

“Law and Ethics for Journalists” Course
Hong Kong Baptist University
19 April 2018

**Privacy Right & Freedom of the Press:
An Enduring Balancing Exercise**

保障・尊重個人資料
Protect, Respect Personal Data

Stephen Kai-yi Wong, Barrister
Privacy Commissioner for Personal Data, Hong Kong



Presentation Outline

1 Constitutional and Legal Protection of Rights

2 Personal Data (Privacy) Ordinance

3 Privacy Right and Freedom of the Press: The Balancing Exercise

4 Right to Be Forgotten

5 Ethics

1

Constitutional and Legal Protection of Rights

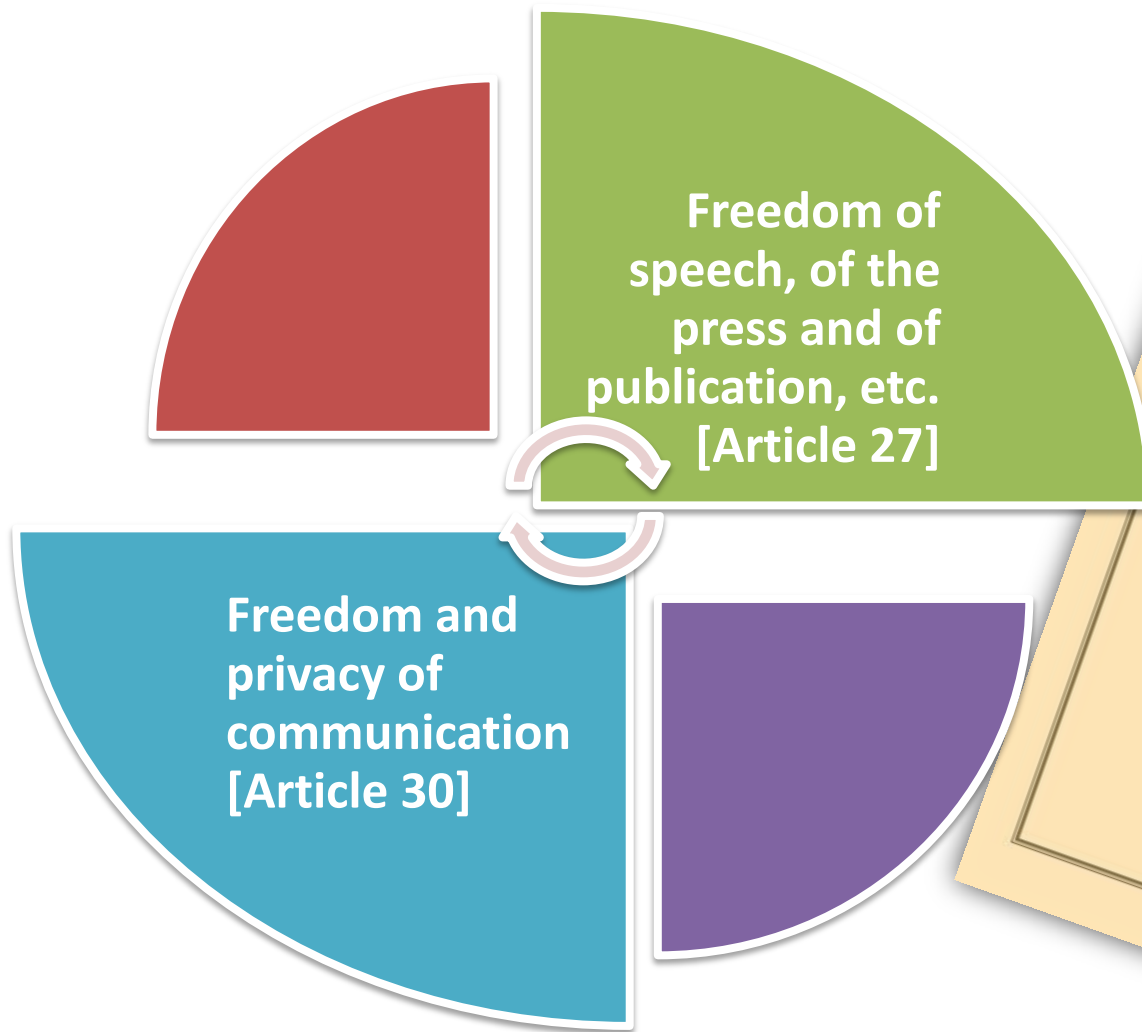
Sino-British Joint Declaration on the Question of Hong Kong (1984)



Article 3(5):
Rights and freedoms, including those of the **person**, of **speech**, of the **press**... of correspondence...will be ensured by law in the Hong Kong Special Administrative Region

4

The Basic Law (1990)



Hong Kong Bill of Rights Ordinance (1991)

Protection of privacy, family, home,
correspondence, honour and
reputation

[Art. 14]

(c.f. ICCPR Art. 17)



International Covenant on
Civil and Political Rights

Freedom of opinion and
expression

[Art. 16]

(c.f. ICCPR Art. 19)

2

Personal Data (Privacy) Ordinance

Personal Data (Privacy) Ordinance, Cap 486, Laws of Hong Kong

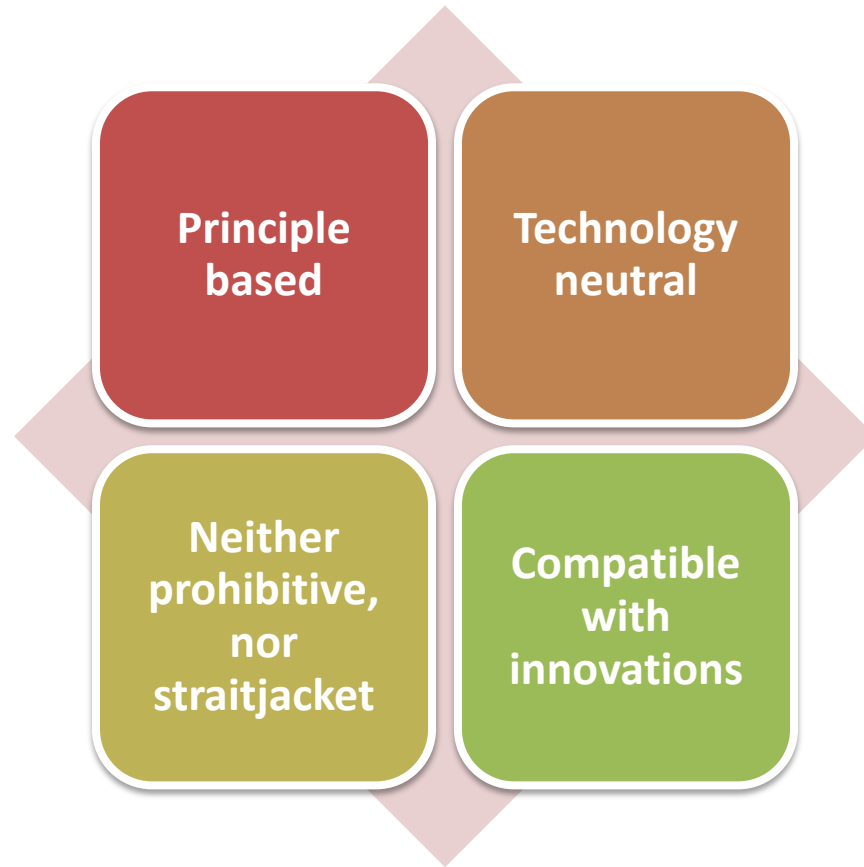
- Enacted in **1995**
- **Independent** Privacy Commissioner for Personal Data (not part of the government)
- Comprehensive **personal data** protection law
- Covers the **public** (government) and **private sectors**
- Referenced to 1980 OECD Privacy Guidelines and 1995 EC Data Protection Directive



Legislative Intent

- **Business Perspective** – To facilitate business environment, maintain Hong Kong as a financial and trading hub
- **Human Rights Perspective** – Protect individuals' personal data privacy

Characteristics of the Ordinance



What is “Personal Data”?



- (a) **Relating** directly or indirectly to a living individual
- (b) Practicable for the **identity** of the individual to be directly or indirectly ascertained
- (c) In a **form** in which access to or processing is practicable

Examples of Personal Data in Everyday Life



Who is the “Data Subject”?



Who is the “Data User”?



The Six Data Protection Principles (DPPs)

1

收集目的及方式 Collection Purpose & Means



資料使用者須以合法和公平的方式，收集他人的個人資料，其目的應直接與其職能或活動有關。

須以切實可行的方法告知資料當事人收集其個人資料的目的，以及資料可能會被轉移給哪類人士。

收集的資料是有實際需要的，而不超乎適度。

Personal data must be collected in a lawful and fair way, for a purpose directly related to a function/activity of the data user.

All practicable steps shall be taken to notify the data subjects of the purpose of data collection, and the classes of persons to whom the data may be transferred.

Data collected should be necessary but not excessive.

2

準確性、儲存及保留 Accuracy & Retention



資料使用者須採取切實可行的步驟以確保持有的個人資料準確無誤，而資料的保留時間不應超過達致原來目的的實際所需。

Practicable steps shall be taken to ensure personal data is accurate and not kept longer than is necessary to fulfil the purpose for which it is used.

3

使用 Use



個人資料只限用於收集時述明的目的或直接相關的目的，除非得到資料當事人自願和明確的同意。

Personal data is used for the purpose for which the data is collected or for a directly related purpose, unless voluntary and explicit consent is obtained from the data subject.

15

The Six Data Protection Principles (DPPs)

4

保安措施 Security



資料使用者須採取切實可行的步驟，保障個人資料不會未經授權或意外地被查閱、處理、刪除、喪失或使用。

A data user needs to take practical steps to safeguard personal data from unauthorised or accidental access, processing, erasure, loss or use.

5

透明度 Openness



資料使用者須採取切實可行的步驟來公開其處理個人資料的政策和行事方式，並交代其持有的個人資料類別和用途。

A data user must take practicable steps to make personal data policies and practices known to the public regarding the types of personal data it holds and how the data is used.

6

查閱及更正 Data Access & Correction



資料當事人有權要求查閱其個人資料；若發現有關個人資料不準確，有權要求更正。

A data subject must be given access to his personal data and to make corrections where the data is inaccurate.

What is “Collection of Personal Data”?



*Eastweek Publisher
Ltd. v Privacy
Commissioner for
Personal Data
(CACV 331/1999)*

DPP 1 – Purpose & Manner of Collection

- **Collection of personal data shall be:**
 - **related to the data user's functions or activities**
 - **adequate but not excessive**
 - **by lawful and fair means**
 - **with notification**

DPP 1 – Purpose & Manner of Collection

What is a “fair” means of collection?

- *FACE Magazine Ltd v PCPC – AAB 5/2012*?
- *Sudden Weekly Ltd v PCPD – AAB 6/2012*



19

S.61 – News Exemption

- To strike a balance between upholding freedom of the press and protection of personal data privacy rights
 - S.61(2):
 - Exempt sources from DPP 3 – use limitation – if:
 - a) use of the data consists of disclosing the data to journalists as a data user; AND
 - b) sources have **reasonable grounds to believe** and that the publishing/broadcasting of the data is in the **public interest**
 - Sources are free to disclose information without fear of contravening the PDPO, esp. DPP 3

20

S.61 – News Exemption

S.61(2) exemption:

☐ 溫潮英 v 私隱專員 – AAB 23/1997

3

Privacy Right and Freedom of the Press: The Balancing Exercise

PUBLIC INTEREST?



Striking the Balance: Where does public interest lie?

- *Campbell v. MGN Ltd* [2004] 2 AC 457
 - UK House of Lords decision
 - Held: It was in the public interest for the press to disclose the truth when a public figure repeatedly lies to the public about her misbehaviour.



Striking the Balance: Where does public interest lie?

- *FACE Magazine Ltd v PCPC* – AAB 5/2012
- *Sudden Weekly Ltd v PCPD* – AAB 6/2012
 - Contrast with *Campbell v. MGN Ltd*
 - No “public interest” in the HK cases



Striking the Balance: Where does public interest lie?

- *PJS v News Group Newspapers Ltd* [2016] UKSC

- UK Supreme Court decision
- Widespread availability of information in the public domain may not be relevant to the privacy claim
- Editors must demonstrate an exceptional public interest to over-ride the normally paramount interests of children

Striking the Balance: Where does public interest lie?

- *Education University case (PCPD 2017)*
 - A person offending the law or certain established regulation cannot take privacy as a “refuge” or “sanctuary” of his wrongdoings
 - Use or disclosure of personal data for disciplinary investigation without consent may be exempted under s.58 of the PDPO

Striking the Balance: Duty of Confidence vs. Freedom of Expression

- *The University of Hong Kong v. Hong Kong Commercial Broadcasting Co. Ltd & Others* (HCMP2801/2015)

- A public interest that confidences should be preserved and protected by the law
- Contribution to a debate of public interest does not provide adequate justification for breach of confidence (seems to be a higher standard than privacy protection)

4

Right to Be Forgotten

Google Spain v Mario Costeja González (CJEU / 2014)

- Right to be forgotten arises if the information is:
 - inaccurate;
 - inadequate;
 - irrelevant; or
 - excessive.
- In fact, right to be de-listed or de-indexed

Google

30

NT1 & NT2 v Google LLC

(Right to be forgotten)

[2018] EWHC 799 (QB)

NT1	NT2
A <u>public figure</u> with a limited role in public life at the time of conviction	Not public figure
Convicted of a business crime (<u>dishonesty</u>) many years ago, and imprisoned for 4 years	Convicted for conspiracy to carry out surveillance (<u>not dishonesty</u>) based on a <u>plea of guilty</u> , and imprisoned for 6 months
Conviction spent; but showed <u>no remorse</u> ; continued misleading the public and the Court	Conviction spent; expressed <u>genuine remorse</u>
<u>Still running a business</u> , so the information is still relevant	Conviction unrelated to current business activities; <u>low risk of repetition</u>

31

EU General Data Protection Regulation (GDPR)

- Effective on 25 May 2018
- May apply to HK
- Article 17: Right to erasure (or “right to be forgotten”) if:
 - personal data no longer necessary for the original purpose;
 - data subject withdraws consent;
 - data subject objects to processing;
 - the processing is unlawful; etc.



5

Ethics

• Protect, **Respect** Personal Data

- No surprise
- No harm
- Balance of interests



34

- Privacy and freedom of expression are “*lips and teeth*”

- No privacy

- No freedom of thought

- No freedom of expression



Cambridge
Analytica

35

Contact Us



- Hotline 2827 2827
- Fax 2877 7026
- Website www.pcpd.org.hk
- E-mail enquiry@pcpd.org.hk
- Address 12/F, Sunlight Tower,
248 Queen's Road East,
Wanchai, HK

Copyright



This PowerPoint is licensed under a Creative Commons Attribution 4.0 International (CC BY 4.0) licence. In essence, you are free to share and adapt this PowerPoint, as long as you attribute the work to the Office of the Privacy Commissioner for Personal Data, Hong Kong. For details, please visit creativecommons.org/licenses/by/4.0.