Reform Commission, \textit{Report on Privacy and Media Intrusion} Ch. 12. See also Geoffrey Robertson Q.C. & Andrew Nicol Q.C., \textit{Robertson & Nicol on Media Law} (5\textsuperscript{th} edn. Sweet & Maxwell, London 2007) [14-003]-[14-037] for a comprehensive review on PCC.
\item \textsuperscript{114} \textit{History of the PCC} <http://www.pcc.org.uk/about/history.html> (accessed on 25 April 2010).
\item \textsuperscript{115} Sally Walker, \textit{Media law: commentary and materials} (LBC Information Services, Pyrmont, New South Wales 2000) 1023.
\item \textsuperscript{116} The current APC Chairman is Professor Julian Disney.
\item \textsuperscript{117} Hong Kong Law Reform Commission, \textit{Report on Privacy and Media Intrusion} (2004) 158.
\end{itemize}
The complainant must sign a waiver in legal proceedings against the media, before APC would entertain the claim.

If APC upholds the complaint, the publication concerned must publish the adjudication promptly and with due diligence. APC has no requirements as to the contents of printing the adjudication printed verbatim but requires the conclusion and spirit of the adjudication remain clear and unchanged if there is any editing. It has no power to punish those publishers which do not follow its adjudication, nor does it have power to enforce publication of its censure. For the past two decades between 1988 and 2008, 5.4% of the complaints can be classified as invasion of privacy. However, if we include other categories like inaccuracies and false reporting, which involves certain elements of invasion of privacy, the proportion can go above 50%. Though APC did not have a specific statistics on the successful rate of these complaints, it has provided that among all the complaints made in the past two decades, around 41.1% of the complaints brought to adjudication have been upheld in whole or in part.

Though mainstream newspaper or magazine is willing to comply with the order, rarely country and suburban newspapers have cooperated with APC. APC is also subject to

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121 Ibid.
122 Ibid.
criticisms for its lack of power by media as well as scholars.\(^{123}\) In particular, Frank Sharman, an Australian lecturer, notes that despite the fact that the concerned press rarely refuses to publish a report against itself, but more often ‘the report will not get as much prominence as the original story’.\(^{124}\)

It is expected that Australia might have had a tighter control over the media in relation to the privacy following the Australian Law Reform Commission’s (ALRC) final report on privacy released in 2008.\(^{125}\) ALRC’s proposals can be summarized as follow:-

(a) The scope of media exemption under the current regime is too broad and a definition of ‘journalism’ should be added;

(b) a statutory cause of action for serious invasion of privacy should be introduced and the test in the U.S. is favoured on the reasonableness; and

(c) journalism exemption should not be extended to actions for breach of privacy and fewer defences should be available to the media.\(^{126}\)

It is to be noted that the Australian Special Minister of State has commented this reform is not in a priority as he concerned.\(^{127}\)


\(^{124}\) Ibid.


\(^{126}\) Ibid.

\(^{127}\) Ibid.
(iv) **New Zealand**

(a) **Development of the tort of privacy intrusion**

New Zealand has been very cautious in incorporating the American tort of invasion of privacy into her common law. She first considered the case of *Tucker v. News Media Ownership Ltd.*  

In this case, the plaintiff was granted injunction against the defendants in New Zealand, restraining them from reporting his previous criminal convictions, which would affect his fundraising campaign for his heart transplant operation in Australia. Later, the plaintiff applied for an injunction, claiming the publication would cause him grievous physical or emotional harm. It was later advised that the Australian hospital had refused to do the operation since the plaintiff failed to meet certain medical criteria. The Court of Appeal considered the possible application of the American tort of invasion of privacy. McGechan J. supported the introduction of the American tort into the New Zealand common law, or at least the invasion of personal privacy by public disclosure of private facts and cited its local legislation and textbooks in support of his judgment. He acknowledged the fact that the American constitutional provisions are different from that in New Zealand, yet he considered ‘…good sense and social desirability of the protective principles enunciated are compelling’ and that he tried to incorporate this tort by further developing beyond the tort of intentional infliction of emotional distress as illustrated in *Wilkinson v. Downton*. Nevertheless, he considered that even if the tort is accepted, how it should be applied should be operated on a case-to-case basis to suit the conditions of the jurisdiction and legislative intervention is welcomed.

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129 Ibid, 733.
130 Ibid.
131 [1897] 2 QB 57 (CA).
However, the court stepped back seven years later in 1993 in the case of *Bradley v. Wingnut Films Ltd.* In this case, a tombstone marking the plaintiff’s burial plot appeared in a film as a backdrop to a sequence shot at a cemetery. The tombstone was never shown in its entirety and only appeared in the film for a total of 14 seconds. The plaintiff sued the defendants on various grounds, one of which is relying on *Tucker* about the introduction of the American tort. Gallen J. rejected this argument on the basis that though there is such a tort in the country, in reality, the development should be ‘regarded with caution’ and the court must balance the rights of individuals against the significance of freedom of expression. He also found difficulties in formulating the boundaries in which he can ensure both rights are appropriately recognized. It was further held that the *Tucker* case was so exceptional that Bradley did not meet the requirements laid down, and therefore, the action failed.

**(b) Press Council**

The New Zealand Press Council (NZPC) entertains complaints made against newspapers and magazine, including print media with an appreciable readership including websites. It is funded entirely by the publication industry. The Council comprises of six public members, including the chairman who is a retired judge, and five industry members, who are appointed by three different categories, namely the newspapers publishers, journalist’s union and also from the magazine publishers. Similar to Australia, the complainant is required to sign an undertaking that having referred the matter to the NZPC, he will not pursue his claim

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133 Ibid, 423.
134 Ibid.
136 Ibid. See also the Annual Reports of the NZPC.
137 The Current NZPC’s Chairman is Barry Paterson according to the NZPC’s website <http://www.presscouncil.org.nz/members.html> (accessed on 25 April 2010).
against the alleged media organization in court proceedings. Further, the only sanction is to require the offending publishers to publish the essence of the decision but NZPC has no power to insist the publishers for follow-up actions.

In 2008, NZPC dealt six cases related specifically to privacy, double that of the previous year. Moreover, from 2000 there have been more than 50 complaints related in part or wholly to this subject.

Concluding remarks

From examining the worldwide situation, a finding might be drawn that common law courts have shown its willingness to accept the introduction of the tort of invasion of privacy, such as the case of Tucker as well as Bradley. Its only concern is how the rights of privacy and freedom of expression can be balanced properly such that better protection and remedies could be provided. New remedies, such as the ‘super-injunction’, have been handed by the English courts. Despite the fact that it is subject to criticism about infringing the right of freedom of press, it has shown that the court has gradually developed to reflect the reality of the emergence of this tort, such as incorporating the American tort during its development or merging of the existing tort. So, in the next section, we will discuss the reasons why there are the concerns of citizens and scholars in Hong Kong and how that could possibly be dealt with.

138 Ibid, Complain, Complaints Procedure [10],
VI. Concerns in the society

It is the writer’s argument that we should allow what belongs to the court to go to the court. If one alleges there is a breach of privacy, he or she should bring the claim to the court and allow the court to determine the dispute. Setting up a press council should always be considered as the last alternative and a self-regulatory one is preferable. The writer acknowledges concerns from citizens and scholars. Citizens desire for a statutory press council since instead of bringing the actions to courts, the statutory press council can impose fines on offending press and lots of costs can be saved in instructing lawyers and the courts’ fees. The Government and scholars may prefer a statutory council as they worried about the effectiveness of a self-regulatory body.\textsuperscript{141} Details of each concern are discussed as follows.

(i) Costs

One of the concerns by citizens in Hong Kong in bringing the actions is the matter of costs.\textsuperscript{142} They are in the view that media organizations would abuse their financial resources in oppressing them in taking the greatest advantage. Therefore, the costs of the actions might well exceed what they intend to get and the public hearing will further devastate their reputation and this damage is non-compensable. This worry was reflected by the dissenting judgment by Wong JA in the case of Eastweek:

‘… It’s open to her to bring an action for defamation against the publisher. That is a perfectly true and correct statement in so far her legal action is concerned. In reality, the situation is not so simple… [the action] is not only technical, complicated and time-consuming but it also has become so expensive that only very few people can afford to take legal actions against rich


and powerful newspapers or magazines. As for the small men or women, the doors of the law are out of their reach. This, perhaps, explains why the legislature steps in to give limited protection to these individuals to alleviate their hardship in a small way.\textsuperscript{143}

However, their worries could be alleviated with the implementation of the Civil Justice Reform (CJR), the strengthening of the bi-polar litigation system in Hong Kong and amendment of the \textit{PDPO}.\textsuperscript{143}

\textbf{(a) Civil Justice Reform (CJR)}\textsuperscript{144}

The CJR was implemented in 2009\textsuperscript{144} in attempts to improve civil proceedings. One of the underlying objectives of the CJR would be promoting the concept of cost-effectiveness.\textsuperscript{145} The court is now taking the active role in case management so as to conduct a cost-effective, fair and reasonable trial.\textsuperscript{146} For example, the court would set deadlines and dates for parties to comply\textsuperscript{147} and failure to comply with those deadlines might lead to claims being struck out.\textsuperscript{148} The rationale behind this is to allocate courts’ resources fairly\textsuperscript{149} when variation would lead to possible denial to other litigants which might not be justified or fair.\textsuperscript{150}

\begin{itemize}
  \item \textsuperscript{143} Eastweek Publisher Ltd. & Anor v. Privacy Commissioner for Personal Data [2000] HKCA 442 (CA), [48] (Wong JA).
  \item \textsuperscript{145} Rules of High Court (RHC) 1A, r.1(a).
  \item \textsuperscript{146} Michael Wilkinson, Christine N. Booth & Eric TM Cheung, \textit{The Student Guide to Civil Procedure in Hong Kong} (LexisNexis 3\textsuperscript{rd} edn. 2009) 389.
  \item \textsuperscript{147} RHC r.4(2)(g).
  \item \textsuperscript{148} See \textit{RHC} O. 25.
  \item \textsuperscript{149} RHC C.1A, r.1(f).
  \item \textsuperscript{150} Adrian Zuckerman, “The Challenge of Civil Justice Reform: Effective Court Management of Litigation”, \textit{1 City University of Hong Kong Law Review} 49, 63.
\end{itemize}
Therefore, the wealthy publisher is less likely to use litigation as a tool to oppress our citizens to accept an unreasonable settlement.

(b) Bi-polar litigation systems in Hong Kong

As mentioned earlier, even if a citizen would like to claim damages from the offending publisher, the litigation costs might well exceed the damages a victim would like to claim. It would make no sense to risk for such an investment. Even if victims are willing to risk, it is a waste of our resources if the court needs to decide on cases with similar character all over again. Therefore, the Government must provide effective procedural means in such situations to assure resources are appropriately and adequately employed.

There are currently two possible strategies in Hong Kong for dealing with such problems, namely representative proceedings151 and ad hoc case management techniques.152 The HKLRC has also recently released a consultation paper in November 2009 about a possible introduction of class actions.153 In a class action, a representative plaintiff sues on behalf of himself and its class who raise the same questions of law or fact. By adopting those strategies, it costs citizens less in bringing actions against the offending press.

(c) Amendment of PDPO

As commented by Robertson and Nicol, press councils and privacy laws are not mutually exclusive.154 In fact, press councils should play a role in the development of a privacy law

151 See RHC O. 15, r. 12.
152 See RHC O. 4, r. 9.
154 Geoffrey Robertson Q.C. & Andrew Nicol Q.C., Robertson & Nicol on Media Law (5th
when it involves press freedom. The integrity of a press council or the press itself would be jeopardised if they remain hostile and treat the legal process as an arch rival.

Our Government has released a consultation document on the review of the *PDPO*.\(^{155}\) Whether it appears to give too much power to the Privacy Commission for Personal Data is out of the topic of discussion for this research. Interestingly, the document did not address the problem raised in *Eastweek* that *PDPO* only protects privacy of information but not other forms of privacy. It is hopeful that the Government would address the concerns and incorporate other forms of privacy into *PDPO*. The Californian anti-paparazzi Act could be an example for us to follow. In particular, the writer praises the fact that certain proportion of civil fines would be given to an art and entertainment fund in California. In Hong Kong, the fines could be shared between the newly formed press council and possibly a charitable fund to support arts and education for our next generation.

The author believes through strengthening the current causes of actions, citizens would enjoy an enhanced access to justice with a more efficient, well-defined and workable mechanism in our court system for claiming redress.

**(ii) Self-regulatory bodies**

There are concerns and criticisms as to the effectiveness of a self-regulatory body, such as the lack of power for sanctions for enforcement.\(^{156}\) As indicated by the National Consumer Council in the United Kingdom that a self-regulatory body is ‘generally in a weak position to

\(^{155}\) *Consultation Document on Review of the Personal Data (Privacy) Ordinance* (2009).

secure commitment to a code’s provisions or to enforce them effectively. However committed, it is caught between alienating their own membership yet still generating public scepticism about [its] impartiality. There appear to be real difficulties for most trade associations, too, in securing the resources and commitment needed for adequate monitoring and publicity.¹⁵⁷

However, the Consumer Council in New Zealand has a different view when it considers self-regulation can also promote improved industry practices and the industry’s informational advantages may lead to more effective standards which are then more likely to be complied with.¹⁵⁸ However, it also recognized the Government’s role in the regulation and suggest its role ‘tend to be couched in vague generalities giving little guidance to what is necessary or desirable to achieve compliance’.¹⁵⁹

In fact, even the British Government recognized PCC’s achievements.¹⁶⁰ The Select Committee in 2007 concluded that the system of self regulation should be maintained for the press that a statutory regulator is unnecessary.¹⁶¹ Furthermore, the Government and the

¹⁵⁹ Ibid.
¹⁶⁰ Fifth report of House of Commons Culture, Media and Sport Select committee in 2002-2003, ‘Privacy and Media Intrusion’.
opposition parties have voiced out the adequacy and appropriateness of the PCC to remain self-regulatory without statutory control.\textsuperscript{162}

Therefore, it is the writer’s argument that as long as a voluntary press council is rested with appropriate power, a self-regulatory body can take up the responsibility to balance press freedom and the right of privacy for our citizens.

VII. A possible press council in Hong Kong

However, solely relying on the strengthening of the court system may not solve the problem. The Government should step up and give a last chance for the publication business. The writer favours the British model as a base for the future press council in Hong Kong, if any, with a slight variation in certain aspects. A separate body should set up and raise funds for the council. The several factors which we need to consider during the establishment of a press council to ensure press freedom is not deprived and the adjudication is on a fair and equitable basis include: (i) scope of coverage; (ii) formation of the council and (iii) powers of the council.

(i) Scope of coverage

The council should have jurisdiction over all newspapers and magazines, including its online version, registered under the Registration of Local Newspapers Ordinance.\textsuperscript{163} There have been concerns on how it would be achieved without intervention of the Government with the Hong Kong Press Council Limited as a clear example when only 10 newspapers are members

\textsuperscript{162} Ibid.
\textsuperscript{163} Cap. 268.
which do not include the topsellers as indicated previously. nevertheless, the writer believes that the situation in england has provided a good illustration. when the calcutt report proposed that the business has 18 months to prove that a self-regulatory body without the help from the government would work, the press has sat together and formed the press complaints commission. they also collaboratively drafted and continued to revise the code of ethics that a journalist should have. our government could follow its british counterpart and issued a similar warning. it is the writer’s view that the top-sellers have the wisdom to choose between the fact that the government would step in to control the press and the fact that while they might lose some freedom in investigating news, they still enjoy the freedom to criticize the government.

the writer is also in the view that online magazines or newspapers which do not have their printed version should also be subject to the control of the commission. this is because in our current society, there have been occasions in which internet could have a more devastating effect than a printed press.

(ii) formation of the council

there should be two categories of members in the council, public and industry. the total number of the members is not the key factor, though the writer prefers it to be within 20 for easier management. however, whenever there is adjudication or a primary screening, the number of members present in the meeting should be an odd number and there should be more public members than the industry members present in the meeting. this can ensure the industry members would not protect their colleagues by dominating the meeting.

164 see hong kong law reform commission, report on privacy and media intrusion (2004).
(a) Public Members

Public members, including the Chairperson, should have no connections neither with the press nor the Government. This is to create an image that this press council is independent from the press and the Government. We could adopt the test in rule against bias adopted as a ground of judicial review in administrative law. Lord Denning observed that:

‘While there was no bias the court looks at the impression which would be given to other people. Even if he was impartial, as could be, nevertheless, if right minded persons would think that in the circumstances, there was a real likelihood of bias on his part, then he should not sit, his decision cannot stand. The court will not inquire whether he did in fact favour one side unfairly. Suffice if reasonable people might think he did.’

Therefore, the writer believes that professors of journalism and communication in tertiary institutions, even if they are the front-runners in reinforcing the fundamental values of press freedom, should not sit as public members when they would have some kind of connection with the press during their office with the press. Similarly, members should not sit in adjudication if they have a connection with the case concerned.

For public members, the council should ensure that they are nominated and selected on their personal qualities, including community involvement, as well as reflecting gender, moral and ethical needs. It should ensure they have wide range of qualifications, experience and represent different community interests. Members are expected to act and vote as individuals, not as representatives of the bodies that nominated them. For example, organizations like Hong Kong Professional Teachers' Union and The Society for Truth and Light could

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nominate representatives to be selected, yet they must vote as individuals rather than the bodies which nominate them.

There are various discussions as to the qualifications of the Chairperson of the council should have. The general consensus is that the Chairperson should be equipped with legal knowledge, either as highly-respected practitioners or a retired High Court judge. The writer agrees with this view. When the Chairperson needs to vote to determine the fate of a case, it is vital that the Chairperson possesses some kind of legal knowledge about the balancing exercise between press freedom and the right to privacy.

(b) Industry members

The council can apportion the number of seats for industry members in the council among the different industries, such as newspapers, magazines and reporters. The writer recognizes the importance and contribution made by the industry to the improvement of a better society. Therefore, industry members should take a leading role in drafting the code of ethics for universal application in Hong Kong, with consultation and approval from other members in the Council.

To ensure the journalists and newspapers must abide by the code of ethics adopted, the writer proposes that the British model should be adopted in which the code of ethics is written into the employment contracts of all possible candidates in the press industry. This ensures adherence to the code and also gives the press council a real tooth.

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166 See the discussions of previous section in relation to the press councils in other jurisdictions.
(iii) Powers of the Council

One of the previous concerns by the press is that the Council having the power to fine the press for offending the rules. The writer agrees to the HKLRC’s suggestion that the new press council should not be entrenched with power to impose fines. However, in order to assure that the offenders will comply with the instructions, the writer suggests the Council should have the power to transmit its findings and apply to the courts to enforce the orders, or to impose fines, if courts find it appropriate. This is in line with the proposals of the HKLRC and supported by the legal remedy provided in British Broadcasting Complaints Commission (BCC) if a programme reveals private information. While BCC cannot award damages for infringement, it is able to direct the broadcaster to transmit the findings, which can be enforced by the Independent Television Commission.

The writer is in the view that there should not be any difference between invasion by the written press and television programme. It is true that an important German Constitutional Court decision has determined that there should be a degree of difference of damages in relation to privacy intrusion by a television and a written press and this is also reflected in an English court’s decision when the Court of Appeal refused to grant injunction to restrain the publication of a book which revealed details of a ward’s father’s private life. Unlike broadcasting programmes, if a newspaper or magazines reveals private information of a person, what a person in England can do is to make a complaint to the Press Complaints

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170 Ibid, 27.
171 Re X (A Minor) [1975] Fam 47.
Commission with no legal redress. However, taking into account the fast-moving evolvement of internet access, those photos and news written can be transmitted through internet promptly and its effect could be even more devastating than that created by broadcasting private information of a person. Therefore, the writer argues that the council should have the power to transmit the case to the court for enforcement if the offender fails to respond to the punishments handed by the council.

In relation to the problem of legal waiver, the writer is in the view that the council ought not to take a complaint when there is a pending legal action. We need to bear in mind that the proposed council has power to impose compensations for a victim. This would leave the victim into jeopardy when he has to elect between filing a complaint with the council for no remedy and filing a claim in the court with some remedies. A complainant should, therefore, not to be forced to sign a legal waiver as a prerequisite for the council to take the complaint. Furthermore, parties should be allowed to seek legal advice but should not be legally represented during the adjudication. This can ensure parties would not exploit their financial resources to deprive the poor of a fair legal proceeding.

**VIII. Conclusion**

In most circumstances, the law of privacy and the freedom of press do not contradict each other. In fact, they are mutually supporting each other when both are vital dignities of individual rights. In particular, right to privacy is protected through legislation and private actions like trespass or theft, while the press has its own limitations on news gatherings. Nevertheless, there are occasions when privacy tort comes into controversies with the right to

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publish and this is the gap that needs to be filled.

The gap is likely to continue with vigorous opposing arguments. On one hand, artists, eminent public figures or even members of the Government are desperate to fight for more space for their privacy in life from media scrutiny. On the other hand, the press has repeatedly expressed their worries about tighter control over press freedom and fought for the right to retain its liberation of publication.

The writer acknowledges privacy is a fundamental human right in our society, which every civilized government ought to recognize and protect their citizens from having their privacy infringed. It does not matter who gives this sort of protection, whether by the Government, individuals or the media. Press freedom is not an excuse for the press to circumvent this fundamental human right. However, rarely a human right is an absolute one and privacy is no exception. Furthermore, the word ‘privacy’ is a term subject to changes with the evolution of a society.

In considering whether to set up a statutory Press Council in Hong Kong, the Government should balance privacy against legitimate public policies, including freedom of press to report matters of great public interests. It is, in the writer’s view, the responsibility for our court system to determine whether a particular news report has gone beyond the limit of press freedom in invading other’s privacy. With uncertainties about the legislation to safeguard our basic human rights, such a radical move might be undesirable when considering the circumstances in a holistic picture. Perhaps maintaining what we have right now, with a gradual strengthening of our court system and the reference of infringement cases from various organizations to courts, will bring us fewer troubles. Nevertheless, there is no free lunch in the world. If the press industry wants to avoid governmental intervention, it must
prove to the society that a voluntary press council will work effectively. Time will tell whether it works. Therefore, why not allow this ‘legal fiction’\textsuperscript{173} be written a bit longer until a better novel, which is much well-planned with directions, is published so as to enable us to have a better look at the holistic picture?

\textsuperscript{173} Report of the Committee on an Uniform Incorporation Act (1920) (USA), 6.
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