CONSTITUTIONAL PROTECTION OF THE RIGHT TO BE PRESUMED INNOCENT AND THE RIGHT AGAINST SELF-INCRIMINATION

The Hong Kong Experience

This essay provides a detailed analysis of Hong Kong judicial decisions on legislative encroachment of the constitutional right to be presumed innocent and the right against self-incrimination.[1] It argues that the impact of a constitution depends very much on the approach adopted by the Judiciary towards the interpretation of constitutional provisions, and this approach is in turn affected by a whole range of factors, including personal value choices regarding the relative priorities of public interests *versus* individual rights and the socio-political environment in which the constitution operates. It cautions against the adoption of a balancing approach, which on most occasions will lead to undermining fundamental rights, and argues that placing at the forefront the values of a constitutional right will likely lead to a more rigorous scrutiny of legislative encroachment and provide better protection to fundamental rights.

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I. Introduction

1 While civil libertarians embrace the introduction of a bill of rights as a hallmark in human right protection, sceptics have labelled a bill of right as a "bill of wrongs" or even a "criminal's charter". Such a negative sentiment is understandable, as those who face criminal charges are usually the first to invoke human rights protection. Not surprisingly, some people consider that constitutional protection may have gone too far in protecting the dubious members of the community. This tension between protection of fundamental rights and the protection of public interest is best seen in the context of the presumption of innocence, which lies at the heart of our criminal justice system. This presumption shapes our approach towards burden of

1 The author is grateful to Professor Simon Young, Cora Chan, Professor Richard Cullen and Professor Michael Davis for their valuable comments on an earlier draft of this essay. All errors remain the author's own.

proof, the right against self-incrimination, and remedies in the event of a violation. Yet ironically, this golden thread of our criminal justice system has only a recent origin and is entirely judge-made. This means that, traditionally, it is at the mercy of parliamentary acceptance. In a traditional common law system, without a bill of rights, the presumption of innocence has been hamstrung by Parliament through the introduction of reverse onus provisions and the statutory abrogation of the right against self-incrimination. When the presumption of innocence acquires constitutional status in a bill of rights, the power is rebalanced as it is now in the hands of the Judiciary to determine whether statutory encroachment into this originally judge-made presumption has gone too far. This essay will examine how the Hong Kong judiciary has responded to this new challenge by focusing on two main issues: reverse onus provisions and statutory inroads into the right against self-incrimination. At the end of the day, whether a bill of right turns out to be a criminal's charter or nothing more than a set of rhetorical promises depends largely on how the Judiciary is going to interpret the constitutional provisions, and the approach of the Judiciary is from time to time shaped by the prevailing social, political and legal environment. In Hong Kong, there is, in addition, the unique constitutional framework of "one country, two systems" wherein the sovereign country has a different criminal justice system and does not accept the presumption of innocence. The challenge for the Hong Kong judiciary is best captured by Justice Kennedy of the US Supreme Court in his inspiring speech to the Hong Kong judiciary shortly after the change of sovereignty over Hong Kong:[2]

> It is our human condition, it is our common fate that we may never know the verdict that history returns on our efforts, our attempts to shape our own times. We do not know whether you in Hong Kong are writing a quiet epilogue, or are instead writing a prologue for what will become a new and noble chapter in the history of the law. I hope and pray it is the latter.

2 It is against such a background that this essay examines the development of the presumption of innocence under the constitutional system of Hong Kong in the last decade.

II. The constitutional framework

3 Hong Kong became a British colony in the mid-19th century. Despite all the shortcomings associated with colonialism, the British government brought to Hong Kong the common law system, a benign government that ruled on consensus, and an efficient and a relatively

2 Speech delivered to the Judiciary on 5 February 1999; quoted in Kemal Bokhary, *Recollections* (Sweet & Maxwell, 2013) at pp 213–214.

liberal regime. Within a century Hong Kong was transformed from a remote fishing village into a major international financial centre. By virtue of the Sino-British Joint Declaration 1984, the British government agreed to return Hong Kong to the People's Republic of China in 1997, and in return, China agreed to make Hong Kong a Special Administrative Region governed by the so-called "one country, two systems" model. In essence, Hong Kong would retain its legal, social and economic system. The common law would be preserved. The previous judicial system would be retained, save that a Court of Final Appeal would be established in Hong Kong. Independence of the Judiciary, fundamental human rights, and prosecutorial independence would be guaranteed. Chinese socialist policies, including the criminal law, would not apply to Hong Kong. These guarantees were written into the Basic Law, the Constitution of the Hong Kong Special Administrative Region, which was promulgated by the National People's Congress of China in April 1990.

4 In 1991, despite China's objection, the Hong Kong Legislative Council enacted the Hong Kong Bill of Rights Ordinance, which incorporated into domestic law the International Covenant on Civil and Political Rights ("ICCPR") as applied to Hong Kong.[3] On 1 July 1997, the Basic Law came into effect. Chapter 3 of the Basic Law sets out the protection for fundamental rights. Article 39 provides that the provisions of the ICCPR as applied to Hong Kong shall remain in force and shall be implemented through the laws of the Hong Kong Special Administrative Region ("HKSAR"). The rights and freedoms enjoyed by Hong Kong residents shall not be restricted unless prescribed by law, and such restrictions shall not contravene the provisions of the ICCPR as applied to Hong Kong. Soon after the establishment of the HKSAR, the Court of Final Appeal has confirmed the constitutional status of the ICCPR as applied to Hong Kong, and the supreme authority of the Basic Law such that any law in contravention of the Basic Law shall be of no legal effect.[4] In short, the courts assumed without question the power of constitutional review.

III. Reverse onus provisions

5 The presumption of innocence has rightly been described as "the golden thread" which runs through the criminal law.[5] It lies at the heart of our criminal justice system. It would have been a very

3 For more details, see *The Law of Hong Kong Constitution* (J Chan & C L Lim eds) (Sweet & Maxwell, 2011) chs 1 and 15.

4 *Ng Ka Ling v HKSAR* (1999) 2 HKCFAR 4; *A v Commissioner of the Independent Commission Against Corruption* (2012) 15 HKCFAR 360 at 381, [34]–[36].

5 *Woolmington v Director of Public Prosecutions* [1935] AC 462 at 481–482, *per* Lord Sankey LC.

different system without such a presumption. Among other things, the presumption means that the burden of proof of an offence falls on the Prosecution. However, over the years, it has been found convenient to place the burden of proof of some elements of an offence on the defendant, invariably on the ground that it is difficult or impossible for the Prosecution to prove these elements or that the facts are peculiarly within the knowledge of the defendant. Thus, it is not surprising that the first case that reached the Court of Appeal on the Bill of Rights was a case challenging the constitutionality of a number of reverse onus provisions in the Dangerous Drug Ordinance. In a colourful judgment, Silke VP held that:[6]

> In my judgment, the glass through which we view the interpretation of the Hong Kong Bill is a glass provided by the Covenant. We are no longer guided by the ordinary cannons of construction of statutes nor with the dicta of the common law inherent in our training. We must look, in our interpretation of the Hong Kong Bill, at the aims of the Covenant and give 'full recognition and effect' to the statement which commences that Covenant. From this stems the entirely new jurisprudential approach to which I have already referred.

6 Under this new jurisprudential approach, in balancing individual rights against societal interests, the courts proceed with a presumption in favour of individual rights, and the Government has to justify tilting the balance by presenting cogent and persuasive evidence. Silke VP laid down the following guidelines:[7]

> The onus is on the Crown to justify. It is to be discharged on the preponderance of probability. The evidence of the Crown needs to be cogent and persuasive. The interests of the individual must be balanced against the interests of society generally but, in the light of the contents of the Covenant and its aim and objects, with a bias towards the interests of the individual.

7 After reviewing comparative jurisprudence from international and foreign domestic jurisdictions with a constitutional bill of rights, the court concluded that a mandatory presumption of fact may be compatible with the constitutional guarantee of presumption of innocence only if the Crown could show, taking into account the legislative intention, that "the fact to be presumed rationally and realistically follows from that proved and also if the presumption is no more than proportionate to what is warranted by the nature of the evil against which society requires protection".[8] Under the then legislation, a defendant was presumed to be in possession of dangerous drugs for the purpose of trafficking if he was found to be in possession of a

6 *R v Sin Yau Ming* (1991) 1 HKPLR 88 at 107.
7 *R v Sin Yau Ming* (1991) 1 HKPLR 88 at 113.
8 *R v Sin Yau Ming* (1991) 1 HKPLR 88 at 134.

certain quantity of dangerous drug (0.5g or more than five packets whatever be the quantity of the drug). He was further presumed to be in possession of a dangerous drug and to know the nature of the drug if he was found to be in possession of a key to anything where the drug was found, which involved building a presumption upon another presumption. The court held that these reverse onus provisions were too broad and, on the evidence before it, failed to satisfy the rationality test and were hence unconstitutional.

8 Encouraged by this judgment, the courts were soon flooded with constitutional challenges against many reverse onus provisions. As these provisions could take many different forms, the courts have held that it should consider the substance rather than the form in approaching reverse onus provisions. Some provisions may appear as classic reverse onus provisions; some may impose an evidential rather than a legal burden on the defendant. Sometimes it could be a presumption of law rather than a presumption of fact. Sometimes the essential element of an offence may be drafted as a defence.[9] The presumption of innocence was also held to apply to both the pretrial and the post-trial stage. It has been invoked to challenge interdiction and suspension of part of the salary of a civil servant who has faced criminal charges,[10] extensive pretrial adverse publicity,[11] refusal to award costs upon a successful appeal against conviction with an order for a retrial,[12] and a presumption, at the stage of sentencing, of having committed repeated offences of managing an unlicensed massage establishment if another person has previously been convicted of the same offence at the same address.[13]

9 Judicial enthusiasm on constitutional presumption of innocence was halted by the decision of the Privy Council in *Attorney-General v Lee Kwong-kut*.[14] Lord Woolf set down a more cautious approach to constitutional interpretation:

> While the Hong Kong judiciary should be zealous in upholding an individual's rights under the Hong Kong Bill, it is also necessary to ensure that disputes as to the effect of the Bill are not allowed to get out of hand. The issues involving the Hong Kong Bill should be approached with realism and good sense, and kept in proportion.

9 See *Brown v Stott* [2003] 1 AC 681 at 710B–D where Lord Steyn addressed the possibility of redrafting a provision requiring the registered owner to supply the identity of the driver at the material time for a suspected traffic offence into a presumption of the registered owner being the driver until the contrary is proved.

10 *Yeung Chung Ming v Commissioner of Police* (2008) 11 HKCFAR 513.

11 *R v Lo Chak Man (No 2)* (1994) 4 HKPLR 466.

12 *R v Man Wai Keung (No 2)* [1992] 2 HKCLR 207.

13 *R v Wong Yan-fuk* (1993) 3 HKPLR 341; see also *R v Ko Chi-yuen* [1994] 2 HKCLR 65 (assumption of benefits in confiscation proceedings).

14 [1993] 2 HKLRD 186 at 202.

> If this is not done, the Bill will become a source of injustice rather than justice and it will be debased in the eyes of the public. In order to maintain the balance between the individual and the society as a whole, rigid and inflexible standards should not be imposed on the Legislature's attempts to resolve the difficult and intransigent problems with which society is faced when seeking to deal with serious crime. It must be remembered that questions of policy remain primarily the responsibility of the Legislature.

10 That case involved two appeals that were heard together. In the first appeal, the subject of the challenge was s 30 of the Summary Offences Ordinance, under which a person committed an offence if he was found to be in possession of anything that was reasonably suspected of being stolen or unlawfully obtained, unless he could provide a satisfactory account of how he came by the same. The second appeal was concerned with the constitutionality of s 25 of the Drug Trafficking (Recovery of Proceeds) Ordinance, which provided for an offence of being involved in any arrangement to facilitate the retention or control of the proceeds of drug trafficking, with a defence of an absence of knowledge or reasonable suspicion that the relevant arrangement was related to the proceeds of drug trafficking. The Privy Council rejected the rationality and proportionality tests, describing them as an unnecessarily complex process. Instead, it proposed a reasonableness test:[15]

> Some exceptions will be justifiable, others will not. Whether they are justifiable will in the end depend upon whether it remains primarily the responsibility of the prosecution to prove the guilt of an accused to the required standard and whether the exception is reasonably imposed, notwithstanding the importance of maintaining the principle which article 11(1) enshrines. The less significant the departure from the normal principle, the simpler it will be to justify an exception. If the prosecution retains responsibility for proving the essential ingredients of the offence, the less likely it is that an exception will be regarded as unacceptable. In deciding what are the essential ingredients, the language of the relevant statutory provision will be important. However what will be decisive will be the substance and reality of the language creating the offence rather than its form.

11 Applying these tests, the Privy Council found the shifting of the burden of proof to the defendant to provide an explanation of innocent possession, which was the most significant element of the summary offence of unlawful possession, violated the right to be presumed innocent, whereas the defence of an absence of knowledge or reasonable suspicion in the Drug Trafficking (Recovery of Proceeds) Ordinance, which was something the defendant could easily substantiate but extremely difficult if not impossible for the Prosecution to prove,

15 *Attorney-General v Lee Kwong-kut* [1993] 2 HKLRD 186 at 198.

was justifiable. Indeed, the two reversed onus provisions were said to be "examples of situations close to the opposite ends of the spectrum of what does and does not contravene article 11(1)".[16]

12 Lord Woolf further added that in the majority of cases, the court would be able to come to a conclusion whether the reverse onus provisions were inconsistent with the presumption of innocence by examining the provisions themselves, without the need to go through the complex tests of rationality and proportionality. Even when it is necessary to resort to these tests in exceptional circumstances, these tests should be applied with caution and flexibility.[17]

13 It is not easy to understand the judicial scepticism of the Privy Council towards the tests of rationality and proportionality. The Privy Council is probably right that, in the majority of cases, the outcome would be the same whichever approach is adopted. On the other hand, the approach of the Privy Council lends itself to a subjective assessment of the effect of reverse onus provisions. By treating the matter as purely one of statutory interpretation, the Privy Council's approach may not allow the court to consider evidence concerning the practical operation of a reverse onus provision or alternative measures, which is what proportionality would require. Take *R v Sin Yau Ming* as an example. It would be difficult to assess whether it is constitutional to require a defendant to rebut a presumption of possession for the purpose of trafficking when he is in possession of 0.5g or more of a dangerous drug, without considering evidence of the average consumption of that drug by an average drug addict, or the pattern of acquisition of that drug.[18] Likewise, in considering the proportionality of a presumption of repeated offences, in the case of a conviction for operating an unlawful gambling establishment or an unlicensed massage parlour, by reason of a similar previous conviction of another person at the same address, it is difficult for the court to confine itself to an examination of the statutory provision without looking at the evidence, and sometimes the alternative measures available to the Prosecution. The intuitive approach is particularly dangerous when a popular but draconian provision is involved, such as a presumption that a civil servant is corrupt if he maintains a standard of living that is incommensurate with his official emolument. There is of course nothing to prevent a judge

16 *Attorney-General v Lee Kwong-kut* [1993] 2 HKLRD 186 at 200.

17 *Attorney-General v Lee Kwong-kut* [1993] 2 HKLRD 186 at 200.

18 In *R v Sin Yau Ming* (1991) 1 HKPLR 88, the evidence adduced by the Prosecution showed that the average drug consumption of an average drug addict is about 0.9g *per* day, thus casting doubt on the appropriateness of adopting 0.5g as a criterion to trigger the presumption. It was further shown that most drug addicts tend to acquire a sufficient amount of drugs for a few days' consumption, and hence the amount would easily be above the statutory triggering point even though the drug was acquired for personal consumption.

who has adopted the approach advocated by the Privy Council from asking for evidence of justification, but this will largely be a matter for individual judges, whereas the *Sin Yau Ming* approach allows all parties concerned to know from the very beginning where they stand, what they have to prove and what evidence would be necessary. It does not mean that a mechanical approach should be adopted or that the rationality and proportionality tests will always produce the right answer, but a systematic approach is likely to produce a more convincing and objective solution that is capable of being objectively and rationally tested. More importantly, a statutory interpretation approach which does not place adequate prominence on individual rights is likely to result in the triumph of societal interests over individual rights, whereas the rationality and proportionality tests are more likely to lead to a more rigorous scrutiny of any restriction of fundamental rights.

14 Thus, it is not surprising that the Court of Final Appeal had no hesitation in preferring the *Sin Yau Ming* approach when this issue was raised under the Basic Law after the change of sovereignty. In *HKSAR v Lam Kwong Wai*,[19] the defendant challenged the constitutionality of s 20(3) of the Firearms and Ammunition Ordinance, which created an offence of possession of an imitation firearm for a purpose dangerous to the public peace or for the commission of an offence. It then provided for a defence if a defendant could satisfy the court that he was in possession of the firearm for an innocent purpose. The Court of Final Appeal readily accepted that, to be consistent with the Basic Law, the relevant presumption could only be justified if it had a rational connection with the pursuit of a legitimate aim and if it was no more than necessary for the achievement of that legitimate aim. In addition, the justification had to be compelling.[20] Although the reverse onus provision was formulated as a defence, it had the effect of placing the burden of proof of an essential element of the offence on the defendant, and hence it had to be justified by the rationality and proportionality tests.[21] While it satisfied the rationality test, it failed the proportionality test by imposing a legal burden of proof on the defendant. In upholding the reverse onus provision, the Court of Final Appeal was prepared to adopt a remedial interpretation by reading down the provision to impose an evidential, rather than legal, burden of proof. It reached this conclusion despite the fact that the Legislature has considered it

19 (2006) 9 HKCFAR 574 at 593, [21] and 595, [29], *per* Sir Anthony Mason NPJ.

20 *HKSAR v Lam Kwong Wai* (2006) 9 HKCFAR 574 at [42]–[43]. See also *R v Johnstone* [2003] 1 WLR 1736 at 1749H–1750A, *per* Lord Nicholls; *S v Mbatha* (1996) (3) BCLR 293 (SACC).

21 See *HKSAR v Lam Kwong Wai* (2006) 9 HKCFAR 574 at [32]–[34]. It is a fine line between imposing the burden of proof of an essential element on the defendant and turning that essential element into a matter of defence so that it is no longer necessary to prove that element in prosecuting the criminal offence. See also *Sweet v Parsley* [1970] AC 132 at 150C, *per* Lord Reid.

appropriate to impose a persuasive burden, holding that in the area of matters of proof, onus and evidence, the court was the master of its own house and was able to form its own judgment after giving appropriate respect to the judgment of the Legislature.[22]

15 This case raises the vexed question whether imposing a legal burden of proof of an essential element of an offence on the defendant could ever be justified. The argument against such a provision is that a defendant would be exposed to a risk of conviction notwithstanding that he is able to raise a reasonable doubt in the Prosecution's case, but is unable to discharge a legal burden of proof. This is a powerful argument, which has by and large been accepted by the court,[23] but the court was nonetheless reluctant to lay down a general principle that imposing a legal burden to disprove an element of an offence is always unconstitutional. Instead, it suggested, without elaboration, that there might be situations where imposing a legal burden on a defendant could be justified. It distinguished two English cases where the court upheld a reverse onus provision imposing a legal burden in relation to an offence of possession of a bladed knife in a public place on the basis that that act was inherently dangerous in a public place, whereas it was not necessarily the case with possession of an imitation firearm, especially when possession was in private premises.[24] This distinction is hardly convincing and could not explain why a defendant could still be convicted notwithstanding that he was able to raise a doubt of the dangerous purpose of possessing a bladed knife in public. At the same time, the Court of Final Appeal rejected an argument that the purpose of possession of an imitation firearm was peculiarly within the knowledge of the defendant. There was simply no inherent or abnormal difficulty of proving knowledge, which in many cases was a matter of inference from facts proved. Nor did the Court of Final Appeal find it a convincing justification that a prosecution could only be pursued with the consent of the Secretary for Justice, as the fairness of a trial should not be dependent on someone's decision of whether there should be a prosecution. In the light of these comments, it would be extremely rare and exceptional that the imposition of the legal burden on the accused would ever be justified. Such an exception is to be found in *Fu Kor Kuen*

22 *HKSAR v Lam Kwong Wai* (2006) 9 HKCFAR 574 at [45].

23 *HKSAR v Lam Kwong Wai* (2006) 9 HKCFAR 574 at [23]–[28] and [41]. See also *R v Lambert* [2002] 2 AC 545 at 572D, *per* Lord Steyn, and *R v Whyte* (1985) 51 DLR (4th) 481 at 493, *per* Dickson CJC. See also the Court of Final Appeal in *HKSAR v Hung Chan Wa* (2006) 9 HKCFAR 614 where the reverse onus provisions in the Dangerous Drug Ordinance were read down on the basis of their imposing a legal burden on the defendant. See also *HKSAR v Ng Po On* (2008) 11 HKCFAR 91 and *Lee To Nei v HKSAR* (2012) 15 HKCFAR 162 for a similar approach.

24 *HKSAR v Lam Kwong Wai* (2006) 9 HKCFAR 574 at [40]. The two English cases are *L v Director of Public Prosecutions* [2003] QB 137 and *R v Matthews* [2003] 2 Cr App R 19. See also *Downey v The Queen* (1992) 90 DLR (4th) 449.

Patrick v HKSAR, which dealt with complex issues of securities market legislation.[25] The Court of Final Appeal found that, to stop short of imposing an absolute ban of washed sales or matched orders in securities market transactions, the Legislature was entitled to impose a persuasive burden and to require the defendant to provide an innocent explanation. This case may be explained by the peculiar nature of the transactions in question, the lawfulness of which is dependent on the purpose of the defendant in entering the transaction. This is a matter of the defendant's state of mind and is peculiarly within his knowledge.

A. *Displacing* mens rea

16 Another difficult issue is whether strict liability or absolute liability offences can ever be justified. Neither strict nor absolute liability offences require the Prosecution to prove criminal intent, but it is a defence to a strict liability offence (but not to an absolute liability offence) if the accused proves he or she does not have criminal intent. It is a fine distinction, and could well be a matter of legislative drafting, whether a provision which does not clearly set out what the *mens rea* of an offence is nonetheless requires an implied *mens rea* to be proved by the Prosecution, or whether either strict or absolute liability is operative. The court has adopted a fairly liberal and flexible approach which is not to be dictated by how the offence is formulated, but what in substance the elements of the offence are. While the court would be slow to accept that a strict or absolute liability offence is intended in the absence of clear statutory language and the starting point is therefore a presumption of *mens rea* in relation to every element of the offence,[26] it has also held that an absolute or strict liability offence is not *per se* inconsistent with the presumption of innocence. Nevertheless, it would have to be justified by satisfying the rationality and proportionality tests. In the case of an absolute offence imposing a custodial sentence, it would have to be further justified as not being an arbitrary deprivation of liberty. In *Kulemesin Yuriy v HKSAR*,[27] the Court of Final Appeal identified five alternative regimes regarding *mens rea*, ranging from the presumption of *mens rea* to the complete displacement of *mens rea*, with a number of "half-way house" options. The question of which option is appropriate will have to be governed by the context of the case and the language of the legislation in question,[28] but the more serious the offence in terms of

25 *Fu Kor Kuen Patrick v HKSAR* FACC 4/2011 (24 May 2012) at [83]–[96], *per* Gleeson NPJ.

26 *Hin Lin Yee v HKSAR* (2010) 13 HKCFAR 142; *Kulemesin Yuriy v HKSAR* FACC 6&7/2012 (22 February 2013).

27 FACC 6&7/2012 (22 February 2013).

28 *Kulemesin Yiriy v HKSAR* FACC 6 & 7/2012 (22 February 2013) at [83], *per* Riberio PJ, reformulating the regimes in *Hin Lin Yee v HKSAR* (2010) 13 HKCFAR 142. The half-way house options include an evidential burden to raise

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penalty and social obloquy, the less likely that the court will find a displacement of *mens rea*.[29] In general, the court tends to view an absolute offence with great suspicion and would readily read in a defence of reasonable but mistaken belief or excuse. However, in rare circumstances such as when the protection of a minor was involved, the court was prepared to uphold an absolute offence of having sexual intercourse with a girl below the age of 16 where no *mens rea* with respect to age need be proven by the Prosecution, nor would the absence of *mens rea* be a defence, as the offence did satisfy the tests of rationality and proportionality.[30]

B. A ripple

17 Despite the enlightened approach adopted by the Court of Final Appeal, its commitment to fundamental rights is only under real challenge when the courts begin to balance constitutional rights with other competing interests. Should it be considered as just one of the factors in the balancing process, or should it carry greater weight and should only be displaced upon cogent and persuasive justification after considering the fundamental values of the rights concerned? *Yeung Chung Ming v Commissioner of Police*[31] is a good illustration. In that case, a police officer who was charged with a criminal offence was suspended from duties pending his trial. At the same time, he had his salary withheld pursuant to s 17 of the Police Force Ordinance, which authorised the Commissioner to withhold not more than half of his salary. The withheld salary would be returned to the police officer if he was eventually acquitted. He challenged the withholding of his salary as a violation of his right to be presumed innocent, as such a decision appeared to treat him as a person who might be guilty and it was not demonstrably necessary to achieve any societal objective. This argument was rejected by the Court of Final Appeal by a majority, who held that the presumption of innocence was essentially an element of a fair trial. Where a person is at the beginning of the criminal process, and when the authorities take action in relation to a person charged with a criminal office merely on the basis that he *might* be guilty (as opposed to a view that he is guilty), there would be no violation of the presumption of innocence. It was held that the correct test was whether the Commissioner's decision to withhold any proportion of the pay of an interdicted officer implied a view that the officer was guilty. As the police officer had been interdicted on the ground that such interdiction was in the public interest, and having been interdicted, he was relieved

an honest and reasonable belief, the defence of an honest and reasonable belief and statutory defence only.

29 *Kulemesin Yiriy v HKSAR* FACC 6 & 7/2012 (22 February 2013) at [61].

30 *So Wai Lun v HKSAR* [2006] 3 HKLRD 394 at 403H–404C.

31 [2008] 4 HKC 383.

from his duties and not required to perform any work, the decision to withhold his salary did not imply that the officer was guilty.

18 This explanation is problematic. If the reason for withholding the salary is that the officer is not performing any duty during the period of interdiction, it would be illogical to return the full amount to him even if he is eventually acquitted. The Government argued that the withheld salary was to defray the expense of paying someone else to do the suspended police officer's work. This was rejected by Bokhary PJ in his dissenting judgment, as the impact of withholding salary on a suspended police officer would be much more significant to the police officer concerned than the burden on the public purse, especially if the interdiction lasted for any considerable period of time. In any event, the logical conclusion of this argument is that the withheld salary should not be returned to the suspended officer as the withholding has nothing to do with his conviction or acquittal. The Government further argued that public sentiment found it objectionable that officers who were eventually found guilty and dismissed should be paid in the meantime. Yet this is precisely the prejudice that the presumption of innocence is meant to guard against. As Bokhary PJ pointed out, there was no evidence to warrant such a conclusion, as there could well be a wide variety of responses from the public. While the majority of the court approached the issue from the societal point of view, Bokhary PJ adopted a starting point emphasising the primacy of the right to be presumed innocent. As the learned judge put it:[32]

> As I see it, the presumption of innocence reflects the way in which the members of a free society generally approach each other unless and until there is good reason otherwise in any particular instance. And even then, that general approach is departed from only to the extent called for by such reason. The presumption of innocence stands in the way of arbitrary treatment generally. Many forms of treatment are recognized as arbitrary precisely because the persons subjected to it are presumed innocent. In a free society, persons are surrounded and protected by a network of interrelated rights and freedoms of a fundamental nature … If a society is to remain truly free, the entirety of its network or continuum of fundamental rights and freedoms must be carefully kept in good repair. The thing to fear is too narrow an interpretation of the presumption of innocence, not too wide an interpretation of it.

19 Thus, Bokhary PJ subjected the decision of withholding the salary of the suspended officer to great scrutiny. He took into account the need for a constitution to protect the weak, particularly in an employment relationship where the employee is normally the weaker

32 *Yeung Chung Ming v Commissioner of Police* [2008] 4 HKC 383 at 397–398, [42]–[43].

party, and the general contractual right of an employee to be paid his wages in full unless and until he is lawfully dismissed. He did not find the justifications convincing, and held that s 17 of the Police Force Ordinance unconstitutional as it failed the test of legitimate need, rationality and proportionality. The difference between the majority and the minority lies not so much in the formal rhetoric of their approach, but how a court perceives the relative importance between a fundamental right and wider competing societal interests. Without placing at the forefront the values of the fundamental right implicated, a balancing process would tend to lead to the triumph of wider societal interests.

C. Constitutional remedies

20 *HKSAR v Hung Chan Wa*[33] presented a different type of challenge to the Judiciary. After the decision in *R v Sin Yau Ming*, the Dangerous Drug Ordinance was amended. The amended ss 47(1) and 47(2) continued to provide for a double presumption of possession of the drug (albeit with a more limited scope), and of knowledge of the nature of the drug for the offence of drug trafficking which imposed a legal burden of proof on the defendant. Adopting a remedial interpretation, the Court of Final Appeal read down and upheld these provisions as imposing only an evidential and not a legal burden of proof on the defendant. The difficult issue in this case was that many defendants had been convicted of this offence on the basis that they failed to rebut the presumptions. The Government was anxious to ensure that the decision of the Court of Final Appeal would not disturb previous convictions. It invited the court to apply its decision only prospectively, or to limit the retrospective effect of its judgment.

21 This raises a difficult and complex issue in constitutional law of a constitutional judgment disturbing the past (by upsetting a large number of previous judgments) or jeopardising the future (by creating a legal vacuum immediately after the judgment).[34] It involves a delicate balance between the right to constitutional remedies and the need for finality in the criminal process. The solution may depend on the judicial conception of the doctrine of separation of powers in a particular constitutional system. This opens up the possibility that

33 (2006) 9 HKCFAR 614.

34 For a more detailed discussion, see J Chan, "Some Reflections on Remedies in Administrative Law" (2009) 39 HKLR 321–337; Andrew Li CJ, "Reflections on the Retrospective and Prospective Effect of Constitutional Judgments" in *The Common Law Lecture Series 2010* (Jessica Young & Rebecca Lee eds) (University of Hong Kong) at pp 21–55; and Kevin Zervos, "Constitutional Remedies Under the Basic Law" (2010) 40 HKLJ 687. See also *Koo Sze Yiu v Chief Executive of the HKSAR* (2006) 9 HKCFAR 441 where the court dealt with the aspect of jeopardising the future when striking down a legal provision on covert surveillance which was said to create great difficulties for the law enforcement agencies.

different jurisdictions may choose to adopt a different approach. Thus, the Australian High Court has rejected the existence of a power to pronounce its judgment prospectively,[35] whereas the House of Lords was in favour of its existence, albeit the exercise of this extraordinary power was confined to the most exceptional circumstances.[36] The Court of Final Appeal to some extent avoided the issue by treating the matter as one of discretion to allow an appeal to be filed out of time. It refused to grant leave to appeal out of time merely on the ground that an authoritative judgment subsequent to the conviction has reversed the previous understanding of the law, and hence minimised the impact of its judgment on past convictions. At the same time, the court went to considerable lengths to argue in favour of the existence of a power of prospective overruling, and set out with admirable clarity the principles to be applied in exercising this extraordinary power.

22 It is understandable that the court was reluctant to define exhaustively the exceptional circumstances that would justify its decision to extend the time limit for filing an appeal on the ground that the law at the time of conviction was subsequently proved to be unconstitutional. In this regard, it expressed no opinion on the correctness or otherwise of the decision of the Court of Appeal in *R v Kwok Hing Man*.[37] In that case, 386 defendants were convicted of the offence of unlawful possession between the date when the Bill of Rights came into effect and when the Privy Council upheld the decision of unconstitutionality of the offence in *Attorney-General v Lee Kwong-kut*[38] two years later. Most of the defendants had already served their sentence by then, and the time limit for appeal had long expired. They applied to expunge their criminal records. In an exceptional move, the Court of Appeal consulted its full membership and decided to allow an appeal out of time in these circumstances, hence expunging 386 criminal convictions. Although the Court of Final Appeal in *HKSAR v Hung Chan Wa* did not express any view on the correctness of *Kwok Hing Man*, and though it is understandable that any court would not find it attractive to expunge a large number of previous convictions when the time limit for their appeal had long expired, it is submitted that the court has no real choice in such circumstances. It would be difficult for any court to uphold the convictions of a non-existent offence by hiding behind the technical point of refusing to allow an appeal out of time. This would particularly be the situation if the defendants are still in custody. Ironically, the longer the Bill of Rights or the Basic Law is in existence, the greater the risk that this will happen. In that situation, it is submitted that liberty of the person shall prevail over the finality of the

35 See *Ha v State of New South Wales* (1997) 189 CLR 465 at 503–504.
36 *Re Spectrum Plus Ltd* [2005] 2 AC 680.
37 [1994] 2 HKCLR 160.
38 [1993] 2 HKLRD 186 at 202.

criminal justice system, and that the court should be slow to adopt prospective overruling even if it means setting aside a large number of previous criminal convictions, and should not ever do so if personal liberty is at stake.

IV. Statutory interference with the right against self-incrimination

23 One of the consequences flowing from the presumption of innocence and hence the burden of proof being on the Prosecution is that an accused has a right to remain silent. He has no duty to assist the Prosecution and has a right not to be compelled to incriminate himself. Although commonly described as a "privilege", this is indeed a fundamental right that forms an integral part of the right to a fair trial and the right to be presumed innocent.[39] This common law right is "primarily designed to protect against improper compulsion by the authorities and the obtaining of evidence through methods of coercion or oppression in defiance of the will of the accused".[40] It is so deep-rooted in English law that reliability of the evidence by itself was held to be insufficient to justify an abrogation of this right.[41] This right exists at different stages of the criminal process, and embodies a cluster of rights or immunities which differ in nature, origin, incidence and importance.[42] Unfortunately, this common law right is also abridged by numerous statutory inroads. Some are almost as old as the right itself.[43] This part will focus on statutory interference with the right at the investigation stage, leading to direct or derivative use of the incriminating material at a later stage in the criminal process.[44] If the common law right against self-incrimination is found to be abrogated by statute, the next issue is whether the abrogating statute is consistent

39 *A v Commissioner of Independent Commission Against Corruption* (2012) 15 HKCFAR 362 at 373, [13], *per* Bokhary and Chan PPJ. In this essay, the terms "privilege against self-incrimination", "right against self-incrimination" and "the right to silence" are used interchangeably.

40 *Allan v United Kingdom* (2003) 36 EHRR 12 at [50].

41 *Lam Chi Ming v The Queen* [1991] 2 AC 212 at 220 and 222 (PC); *R v S* [2008] EWCA Crim 2177, [16]; *Saunders v United Kingdom* (1996) 23 EHRR 313.

42 For a useful classification, see *R v Director of Serious Fraud Office, ex parte Smith* [1993] AC 1 at 30, where Lord Mustill identified six different categories of immunities.

43 *R v Director of Serious Fraud Office, ex parte Smith* [1993] AC 1 at 40. See, for example, *Fu Kin Chi Willy v Secretary for Justice* [1998] 1 HKLRD 271 (abrogation of the common law right against self-incrimination by the Police Force Ordinance in a police disciplinary inquiry) and *Chan Sze Ting v HKSAR* (1997–98) 1 HKCFAR 46 (abrogation of the common law right against self-incrimination by s 13 of the Prevention of Bribery Ordinance). No Bill of Rights arguments were invoked in these cases.

44 For a helpful analysis, see S Young, "A Decade of Self-Incrimination in the HKSAR" (2007) 37 HKLJ 475.

with the right to fair hearing under Art 10 and the right against self-incrimination under Art 11(2)(g) of the Bill of Rights.

A. Determination of criminal charge

24 Article 10 of the Bill of Rights provides for the right to a fair hearing in the determination of a criminal charge. Article 11(2) then elaborates on the procedural protection in the determination of a criminal charge. Thus, to engage both Arts 10 and 11(2), there has to be a "criminal charge". Decisions from the European Court of Human Rights and English decisions on the Human Rights Act[45] have consistently held that this is an autonomous concept which is not to be determined solely by domestic classification and that the concept is a matter of substance rather than form; for otherwise a state would be at liberty to avoid the protection of a fair trial by reclassifying its domestic process or by transferring what is essentially a criminal decision to an administrative body.[46] The logical conclusion would therefore be that if Art 10 is engaged because there is a criminal charge, then Art 11(2) should equally be engaged in so far as the procedural guarantees are applicable. The two articles should rise and fall together. Strangely, this is not the effect of the Hong Kong decisions.

25 In *HKSAR v Lee Ming Tee*,[47] as far as Art 11(2)(g) is concerned, the court took a literal meaning of "criminal charge" without much discussion and held that it did not apply as no charge had been preferred on the defendants at the time when the compelled information was sought. It also confined the protection of Art 11(2)(g) to testimonial immunity. The court then turned to Art 10. It pointed out that the European Court of Human Rights was able to derive the right against self-incrimination from the European equivalent of the right to fair trial in Art 6 of the European Convention on Human Rights, and then assumed Art 10 was applicable and proceeded to consider whether derivative use was in violation of the right to fair hearing. This was hardly satisfactory, as the right to fair hearing under Art 10 is also engaged only "in the determination of criminal charge". Given that both Arts 10 and 11 come from the single Art 14 of the ICCPR, it is unlikely that the same phrase "criminal charge" in Arts 10 and 11 should bear different meanings. Thus, unless the meaning of this phrase differs in Arts 10 and 11(2)(g), the decision of the court is internally inconsistent.

45 Human Rights Act 1998 (c 42) (UK).

46 *Funke v France* (1993) 16 EHRR 297; *Serves v France* (1997) 28 EHRR 265 at 283; *R v Hertfordshire County Council, ex parte Green Environmental Industries Ltd* [2000] 2 AC 412 at 419; *Secretary for Justice v Latker* [2009] 2 HKC 100 at 137–138; *Koon Wing Yee v Insider Dealing Tribunal* (2008) 11 HKCFAR 170.

47 (2001) 4 HKCFAR 133.

26 The same point was made by the majority of the Court of Appeal in *Secretary for Justice v Latker*,[48] where the applicant challenged the constitutionality of a notice compelling him to disclose the identity of the driver at the time of a traffic offence. Ma CJHC (as he then was) and Stuart-Moore JA held that Art 11(2)(g) of the Bill of Rights had no application as the applicant was not charged with any offence. However, they agreed that the right to a fair trial under Art 10 was engaged, as once the identity of the driver of a vehicle that was involved in a traffic offence was provided, the inevitable reality was that a charge would be laid. In contrast, Stock VP adopted an extended meaning of a "criminal charge" as "the official notification given to an individual by the competent authority of an allegation that he has committed a criminal offence".[49] This liberal meaning would widen the scope of protection to the pretrial investigation stage where the right against self-incrimination could arguably be of much greater significance. In assessing the nature of the notice requiring the provision of information of the identity of the driver, Stock VP noted that the inquiry was conducted solely in order to seek information or evidence in order to support a criminal charge,[50] and realistically the police did have an "element of suspicion" against the registered owner. While the identity of the driver would not complete the traffic offence, it is an important element of the offence, and indeed, in most cases, the only missing part in the Prosecution's case. The realistic approach adopted by Stock VP is much preferred over that of the majority of the court. However, Stock VP was surprisingly silent on whether Art 11(2)(g) applied. Indeed, if "criminal charge" in Art 10 bears the wider meaning as Stock VP has held, there is no reason why the same meaning should not apply to Art 11(2)(g). In both cases there was a criminal charge when the statutory notice to provide information was served.

27 The meaning of "criminal charge" was thoroughly considered in *Koon Wing Yee v Insider Dealing Tribunal*.[51] The issue in this case was whether Arts 10 and 11 of the Bill of Rights applied to proceedings before the Insider Dealing Tribunal. The Court of Final Appeal accepted the approach adopted by the European Court of Human Rights that in determining whether there is a "criminal charge", the court would take into account (a) domestic classification of the offence; (b) the nature of the offence; and (c) the nature and severity of the potential sanction. While domestic, or in the context of Hong Kong, legislative classification would be taken as a starting point, it would not be conclusive.

48 [2009] 2 HKC 100.

49 *Secretary for Justice v Latker* [2009] 2 HKC 100 at 137I, [120].

50 *Secretary for Justice v Latker* [2009] 2 HKC 100 at 139, [123] and [131]–[133], preferring the minority view in *Weh v Austria* (2005) 40 EHRR 37 at [10]–[11]. Since then the police have introduced a standard clause in the notice that consideration is given whether criminal prosecution would be taken out.

51 (2008) 11 HKCFAR 170.

Indeed, the nature of the offence and the proceedings are more weighty considerations. Thus, disciplinary proceedings, which do not concern the public at large, are usually taken to be of a non-criminal or non-penal character. Proceedings under regulatory legislation, whose purpose is essentially protective rather than punitive or deterrent, may also not be considered "criminal". Likewise, the revocation of a parole licence, which is to protect the public and not to punish the offender, is not "criminal" in nature. On the other hand, if the purpose is punitive in nature, or when a heavy penalty is imposed, these are strong indicia of a "criminal" process. In *Koon Wing Yee*, the court found that insider dealing was an "insidious mischief" which threatened the integrity of financial markets and public confidence in them. It involved dishonest misconduct through a misuse of price-sensitive information, and the penalty, which sought to leave a person engaging in such conduct out of pocket irrespective of any personal gain, was clearly punitive in nature. The absence of a formal charge, or a conviction that would become part of the criminal record, or the absence of a provision for imprisonment, did not attenuate its criminal character.

28 In this regard, the court expressly endorsed a substantive approach that looked to substance rather than form. Sir Anthony Mason held that:[52]

> [I]t is necessary to look beyond the absence of a formal charge and to ascertain whether a person is being called upon to answer an allegation of serious misconduct which, if determined against him, will result in punishment. To hold that the absence of a formal charge and the absence of a provision for the recording of a conviction in such circumstances should take the proceedings outside the protection conferred by Arts 10 and 11 of the BOR would reduce substantially the protection conferred by these articles and facilitate the triumph of form over substance.

A similar approach has been adopted by the Court of Final Appeal in *Yeung Chung Ming v Commissioner of Police*,[53] where the court held that the presumption of innocence applied when the State made a declaration of guilt following an arrest even when no criminal charge was preferred. This approach is to be commended, and in the light of these holdings, the remarks made by Riberio PJ in *HKSAR v Lee Ming Tee*[54] and Ma CJHC in *Secretary for Justice v Latker*[55] regarding the applicability of Art 11(2)(g) must now be regarded as dubious.[56]

52 *Koon Wing Yee v Insider Dealing Tribunal* (2008) 11 HKCFAR 170 at 192, [51].

53 [2008] 4 HKC 383 at 394, citing *Minelli v Switzerland* (1983) 5 EHRR 554. See also the dissenting judgment of Bokhary PJ at 396–397.

54 (2001) 4 HKCFAR 133.

55 [2009] 2 HKC 100.

56 In the light of the decision in *Koon Wing Yee v Insider Dealing Tribunal* (2008) 11 HKCFAR 170, it is possible to argue that the notice requiring a registered owner

(*cont'd on the next page*)

B. Direct use versus *derivative use*

29 The first case to reach the Court of Final Appeal on statutory abrogation of the right against self-incrimination was *HKSAR v Lee Ming Tee*.[57] In that case the Court of First Instance ordered a permanent stay of prosecution for abuse of process on the ground that compelled information collected in the course of a company investigation was disclosed to the police and that led to subsequent criminal prosecution of the defendants for various counts of conspiracy to defraud and false accounting. Under s 143 of the Companies Ordinance, the Financial Secretary may order an investigation by an inspector into the affairs of a company. Section 145(3A) further provides that the officers of the company could not refuse to answer a question from the inspector on the ground of self-incrimination, save that the question and answer could not be adduced as evidence against them in subsequent criminal proceedings if the person claimed privilege before answering the question. The defendant relied, *inter alia*, on Art 11(2)(g) of the Bill of Rights, which provided that "in the determination of any criminal charge against him, everyone shall be entitled … not to be compelled to testify against himself or to confess guilty", and successfully argued that the derivative use of incriminating evidence contravened Art 11(2)(g), or more generally, the right to fair trial under Art 10. The Secretary for Justice appealed.

30 The Court of Final Appeal allowed the appeal and set aside the order of permanent stay. Riberio PJ, delivering the judgment of the court, held that there was no free-standing common law right against derivative use of incriminating evidence, and as a matter of statutory interpretation, once the right against self-incrimination was abrogated without any express restriction on its use, it necessarily permitted unrestricted use of the incriminating information. In so far as the Bill of Rights was concerned, it was held that Art 11(2)(g) had no application as there were no criminal proceedings at the time when the information was elicited, and there was no inherent unfairness and no violation of Art 10 in permitting derivative use of incriminating evidence, taking the trial process as a whole and the court's discretion to exclude evidence.

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of a vehicle to disclose the identity of the driver at the material time in *Secretary for Justice v Latker* [2009] 2 HKC 100 amounted to a "criminal charge" and hence attracted the protection of Art 11(2)(g). Since this case, the Government has inserted a new clause in the standard notice that the Prosecution has not decided at this stage whether to prosecute or not. This clause may not achieve its purpose if the statistics show that there is criminal prosecution in the overwhelming majority of cases following the identification of the driver, which is likely to be the case. The court will consider the substance rather than the form.

57 (2001) 4 HKCFAR 133.

31 In that case, the Prosecution gave an undertaking not to rely on any of the oral interviews of the defendants or any of their comments on the draft transcript or on the draft report, or to seek to cross-examine them on the basis of such materials. Nor had the defendants been able to identify any material that was to be used at the trial which was specifically derived from the compelled information.[58] Thus, arguably the question of a violation of the right against self-incrimination through derivative use of compelled information did not arise at all and the decision could be supported on that basis. Indeed, in a case relying on derivative use, it would not be unfair or unreasonable to require the accused to identify the material that is said to be derived from self-incriminating information, and to show that but for the incriminating information such material would not have been available. Once the accused is able to discharge the evidential burden, it would be for the Prosecution to show that it had acquired the evidence independently and without reliance on the compelled information, or if it fails to do so, to show that the court should still exercise its discretion to admit the evidence despite its being obtained in violation of the accused's right against self-incrimination. This is indeed the position in Canada, where the court tried to strike a balance between the right against self-incrimination and the public interest in protecting the public from corporate fraud.[59]

32 Instead, the court rejected the Canadian approach, not on any principle but merely on a vague assertion that the Canadian approach was developed in a highly specific context. It is true that the protection against self-incrimination in s 13 of the Canadian Charter was regarded as too narrowly formulated and hence the Canadian courts tried to extend the constitutional protection through "the principle of fundamental justice" under s 7 of the Charter. It does not follow therefore that the constitutional principles developed thereunder are necessarily inapplicable beyond the Canadian context. Indeed, "the principle of fundamental justice" is derived from the basic tenets of the justice system. Riberio PJ was content to rely on the English common law decision of *Brown v Scott*[60] – a highly criticised decision and which was in any event a case of direct use rather than derivative use of incriminating information.[61]

58 *HKSAR v Lee Ming Tee* (2001) 4 HKCFAR 133 at 157D–F and 157J–158A.

59 See *Thomson Newspaper Ltd v Canada (Director of Investigation and Research)* (1990) 67 DLR (4th) 161 and *RJS v The Queen* (1995) 121 DLR (4th) 462.

60 [2001] SLT 59.

61 See *HKSAR v Lee Ming Tee* (2001) 4 HKCFAR 133 at 178–179.

C. Derivative use: A free standing right under the common law?

33 Is there no basis for a freestanding right against derivative use in the common law? This may require an examination of the rationale of and the values to be protected by the right against self-incrimination. In *Lamb v Munster*,62 Stephen J described the right in these words:

> When the subject is fully examined, it will I think be found that the privilege extends to protect a man from answering any question which 'would in the opinion of the judge have a tendency to expose the witness, or the wife or husband of the witness, to any criminal charge': *Stephen's Dig of the Law of Ev* 3rd ed art 120, p 121. That is what I understand by the phrase 'criminating himself'. It is not that a man must be guilty of an offence and say substantially, 'I am guilty of the offence, but am not going to furnish evidence of it.' I do not think the privilege is so narrow as that, for then it would be illusory. The extent of the privilege is I think this: the man may say, 'If you are going to bring a criminal charge, or if I have reason to think a criminal charge is going to be brought against me, I will hold my tongue. Prove what you can, but I am protected from furnishing evidence against myself out of my own mouth.'

34 Take this situation. If the right against self-incrimination means that an accused cannot be compelled to give evidence that he has made a video record of himself committing a crime, what is the justification for admitting the video in evidence when the video would not have been discovered but for his compelled testimony?63 This would be no different from convicting him "out of his own mouth", metaphorically if not literally, and would indeed encourage the law enforcement agencies to compel a suspect to provide information against his will, hoping that it would lead to something else that is incriminating. It would of course be different if the police were able to find the video independently without his compelled testimony. The position was best explained by the US Supreme Court in *Katisgar v United States*, where the majority of the court held:64

> We hold that such immunity from use and derivative use is coextensive with the scope of the privilege against self-incrimination, and therefore is sufficient to compel testimony over a claim of the privilege. While a grant of immunity must afford protection commensurate with that afforded by the privilege, it need not be broader. Transactional immunity, which accords full immunity from prosecution for the offense to which the compelled testimony relates, affords the witness considerably broader protection than does the Fifth Amendment privilege. The privilege has never been construed to

62 (1882) 10 QBD 110 at 112–113.

63 *Lam Chi Ming v The Queen* [1991] 2 AC 212.

64 406 US 441 (1972). See also the powerful judgment of Wilson J in *Thomson Newspaper Ltd v Canada (Director of Investigation and Research)* (1990) 67 DLR (4th) 161.

> mean that one who invokes it cannot subsequently be prosecuted. Its sole concern is to afford protection against being 'forced to give testimony leading to the infliction of "penalties affixed to … criminal acts."' Immunity from the use of compelled testimony, as well as evidence derived directly and indirectly therefrom, affords this protection. It prohibits the prosecutorial authorities from using the compelled testimony in *any* respect, and it therefore insures that the testimony cannot lead to the infliction of criminal penalties on the witness. [emphasis in original]

35 Thus, it seems that, as a matter of logic and principle, there is a powerful case that the protection against self-incrimination must include the prohibition of both direct and derivative use. The underlying concern is the same be it direct or derivative use – a person cannot be compelled to give incriminating evidence against himself and be forced to convict himself out of his own mouth.

36 Riberio PJ, however, held that there was no free standing common law derivative use immunity, and even if there was, it had been abrogated by s 145(3A). It appears that the learned judge has failed to distinguish four different, though inter-related, issues. Firstly, does the common law recognise derivative use immunity? Secondly, has s 145(3A) abrogated such an immunity? Thirdly, should the court's general residual discretionary power to exclude relevant evidence in order to ensure a fair trial be exercised? And fourthly, is it necessary to establish a causal link between the derivative evidence and the compelled incriminating evidence? The learned judge was preoccupied with the second question. His categorical denial of a freestanding common law derivative use immunity (the first question) has to be regarded in the light of his focus (perhaps rightly so on the facts) on the second question of statutory abrogation.

37 The learned judge first referred to *Sorby v The Commonwealth*,[65] and was prepared to accept that "an unabrogated privilege against self-incrimination, that is, a privilege to decline to answer questions, necessarily carried with it not only protection against direct but also derivative use of any self-incriminating answer".[66] This must be correct (the first question). The learned judge distinguished this case on the particular wording of s 6DD of the Royal Commissions Act 1902, which imposed a general restriction on direct use of compelled evidence without expressly abrogating the right against self-incrimination, and held that the express abrogation of the right in s 145(3A) left no room for the survival of any common law derivative use immunity (the second question). *Hamilton v Oades and Corporate Affairs*

65 (1983) 152 CLR 281 at 293–293, *per* Gibbs CJ.

66 *HKSAR v Lee Ming Tee* (2001) 4 HKCFAR 133 at 166E.

Commission of New South Wales[67] could be explained on the same ground, namely, that s 541(12) of the Companies (New South Wales) Code expressly abrogated the right against self-incrimination and that was sufficient to abrogate both direct use and derivative use. Mason CJ gave a further reason that it would be difficult for Parliament to provide for specific protection against derivative use by reason of the problem of proving that other evidence was derivative.[68] The difficulty of proving a causal relationship between the derivative evidence and the incriminating evidence (the fourth question) is a real limit on the effectiveness of protecting derivative use, but it is not a good answer to say that there is no derivative use immunity or that the statute necessarily abrogates derivative use. Statutory abrogation remains a question of legislative intent in each case.

38 Riberio PJ next referred to *Lam Chi Ming v The Queen*.[69] The issue was whether certain video recordings re-enacting the crime at the scene and the discovery of the murder weapon were admissible evidence when the confession made by the accused, which led to the making of the video and the recovery of the weapon, was held to be involuntarily made and hence inadmissible. It held that when a confession was ruled involuntary and inadmissible, evidence derived by the police from the knowledge acquired through that confession might still be admissible provided that the derivative evidence could be adduced without any reliance on the excluded confession. This goes to the fourth question above (causal linkage) and reinforces the point that if there is a causal linkage, derivative use must be prohibited unless otherwise abrogated. The learned judge's statement that "the common law admits independent evidence against the accused even though it is derivative evidence obtained by using the excluded confession (subject to the court's discretionary power to exclude such evidence)" begs the question of what "independent evidence" means. A generous interpretation of "independent evidence" is not supported by *Lam Chi Ming* where the Privy Council held that there was a strong causal link between the video recording and the involuntary confession and therefore the video was inadmissible, thus confirming derivative use immunity. The statement of Lord Hoffmann in *R v Hertfordshire County Council, ex parte Green Environmental Industries Ltd*,[70] which referred to *Lam Chi Ming* and the 18th century case of *R v Warickshall*,[71] have to be considered in the same light.

67 (1989) 166 CLR 486.
68 *Hamilton v Oades and Corporate Affairs Commission of New South Wales* (1989) 166 CLR 486 at 496.
69 [1911] 3 AC 212.
70 [2000] 2 AC 412 at 421.
71 (1783) 1 Leach 263.

39 Finally, the learned judge dismissed the relevance of two civil cases concerning Anton Piller orders. In *Rank Film Distributors Ltd v Video Information Centre*,[72] Lord Wilberforce held that the judicial order did not abrogate the right against self-incrimination, thus protecting the defendant from both direct and derivative use of any answer provided. Lord Wilberforce expressed the concern that even if there were an undertaking not to use the information obtained in criminal proceedings, it would not sufficiently protect the defendant from derivative use of the information. Thus, whether an undertaking is wide enough to prevent derivative use would depend on its wording, and it may be jumping the gun to conclude from this that if the right against self-incrimination were to be abrogated to some extent by a judicial order, there would be no residual common law derivative use immunity,[73] or that an abrogation of the privilege against self-incrimination, even if accompanied by an undertaking against direct use, would not prevent derivative use.[74] It is very much a matter of drafting in each case.

40 In conclusion, the learned judge's statement that there was no freestanding common law derivative immunity is probably unnecessarily sweeping. It is submitted that the right against self-incrimination must include protection against both direct and derivative use. Whether a statutory provision abrogates both direct and derivative use is a matter of construction which depends on the context of each case. There are two possible approaches. The first is that an express restriction on direct use does not preclude derivative use: *expressio unius est exclusio alterius*. This is typical of the common law approach to statutory interpretation and is the approach adopted by the learned judge. The other is that unless otherwise expressly excluded, a fundamental right is deemed not to be excluded, and hence, in the absence of clear and unambiguous language, the common law derivative use immunity is preserved. This approach is more consistent with the modern liberal approach to construing constitutional rights. The learned judge cannot be faulted for choosing one of the two approaches, especially when this case was decided in the early days of the transition of sovereignty when the court was still feeling its way in constitutional law interpretation. The approach that he did adopt was not as rights-friendly as its alternative. If the statute does not abrogate derivative use, it is argued that the court should then determine whether the causal link between the compelled evidence and the derivative evidence is so remote that it could not be considered rationally to have come from the mouth of the person compelled (the rationality test). If such a rational relationship

72 [1982] AC 380.

73 *HKSAR v Lee Ming Tee* (2001) 4 HKCFAR 133 at 168E–169H.

74 Indeed, in *AT&T Istel Ltd v Tully* [1993] AC 45, the House of Lords found the undertaking wide enough to cover both direct use and derivative use.

cannot be established by the accused or is rebutted by the Prosecution by showing that the incriminating evidence could be obtained independently of the derivative material, the derivative evidence should be admissible, subject to the court's residual discretion to exclude evidence to ensure a fair trial. On the other hand, if an accused can establish a causal link between the compelled material and the derivative evidence and the Prosecution cannot show that it would have been able to obtain the derivative evidence independently, then the derivative evidence should in general be inadmissible. Its admissibility would, in the circumstances, compromise the fair hearing or the dignity of the judicial process, subject to the court's discretion to admit such evidence if there is strong and cogent justification to admit the same notwithstanding its adverse impact on a fair hearing (the proportionality test). Thus, instead of a categorical permission to use derivative evidence, its admissibility becomes a matter of remoteness and should be determined by the usual tests of rationality and proportionality.

D. Approach to constitutional right against self-incrimination

41 Having decided that the prohibition of direct use of the self-incriminating material did not prohibit derivative use, the Court of Final Appeal in *HKSAR v Lee Ming Tee* went on to consider if derivative use would be consistent with the Bill of Rights. It took as a starting point the position that direct use of compulsorily obtained self-incriminating materials might be justified if it was a proportionate response to a serious social problem and did not undermine the accused's right to a fair trial viewed in the round. The court then treated the issue as primarily one of a fair balance between meeting a serious social concern of corporate fraud that called for strong regulation, and ensuring an accused of a fair trial, taking into account the court's inherent power to exclude evidence. It had no difficulty in coming to the conclusion that "there is no inherent unfairness in establishing a person's guilt by the use of reliable objective evidence obtained from an independent source, even if the acquisition of that evidence was facilitated by clues contained in the excluded admission".[75] As noted above, the problem of this conclusion lies in what "independent source" means. If it means that there is no causal relationship between the derivative evidence and the incriminating information, the conclusion is not controversial. This seems to be what the learned judge had in mind, as his conclusion is preceded by a statement that "the privilege has no application to evidence which exists independently of the will of the accused". There is of course no violation of the right against self-incrimination if there is no causal relationship between the

75 *HKSAR v Lee Ming Tee* (2001) 4 HKCFAR 133 at 177F–G.

derivative evidence and the incriminating information, but if this causal relationship is established, then the court did not really address the balancing process as such. In this connection, it is disappointing that the learned judge was too ready to brush aside the Canadian authorities, which addressed separately the need to establish a causal relationship between the derivative evidence and the compelled self-incriminating material. Instead of applying the proportionality test in the balancing process, the learned judge readily assumed the position that a judicial discretion to exclude such evidence would be sufficient to ensure a fair trial.

42 Derivative use was cursorily mentioned in passing in *A v Commissioner of the Independent Commission Against Corruption*.[76] The issue in that case was, primarily, whether a person compelled to provide information to the Independent Commission Against Corruption pursuant to the famous s 14 notice could claim the right against self-incrimination. There was no express abrogation of the right, but the Court of Final Appeal concluded that the Legislature clearly intended to abrogate it. This conclusion was impeccable. There was a general prohibition of direct use of the information in all proceedings, and the court held, as a matter of statutory construction, that the only permissible use was to challenge the credibility of the person concerned on the inconsistencies between the compelled material and his *viva voce* testimony in court. Given this limitation, it was held that there was a proper balance between societal interest and the right to a fair trial, and hence there was no violation of the Bill of Rights.

43 While the case could have been decided solely on that basis, the court made *obiter* remarks about derivative use. Bokhary and Chan PJJ, in their joint separate judgment, asserted that:[77]

> [T]here would be no point at all to s 14 or to the abrogation of the privilege against self-incrimination in regard thereto if derivative use cannot be made of material compelled under that section. Derivative use is plainly necessary and a rational and proportionate response to such necessity. It is constitutional.

This *obiter* statement was made without any argument and is unnecessarily sweeping if it means that derivative use is always constitutionally permissible. Riberio PJ was more restrained, yet his

76 (2012) 15 HKCFAR 363 at 405, [118], *per* Ribeiro PJ:

> It is no part of the appellant's case that such derivative use would be unconstitutional. That is unsurprising since, in the light of *Lee Ming Tee* and *Koon Wing Yee*, such a challenge would have little prospect of success.

Thus, derivative use was not an issue at all.

77 *A v Commissioner of the Independent Commission Against Corruption* (2012) 15 HKCFAR 363 at 383, [38].

treatment also shed light on the real justification of his decision in *HKSAR v Lee Ming Tee*.[78] The learned judge first referred to the common pattern of those statutes that abrogated the right against self-incrimination to prohibit or restrict direct use. He then made the point, following *Lee Ming Tee*, that such prohibition did not in general seek to prohibit or had the effect of prohibiting derivative use, the reason being:

> Thus, there is usually no prohibition against using the compulsorily obtained answers to develop new lines of inquiry; to identify sources of independent evidence; to assist in formulating applications for search warrants; and so forth. Such derivative use of the compelled answers does not raise any issue concerning self-incrimination or admissibility since it is use which does not involve any attempt to adduce the answers in evidence in any curial setting. The law has always drawn a distinction between (inadmissible) compelled answers themselves and (admissible) derivative evidence *independently developed* from indications contained in the compelled answers. [emphasis added]

44 This justification is consistent with the above argument that ultimately the issue is one of remoteness. When the derivative evidence can be independently developed, the causal link between the compelled material and the derivative evidence is too remote to warrant any finding of a violation of the right against self-incrimination, but the right would be upheld if such causal link could be established. The real issue would then be what kind of causal link would be considered constitutionally unacceptable.

45 While direct use is severely restricted in *A v Commissioner of the Independent Commission Against Corruption*, the direct use in *Secretary for Justice v Latker*[79] goes to the heart of the criminal offence. Section 63 of the Road Traffic Ordinance compels the registered owner of a vehicle to provide information to the police on the identity of the driver at the time of a suspected offence, in that case the offence being a failure to comply with traffic signals. Failure to provide the information is itself an offence, which attracts a fine of $10,000 and six months' imprisonment. The requirement to provide information applies to all road traffic offences, irrespective of their nature or gravity. The issue is whether this requirement violates the right of the registered owner against self-incrimination. The Court of Appeal found no violation.

78 *A v Commissioner of the Independent Commission Against Corruption* (2012) 15 HKCFAR 363 at 394, [76]–[77]. Ma CJ and Lord Hoffmann NPJ concurred with Ribeiro PJ.

79 [2009] 2 HKC 100.

46 Ma CJHC approached the issue as one of a fair balance, namely, what is the fair balance to be struck between, on the one hand, the demands and interests of the general community and, on the other, the fundamental rights of the individual?[80] This approach is reminiscent of that adopted by Ribeiro PJ in *HKSAR v Lee Ming Tee* as well. Taking into account the strong public interest in the effective regulation of motor vehicles and their use, the sheer number of motor vehicles on the road and the exposure of most members of the population to them, the minimal intrusion to the right against self-incrimination, and the availability of a defence of lack of knowledge, the court considered that a fair balance had been struck. This conclusion is not surprising, given the fair balance test formulated by Ma CJHC. After all, it is difficult to balance individual right against societal interest and, in most cases, the logical consequence is that societal interest prevails. Stock VP, whilst agreeing with the conclusion of the court, pointed out the danger of this fair balance approach:[81]

> I would myself prefer, as a general rule when addressing derogations from rights, to avoid an approach or test articulated in terms of a 'fair balance' between '… on the one hand, the demands and interests of the general community and, on the other, the fundamental rights of the individual'. A test expressed in those terms runs the danger, in my opinion, of undermining the primacy of fundamental freedoms which, after all, reflect the interests of the general community. In cases where fundamental freedoms are absolute, no derogation is permitted, so no question of 'balance' can arise. Where the freedom is not absolute, the starting point is always the freedom and any derogation from it must, both as to the need for derogation and its extent, be fully justified, albeit on societal grounds, by he who seeks to derogate.'

47 Adopting this approach, Stock VP addressed the respondent's arguments in a more meticulous manner. He considered it unfair to categorise the respondent's arguments as treating the right against self-incrimination as an absolute right. Unlike the majority who was prepared to accept readily that there was a serious problem caused by motor vehicles despite the unsatisfactory state of the statistical evidence,[82] Stock VP was sympathetic to the Magistrate who was troubled by the absence of evidence justifying the legislative measure under attack. He found that the evidential gap was bridged by

80 *Secretary for Justice v Latker* [2009] 2 HKC 100 at 118, [37].

81 *Secretary for Justice v Latker* [2009] 2 HKC 100 at 152, [160]. See also Simon N M Young, "Human Rights in Hong Kong Criminal Trials" in *Criminal Law and Human Rights: Reimagining Common Law Procedural Traditions* (Paul Roberts & Jill Hunter eds) (Oxford: Hart Publishing, 2012) at pp 75–76, where Young criticised the rather conservative approach to derivative use immunity in Hong Kong and pointed out that the Victoria Supreme Court (Australia) has refused to follow Lee Ming Tee's approach to derivative use immunity.

82 *Secretary for Justice v Latker* [2009] 2 HKC 100 at 119, [42].

the legislative history and the debates in the Legislative Council.[83] The learned judge also dismissed the suggestion that the identity of the driver was only one element of the traffic offence, as realistically this was the only crucial piece of evidence in the prosecution.[84]

48 The respondent relied on three salient features in this case, namely, the possibility of a custodial sentence, the indiscriminate nature of the requirement which was irrespective of the gravity of the offence, and the available alternatives. He attempted to distinguish *Brown v Stott*[85] on the ground that, in that case, a custodial sentence for non-compliance was not an option and that the requirement to supply information applied only to serious, and not mere regulatory, offences. Ma CJHC found support for the need for custodial sentence in the legislative debates, and was prepared to accord the Legislature a margin of appreciation regarding such need.[86] He pointed out that a custodial sentence would only be imposed in the more serious situations, and that Hong Kong was not unique in imposing a custodial sentence for non-compliance. Nor did he consider the indiscriminate scope of application a weighty factor. Once "all offences under the Road Traffic Ordinance were regarded as part of an overall regulatory scheme to govern effectively the use of motor vehicles in Hong Kong and to protect the public from harm", it is of little consequence whether serious or minor offences are affected by s 63.[87] This is again exemplary of how the fair balance approach, as advocated by Ma CJHC, is applied in practice. In contrast, Stock VP considered that the threat of imprisonment carried a threat of compulsion which had to be justified with reference to the subject matter of the case. A six-month custodial sentence for non-compliance might not be incommensurate with a serious offence of causing death by dangerous driving which carried a sentence of ten years' imprisonment, but it might appear disproportionate if it was applied to a minor offence of speeding with a maximum sentence of six months' imprisonment.[88] What degree of compulsion is proportionate in a particular case was a matter of factual assessment for the tribunal, which had a power to exclude an admission if the circumstances in which it was obtained in a particular case were found to be oppressive. Stock VP reviewed the legislative history, which had given an account of the problems encountered (the hit and run situations) and the justifications for the introduction of the custodial sanction. Finally, he also considered the available alternatives, as "those who seek to justify restrictions upon fundamental rights are bound to show that the

83 *Secretary for Justice v Latker* [2009] 2 HKC 100 at 148, [148]–[149].
84 *Secretary for Justice v Latker* [2009] 2 HKC 100 at 133, [132].
85 [2003] 1 AC 681.
86 *Secretary for Justice v Latker* [2009] 2 HKC 100 at 121, [54].
87 *Secretary for Justice v Latker* [2009] 2 HKC 100 at 121, [55].
88 *Secretary for Justice v Latker* [2009] 2 HKC 100 at 147, [144].

restrictions go no further than are necessary for the protection of legitimate interests".[89] While a reverse onus clause which placed a burden on the registered owner to prove that he was not the driver of the vehicle at the material time might be a possible alternative, it was a more onerous violation of the right to be presumed innocent than the compulsory disclosure requirement. In conclusion, given the significantly limited nature of the questioning permitted, and the fact that the provisions were directed at a class of persons who had subscribed to a regulatory regime, the problems that have been encountered, and the power of the tribunal to exclude the evidence if the circumstances in which it has been obtained in a particular case were oppressive so as to render the admission unsafe, Stock VP agreed with the majority that the compulsory requirement to disclose the identity of a driver was a proportionate response. While the learned judge had come to the same conclusion as the majority of the court, the approach adopted by Stock VP is intellectually more rigorous and more in tune with the primacy of fundamental rights. In the words of Silke VP, the balance between the interests of the individual against the interests of society generally is not an exercise to be done on an equal plane, but with a bias towards the interests of the individual.[90]

49 While exclusion of incriminating evidence is a natural remedy for a violation of the right against self-incrimination, the Court of Final Appeal came up with a novel, and surprising, remedy in *Koon Wing Yee v Insider Dealing Tribunal*.[91] In that case, ss 33(4) and 33(6) of the Securities and Futures Ordinance conferred on the Securities and Futures Commission wide investigatory powers and abrogated the right against self-incrimination. It also expressly permitted the use of potentially self-incriminating answers "for all purposes of the Securities (Insider Dealing) Ordinance". That is, direct use of self-incriminating material was permitted for proceedings before the Insider Dealing Tribunal. The Court of Final Appeal found that such direct use constituted a substantial intrusion into the right against self-incrimination and that the compelled answers "formed an important element in the evidence relied upon by the Tribunal in the findings which it made against the respondents".[92] In coming to this conclusion, the court was heavily influenced by the fact that the tribunal had power to impose a very heavy penalty, which was punitive in nature and which sought to deter insider dealing by leaving a person who engaged in such dealing substantially out of pocket, irrespective of whether that person had

89 *Secretary for Justice v Latker* [2009] 2 HKC 100 at 149, [151].
90 *R v Sin Yau Ming* (1991) 1 HKPLR 88.
91 (2008) 11 HKCFAR 170.
92 *Koon Wing Yee v Insider Dealing Tribunal* (2008) 11 HKCFAR 170 at 199, [79].

made any personal gain.[93] Instead of excluding the self-incriminating evidence or striking down the provision compelling the disclosure of information and allowing direct use of self-incriminating material, which would seem to have been the obvious remedies, the court decided to strike down the penalty provision which, by itself, did not infringe any provision of the Bill of Rights. The argument was that without this penalty clause, the proceedings would no longer be classified as "criminal" and therefore there would not be any violation of Art 10 of the Bill of Rights. Sir Anthony Mason explained:[94]

> Section 6(1) [of the Bill of Rights Ordinance] should be construed, in accordance with its terms, as conferring a power which will enable the courts to resolve the tension which exists between the legislative will and the protection given by the BOR by striking down only that part of the statute that causes the violation or breach, even if it does not itself infringe the BOR, when to do so best gives effect to the legislative intention … Had it not been for the existence of the power [to impose a heavy penalty], the proceedings would not have acquired a substantially criminal character and there would have been no violation of the BOR. The fact that the relationship or connection is indirect rather than direct is not a matter of any consequence … The history of the matter demonstrates that the legislature would have preferred to sacrifice the power to impose a penalty and retain the other provisions in SIDO [Securities (Insider Dealing) Ordinance] rather than lose the investigatory powers which have resulted in violations of the BOR … Whether the remedy is appropriate and just from the perspective of the respondents is a more difficult question. The remedy is less satisfactory to them than the relief granted by the Court of Appeal because it preserves the findings made by the Tribunal and the orders for disqualification.

50 This is the first time that the court fashioned a remedy by striking down a provision which, by itself, did not infringe the Bill of Rights in order to bring the regime in line with the Bill of Rights. While this is an innovative approach, two questions need further consideration. Firstly, under Art 10, the right to a fair trial applies to both criminal and civil proceedings. Therefore, the mere fact that the proceedings are no longer classified as criminal does not detract from the protection of the right to a fair hearing, and direct use of self-incriminating material may still constitute a violation of the right to

93 Section 23(1)(c) of the Securities (Insider Dealing) Ordinance (Cap 395) provides for an order of a penalty "of an amount not exceeding three times the amount of any profit gained or loss avoided by *any* person as a result of the insider dealing" [emphasis added].

94 *Koon Wing Yee v Insider Dealing Tribunal* (2008) 11 HKCFAR 170 at 208–210, [113], and 117–118. Section 6(1) of the Bill of Rights provides that a court or tribunal may "grant such remedy or relief, or make such order, in respect of such a breach, violation or threatened violation as it has power to grant or make in those proceedings and as it considers appropriate and just in the circumstances".

a fair hearing even when the consequences may not be as drastic as in criminal proceedings. The court has either not considered this question at all or implicitly assumed, somewhat prematurely, that there is no issue of fair hearing once the proceedings are no longer characterised as criminal.95 Secondly, the suggestion that the Legislature would prefer sacrificing a penalty clause to losing the investigatory power may be a bold assertion. One of the problems of the previous regime is that it had no teeth. Thus, a heavy penalty lies at the core of the new regime, without which the investigation may serve no deterrent purpose. It is unclear what materials were before the court to enable it to make such a judgment. Legislative history is not one-sided and it may be dangerous to rely on legislative history to predict what the Legislature would do in the light of the insidious activities of insider dealings.

V. Conclusion

51 This essay focuses on two aspects of criminal law, and hence the conclusion cannot fairly represent the overall impact of the Bill of Rights or the Basic Law on the development of criminal law in Hong Kong. However, one issue stands out clearly, namely, that the impact of the Bill of Rights or any constitutional instrument will depend very much on how it is approached and interpreted by the Judiciary. Constitutional law is about values and their priority in a society. The constitution sets out the primacy of fundamental rights, but it is in applying those rights that the core values of a society are put to the test. The outcome may depend on a wide range of factors, including the predisposition of the judges as influenced by their previous training and experience, their perception of the relationship between the Judiciary and other branches of the Government, as well as the wider socio-political environment. Judges in a common law system are generally not used to the interpretation of general constitutional provisions. In the interpretation of such provisions, it is inevitable that they resort to their common law training, and on occasion, they approach the interpretation of the constitution in a way that is no different from the interpretation of any domestic legislation, focusing on the intention of the Legislature, as revealed by a literal reading of the law rather than exploring the values underlying the constitutional protection of fundamental rights and being guided by how best such rights can be protected within the confines of the constitutional framework. Some judges even take the view that constitutional protection of fundamental rights, at least in so far as procedural rights are concerned, are no more than a

95 See also Simon N M Young, "Human Rights in Hong Kong Criminal Trials" in *Criminal Law and Human Rights: Reimagining Common Law Procedural Traditions* (Paul Roberts & Jill Hunter eds) (Oxford: Hart Publishing, 2012) at p 73, where Young pointed out that the court has indeed inadvertently created a very different tribunal.

codification of common law principles. In so doing, consciously or unconsciously, the court would be more ready to give deference to legislative will, as supremacy of the Legislature has long been engrained through their common law training. In a traditional common law system, judicial personality tends not to have a major impact on the outcome of any case. This may no longer be the case with the open-ended nature of constitutional provisions, which create much more room for judicial creativity and which may force judges to be more explicit with their value choices.

52 At the same time, the courts are not immune from wider socio-political changes. In the days leading to and shortly after the changeover when there was a lot of political uncertainty, the Judiciary was conscious of establishing a liberal regime emphasising the primacy of fundamental rights. The court stood for values such as independence, professionalism and liberalism. It was the last fortress for the protection of fundamental rights and liberties. Thus, the Court of Appeal before the changeover, and the Court of Final Appeal after the changeover, were sensitive to the paramount importance of the protection of constitutional rights at a particularly sensitive historical moment for Hong Kong. The judges readily adopted a liberal approach that is sensitive to the underlying values of the constitution in constitutional interpretation. In this regard, the Hong Kong judiciary had no hesitation in exercising rigorous scrutiny over the Legislature, and its approach towards reverse onus provisions is exemplary of any liberal regime. Reverse onus provisions represent a direct challenge to the entrenched belief that the burden of proof of a criminal charge lies with the Prosecution. The court would not lightly allow derogation from this principle, which could only be displaced by satisfying the tests of rationality and proportionality.

53 Conscious of its role as a guardian of fundamental rights and anxious to build up a liberal tradition, the Court of Final Appeal tended to deliver unanimous decisions in the first decade after the changeover. However, as time passed, when the court became more confident; when there was less need to maintain unanimous decisions than in the early days of the resumption of sovereignty; and when the court was increasingly confronted with difficult constitutional issues involving value choices, the differences in value choices among different judges became more apparent. The differences in the attitude towards the balancing exercise are most illuminating in this regard. Despite its repeated emphasis on the importance of the right to be presumed innocent, it is disappointing that the court has been reluctant to make a categorical finding that any attempt to place a legal burden of proof on the defendant is unconstitutional in the light of the risk of the defendant being convicted despite the existence of a reasonable doubt.

In *Yeung Chung Ming v Commissioner of Police*,[96] the distinction made between the authority treating someone as guilty, where the presumption is violated, and the authority treating someone as possibly guilty, where the presumption is not violated, borders on a distinction without a difference.

54 Likewise, the way the courts deal with the right against self-incrimination is not encouraging either. This may be partly due to the existence of numerous statutory inroads into such a right even under the common law system, so that judges are more ready to accept the propriety or constitutionality of such statutory restrictions. In *HKSAR v Lee Ming Tee*,[97] they found that prohibition of direct use of self-incriminating material did not prevent derivative use. In *A v Commissioner of the Independent Commission Against Corruption*,[98] the court was prepared to uphold a restriction of the right against self-incrimination when there was no express provision to such an effect, and held that the judicial safeguard lies in restricting the circumstances of permissible direct use of self-incriminating materials. In *Secretary for Justice v Latker*,[99] the court went further to uphold direct use of self-incriminating materials, and applied the fair balance test in a way which did not give any primacy to the fundamental right. In *Koon Wing Yee v Insider Dealing Tribunal*,[100] instead of striking down the infringing provision, the court struck down a different provision, which by itself did not infringe the Bill of Rights, so as to save the investigatory regime. One may legitimately ask what is left of the constitutional right against self-incrimination that is not already protected by the common law. Some of these are difficult cases, but on a more general level, what is of concern is how the courts regard a constitutional right. Is it just one of the factors in the balancing equation, and therefore one which can readily be outweighed by other factors, or is it so fundamental that the State will have to tilt the balance with cogent and persuasive evidence after a rigorous scrutiny of the justifications advanced? The fair balance approach adopted by Ma CJHC in *Latker* and Riberio PJ in *Lee Ming Tee* is typical of the type of fair balance in the common law system that involves nothing more than a weighing of conflicting factors with little discussion of why the right against incrimination is so valuable in the criminal justice system. The constitutional basis of the right did not seem to have any impact on the balancing process. On the other hand, the approach of Stock VP in *Latker* and Bokhary PJ in *Yeung Chung Ming*, which places explicitly at the forefront of its consideration

96 [2008] 4 HKC 383.
97 (2001) 4 HKCFAR 133.
98 (2012) 15 HKCFAR 363.
99 [2009] 2 HKC 100.
100 (2008) 11 HKCFAR 170.

the primacy of fundamental rights, is what one would expect in a constitutional regime.

55 In its first decade, the Hong Kong judiciary has firmly established a reputation of being a liberal court that is vigilant in the protection of fundamental rights. It has preferred the liberal approach in *R v Sin Yau Ming*[101] to the cautious approach in *Attorney-General v Lee Kwong-kut*.[102] As time passes, despite the rhetorical consensus on a liberal approach, divergences among the Judiciary on fundamental issues such as the approach to balancing fundamental rights against competing societal interests or the role of the courts under the doctrine of separation of powers have become more apparent. Hong Kong is moving into the second decade of its constitutional era. With a number of senior judges in the highest courts either retiring or coming close to retirement in the last two years, and with a legal profession that is ready, willing and able to mount respectable constitutional challenges, it will be interesting to observe whether Hong Kong is writing a quiet epilogue or beginning another new and noble chapter in its constitutional development.

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101 (1991) 1 HKPLR 88.

102 [1993] 2 HKLRD 186.