

# A DECADE OF SELF-INCRIMINATION IN THE HONG KONG SPECIAL ADMINISTRATIVE REGION



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*The topic of self-incrimination has reached the Court of Final Appeal in only a handful of cases in its first decade. The Court decided most of these cases under the common law and in only one case was consideration given to the protections against self-incrimination under the Hong Kong Bill of Rights. While the Court has fortified the common law position in discrete areas, it has yet to recognise a constitutional right to silence which opens the door to greater coherence in the law and protection for individuals. This article analyses the case law on self-incrimination between 1997 and 2007 to identify general legal propositions, trends in the development of the jurisprudence, and possible areas of future development.*

## **Introduction**

Protection against self-incrimination compelled by the state is one of the cornerstones of the common law. But the common law has not always provided adequate protection. Hong Kong under British rule had a chequered history of police coerced confessions. After 1997, the topic of self-incrimination remains not only one of interest but also of some concern.

This article traces the development of the law of self-incrimination in the first decade of China's Hong Kong. Three stories unfold. First there is the story of how a basic tenet of the common law has been maintained by the Hong Kong judiciary since 1997. Secondly, there is the story of how common law principles and privileges bloom into constitutional rights and freedoms under the Basic Law. Finally there is the story of how a new final appellate court has grappled with judicial and jurisprudential influences from other countries in forging its own distinctive jurisprudence.

Against the backdrop of these three stories, this article attempts to identify general propositions in the current law of self-incrimination in Hong Kong. It orients the law around three prohibitions: the prohibition on compulsion, the prohibition on evidential use, and the prohibition against using silence to incriminate. A critical discussion follows of various trends observed in the

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jurisprudence. While the Court of Final Appeal has maintained and fortified the common law in discrete areas it has also been sceptical about developing the law at the constitutional level. Recent case law from the Court of Appeal however offers some hope of a more robust vision of a constitutional right to silence. This article concludes with mention of a few possible areas of development in the second decade.

### Legal Aspects of Self-Incrimination

#### *Disparate State of the Law*

There is something very odd about the law of self-incrimination. It is clear that there are several branches to the law, yet it is difficult to determine if they extend from the same tree. The discussion of the law in textbooks is usually fragmented and found in different chapters and sections. Courts have failed to bring rationalisation and coherence to the law. Instead they have contributed confusion with the introduction of new terminology. In addition to the traditional “privilege against self-incrimination” derived from the maxim “*nemo debet prodere se ipsum*”, courts have also invoked other terms such as the “right of silence” or “right to silence” and even the “right against self-incrimination”.

There is a tendency to use these terms interchangeably as is evident in this passage by Chief Justice Li in *Secretary for Justice v Lam Tat Ming & Another*:

“The underlying rationale [of the voluntariness rule] is based both on the need to ensure the reliability of confessions as well as the right of silence. In this context, judges often refer to the maxim *nemo debet prodere se ipsum*, no one can be required to be his own betrayer and some judges refer to the right as the right to silence or the privilege against self-incrimination. I shall refer to it as the right of silence.”<sup>1</sup>

In *Regina v Sang*, Lord Diplock described “the right to silence” as a “popular English mistranslation” of the Latin maxim.<sup>2</sup> What bothered Lord Diplock was probably the failure of the term, “right to silence”, to capture the element of state compulsion which is central to the maxim. The modern tendency of courts to use the language of rights to describe common law privileges (see also legal professional privilege) can transform the scope of the privilege. The new language may lead the interpreter to add new substantive content or

<sup>1</sup> *Secretary for Justice v Lam Tat Ming & Another* (2000) 3 HKCFAR 168, 178.

<sup>2</sup> *R v Sang* [1980] AC 402, 436, HL.

overlook existing limitations and qualifications. In today's climate of human rights awareness and protection, using the positive language of rights to describe a privilege is like making a shield into a sword whose blade gets sharpened each time it grinds against the judicial waterstone.

Lord Mustill was well aware of the hazards of using new language when he held that the expression "the right of silence" did "not denote any single right, but rather [referred] to a disparate group of immunities, which differ in nature, origin, incidence and importance, and also as to the extent to which they have already been encroached upon by statute."<sup>3</sup> He identified six immunities and four motivations behind one or more of the immunities. His point was that one could not apply the right to silence on the basis of general principles having common rationales; instead, each case had to be examined to determine whether a recognised and distinct immunity was engaged by the facts of the case. Lord Mustill's reductionist view of the right of silence has been influential, particularly with our Court of Final Appeal.<sup>4</sup> It led Lord Hoffmann in a more recent House of Lords judgment to make the point that "in English law (as, I would imagine, in every other system of law) there is no absolute 'right to silence' or privilege against self-incrimination".<sup>5</sup>

By reducing the right of silence to a disparate group of immunities, however, the law has been left in a disparate state. Lord Mustill's view of the right of silence has the effect of impairing the principled and coherent development of the law in this area. Whatever may have been the historical motivations for the different immunities in the past, courts now have a duty to rationalise the law and to bring it in line with modern values and principles. This is especially true in a society with constitutionally protected rights and freedoms. This author is not against the expansion of common law privileges arising from the new language of rights, but it is necessary that the process be principled, transparent and done with full judicial acknowledgement and justification. Questions of legitimacy will naturally arise. In this author's view, a generous and principled approach to the right of silence can be legitimately achieved within the rights and norms prescribed in the Basic Law and Hong Kong Bill of Rights (HKBOR). Constitutional discourse uses common law doctrines as a starting point but proceeds towards their principled development to ensure that fundamental rights and freedoms are safeguarded. Unfortunately, as discussed below, the Court of Final Appeal in the first decade has kept the discourse on the right of silence at the level of the common law and has made few attempts to rationalise the law.

<sup>3</sup> *R v Director of Serious Fraud Office, ex parte Smith* [1993] AC 1, 30, HL.

<sup>4</sup> See *Fu Kin Chi v Secretary for Justice* (1997–1998) 1 HKCFAR 85, 97 (*per* Li CJ) and 101 (*per* Bokhary PJ).

<sup>5</sup> See *R v Lyons & Others* [2003] 1 AC 976, para 31, HL.

*Prohibition Against Compulsion*

Whatever disputes may exist about the content and perimeters of the right of silence, it is clear that there is no right against self-incrimination *per se*. In *Lam Tat Ming*, it was said that a person “has a right not to incriminate himself”.<sup>6</sup> It is submitted that this is an overstatement and should not be taken literally. A person is free to speak words which could in turn be used as evidence against them in a criminal prosecution even if those words were spoken in response to police questioning. This idea is implicit in the caution which Hong Kong law enforcement agents administer to suspects before taking a statement: “You are not obliged to say anything unless you wish to do so but what you say may be put into writing and given in evidence.”<sup>7</sup> Indeed it could be said from the perspective of law enforcement that one of the aims of the caution is to help secure admissible self-incriminatory evidence against the suspect. There is of course a strong public interest in obtaining, for example, admissible confession evidence. A confession can facilitate the investigation and prosecution, it can help to bring an expeditious closure to the case with a guilty plea, and perhaps most importantly it can expose the truth of “what happened” for the benefit of victims, their families and the public generally.

Rather what the common law prohibits is (1) the procuring of self-incriminatory evidence by state compulsion (prohibition against compulsion), and (2) the use by the prosecution of such evidence in a criminal or quasi-criminal prosecution against the maker (prohibition on evidential use). It is because of the first prohibition that it is said that a person has a right of silence. This “right” should not be understood literally in the sense that the police must cease all questioning simply because the individual has chosen to remain silent.<sup>8</sup> It is the element of state compulsion that must be present if there is to be a breach of the right of silence.

What constitutes the requisite degree of compulsion to breach the right will depend on the factual context and cannot be exhaustively defined. In the context of undercover agents who engage suspects in conversation in the hope of recording self-incriminatory evidence, the agent crosses the line if they actively procure answers to such an extent that the questioning “amounts to interrogation”.<sup>9</sup> Even this test is vague and requires elaboration through application to different fact scenarios. The extent to which the law enforcement agent has violated the law or administrative guidelines (such as the Security for Security’s Rules and Directions for the Questioning of Suspects and the Taking of Statements) is relevant not for the purpose of gauging the

<sup>6</sup> *Lam Tat Ming*, n 1 above.

<sup>7</sup> See Rules and Directions for the Questioning of Suspects and the Taking of Statements, issued by the Secretary for Security, Hong Kong Gazette No 40/1992, Special Supplement No 5, E3, Rule II.

<sup>8</sup> The point was also made in *R v Hebert* [1990] 2 SCR 151, 184.

<sup>9</sup> *Lam Tat Ming*, n 1 above, 181–182.

gravity of the official misconduct but for determining whether the accused would still have incriminated themselves had the agents fully complied with the law and guidelines.<sup>10</sup> This “but for” analysis although not determinative can be a useful guide to assessing when there has been a breach of the prohibition against compulsion.

The Court of Final Appeal has stated the first prohibition in the following terms using the terminology of privilege:

“At common law, a person has the privilege *from being compelled to answer* questions, the answers to which might tend to expose him to any punishment or penalty (including a disciplinary one) and this privilege is capable of application in non-judicial proceedings.”<sup>11</sup> (emphasis added)

Notice the element of compulsion in this definition; again this underlines the point that the privilege does not entitle one to be free from all questioning *per se*. The questioning must tend to expose the person to punishment or penalty, but more importantly it must tend, either by virtue of the conduct of the state agents or a legal compulsion on the person, to undermine their free choice as to whether or not to incriminate themselves.

Many are familiar with the scene where the witness while testifying claims the privilege against self-incrimination, and the judge after inquiry upholds and directs that no further questions be asked on the subject matter of the claim. In this instance it appears that the person has invoked an entitlement to be free from questioning. But such entitlement exists because in this testimonial setting there is a legal compulsion on the person to respond. A testimonial setting is where the person is before a court or tribunal under summons or other process to testify for the purposes of that proceeding. Failure to answer questions in such a setting can normally lead to contempt of court or other penalty against the witness.<sup>12</sup> Non-testimonial settings include all other occasions of state questioning whether or not the law imposes an obligation on the person to answer. Where no such legal obligation is applicable (such as in normal police interviews), it then becomes a facts-specific issue of whether or not the questioning and conduct of the state agents has compelled the suspect to incriminate themselves.

In the testimonial settings of criminal and civil proceedings, statute has intervened to make clear that non-accused witnesses, though compellable as witnesses, continue to enjoy the privilege against self-incrimination.<sup>13</sup> For

<sup>10</sup> Rules and Directions, n 7 above.

<sup>11</sup> *Fu Kin Chi*, n 4 above, 96.

<sup>12</sup> This is what happened in the prosecution of former High Court judge Miles Henry Jackson-Lipkin, see L. Fong, “Former judge, 82, guilty of contempt”, *South China Morning Post*, 20 March 2007, 1.

<sup>13</sup> See Evidence Ordinance (Cap 8), ss 65 and 65A.

the accused person who chooses to be a witness in their own defence, however, their privilege has been abrogated by statute in respect of the charges they contest while safeguards have been imposed to limit cross-examination on prejudicial bad character evidence.<sup>14</sup> In other settings, both testimonial and non-testimonial, where a legal obligation to respond has been imposed, there will be an issue of statutory interpretation as to whether the legislature intended to abrogate the common law privilege. While “there is a strong presumption against interpreting a statute as taking away the right of silence”, Lord Mustill also noted that “statutory interference with the right is almost as old as the right itself.”<sup>15</sup> For this reason, it seems the law of self-incrimination in Hong Kong will inevitably find a home in the Basic Law. It is fundamental to a society with constitutional human rights safeguards that the courts as guardians of the constitution should act as a check on legislative erosion of the cardinal principles of the common law. It is clear that the HKBOR protects a person’s right “not to be compelled to testify against himself or to confess guilt” in the determination of any criminal charge.<sup>16</sup> Given the limitation of this right to testimonial settings, the elucidation of the law is more likely to occur within the general right to a fair trial under the Basic Law and HKBOR.<sup>17</sup>

#### *Trial Fairness and the Prohibition on Evidential Use*

The privilege against self-incrimination has always been an intrinsic part of an accused’s common law right to a fair trial. In *Lam Tat Ming*, the Chief Justice stated that the requirement of a fair trial for the accused involved the observance of the principle that “[n]o man is to be compelled to incriminate himself; his right of silence should be safeguarded.”<sup>18</sup> He went on to hold, applying *R v Sang*, that evidence obtained in breach of this principle was liable to be excluded pursuant to the trial judge’s residual discretion.<sup>19</sup> This is an application of the second prohibition which prevents the prosecution from using evidence obtained in breach of the first prohibition to incriminate the accused who under compulsion created the evidence. The confessions rule is another example illustrating the application of the second prohibition. Where the prosecution fails to prove beyond reasonable doubt that the accused’s confession was given voluntarily to a person in authority, the confessions rule requires that the confession be ruled inadmissible. It is not a matter of discretion.<sup>20</sup>

<sup>14</sup> See Criminal Procedure Ordinance (Cap 221) s 54.

<sup>15</sup> *Director of Serious Fraud Office, ex parte Smith*, n 3 above, 40.

<sup>16</sup> Hong Kong Bill of Rights (HKBOR), Art 11(2)(g), being Part II of the Hong Kong Bill of Rights Ordinance (Cap 383).

<sup>17</sup> See HKBOR, Art 10, and Basic Law, Art 87.

<sup>18</sup> *Lam Tat Ming*, n 1 above, 179.

<sup>19</sup> *Ibid.* See also *Peart v The Queen* [2006] UKPC 5, paras 22–24.

<sup>20</sup> *Ibid.*, 183.

In *Lam Chi Ming v The Queen*, the Privy Council articulated three distinct factors that have combined to produce the confessions rule in England and Hong Kong:

“the more recent English cases established that the rejection of an improperly obtained confession is not dependent only upon possible unreliability but also upon the principle that a man cannot be compelled to incriminate himself and upon the importance that attaches in a civilised society to proper behaviour by the police towards those in their custody.”<sup>21</sup>

The first and third factors could also be said to be considerations behind the prohibition on evidential use. An even more fundamental rationale for this prohibition is that in our adversarial system of criminal justice the presumption of innocence entitles the accused to require the state to prove its case without any assistance whatsoever from the accused. It is orthodox that the defence has no duty to disclose information to the prosecution. Given this starting point, it would be inherently unfair to allow the prosecution to advance its case using improperly obtained self-incriminatory evidence from the accused. Different considerations would apply if it was a co-accused who wished to use another accused's self-incriminatory evidence for exculpatory purposes. But to allow the state to benefit at trial from the fruits of its earlier compulsion on the accused would put the accused at an unfair disadvantage in making full answer and defence to the charges. In such circumstances, the trial judge has little option but to exclude the self-incriminatory evidence.

#### *Prohibition on Using Silence to Incriminate*

There is a third prohibition in the law of self-incrimination. This prohibition prevents the prosecution from using the accused's silence as an item of incriminating evidence at trial. The caselaw distinguishes between pre-trial silence, usually in the context of police questioning, and silence at trial, where the accused does not testify in their own defence. Some cases also try to distinguish between using silence as positive evidence of guilt and using silence as evidence relevant to other issues such as the credibility of the accused and the probative value of prosecution evidence. These cases adopt the position that the former use is prohibited while the latter use is acceptable in certain circumstances.

In Hong Kong, the Court of Final Appeal has refused to make this distinction in the context of pre-trial silence and has held that no adverse inference should be made against the accused from such silence.<sup>22</sup> However,

<sup>21</sup> *Lam Chi Ming v The Queen* [1991] 2 AC 212, 220, PC.

<sup>22</sup> See *Lee Fuk Hing v HKSAR* (2004) 7 HKCFAR 600.

in the context of silence at trial, the Court has made the distinction and recognised a category of exceptional cases where it would be acceptable “to comment that the jury may – but need not – consider the prosecution case on a particular issue is strengthened by the absence of the accused from the witness box.”<sup>23</sup> Where the accused’s defence is presented in the form of a mixed confession statement adduced by the prosecution and the substance of that defence involves circumstances within the accused’s knowledge, this direction to the jury acts as a dose of common sense reminding them that the accused’s assertions were not tested in the usual manner in cross-examination.

The third prohibition is often treated separately from the other two. But it would be wrong to maintain this air of separateness since all three are closely related. The third prohibition does not inhibit questioning *per se* and, like the second prohibition, is chiefly concerned with the use of silence as incriminating evidence at trial. Where the accused remains silent in the face of questioning, they have chosen one mode of avoiding compulsory self-incrimination. But if remaining silent carries with it a cost and ceases to be a safe haven, this in itself bears on the will of the accused and makes them more vulnerable to compulsory self-incrimination. Thus the third prohibition reinforces the first prohibition and serves to exclude evidence that would undermine the fair trial of the accused. The use of silence to draw an adverse inference would inevitably compromise the fairness of the trial not only because the police caution would have misled the accused in thinking that remaining silent was safe, but more significantly the accused would have to answer a case consisting of self-incriminatory evidence (ie silence or otherwise) the creation of which they had limited opportunity to avoid. Such a situation is inimical to our conception of common law fairness in a criminal trial.

### Trends Observed in the First Decade

A small number of cases involving the law of self-incrimination made their way to the Court of Final Appeal in the first decade. The Court decided eight relevant full appeals and determined one leave to appeal application in this period, with roughly the same number decided in the first and last five years. Unfortunately the task of penning these judgments was not strategically given to one or two judges. While the Chief Justice wrote some of the early ones, and Justice Ribeiro wrote the important judgment in the *Lee Ming Tee* case,

<sup>23</sup> See *Li Defan & Another v HKSAR* (2002) 5 HKCFAR 320, para 29.

the main subsequent judgments were written by different non-permanent judges.<sup>24</sup> From all these judgments, and a few notable ones in the Court of Appeal, several trends have been observed.

#### *Maintaining the Common Law*

The early judgments faithfully followed established common law authorities without question. It was as if the Court was applying Article 87 of the Basic Law literally: the principles previously applied in Hong Kong criminal or civil proceedings and the rights enjoyed by parties to proceedings “shall be maintained” without anything more. So in the first two cases of *Chan Sze Ting & Another v HKSAR* and *Fu Kin Chi v Secretary for Justice*, the Court acknowledged the strong presumption against interpreting a statute as abrogating the privilege against self-incrimination but nevertheless proceeded to find a sufficiently clear legislative intent to abrogate the privilege.<sup>25</sup>

As mentioned above, *Fu Kin Chi* was the case where the Chief Justice embraced Lord Mustill’s “disparate group of immunities” analysis. It is not suggested that either case is wrongly decided. *Chan Sze Ting* concerned the original section 13 power under the Prevention of Bribery Ordinance (Cap 201) which provided for executive orders requiring “any person” to produce financial records to the Independent Commission Against Corruption “notwithstanding the provisions of any other law to the contrary”. *Fu Kin Chi* was a police disciplinary case concerned with a police officer’s entitlement to refuse to answer questions on grounds that the answers might be used against the officer at a disciplinary hearing, but this entitlement was in direct conflict with a statutory duty to obey lawful superior orders and conform to police regulations. In the two cases, the Court stressed the strong public interest in respectively tackling corruption and having confidence in the integrity and efficiency of the police force. Reference to these legislative aims, however, was only for interpretive purposes in finding the necessary implication that the common law privilege had been abrogated. They should not be read as providing overriding justification in the constitutional law sense for abrogating the privilege.

In the next case of *Secretary for Justice v Lam Tat Ming*, the trend of maintaining the common law continued but here we start to see some innovative shaping of the common law and a greater willingness to question past authorities.<sup>26</sup> The recognition of the two limbs of the residual discretion to exclude, ie the probative value-prejudicial effect limb and the self-incrimination limb, was not new and could be traced to Lord Diplock’s judgment in *R v Sang*.<sup>27</sup>

<sup>24</sup> *HKSAR v Lee Ming Tee & Another* (2001) 4 HKCFAR 133.

<sup>25</sup> *Chan Sze Ting & Another v HKSAR* (1997–1998) 1 HKCFAR 46; *Fu Kin Chi*, n 4 above.

<sup>26</sup> *Lam Tat Ming*, n 1 above.

<sup>27</sup> *Sang*, n 2 above.

However, the Chief Justice emphasised that the two limbs were part of the judge's single discretion to secure a fair trial for the accused. He also left room for other principles to be included within the residual discretion. The creative challenge for the Court was to articulate guidelines that would help trial judges decide when in their discretion to exclude self-incriminatory evidence obtained by undercover agents. The Court considered authorities from England, Australia and Canada before arriving at an approach of looking to see if "what the officer [did] amounts to interrogation".<sup>28</sup> Unfortunately the covertly obtained evidence was not before the court, and thus we do not have the benefit of seeing how the court would have applied this test to the circumstances of that case. Notably, the Chief Justice commented upon and critiqued several old Hong Kong authorities decided in the 1980s and 1990s.<sup>29</sup>

Eight months after deciding *Lam Tat Ming*, the Court heard the case of *HKSAR v Lee Ming Tee & Another* which tried to push the boundaries of the common law protections and, for the first time in the Court of Final Appeal, invoked constitutional principles against compelled self-incrimination.<sup>30</sup> The creativity in this case came from the well paid legal team representing Lee Ming Tee, who before charges were laid was head of the Allied Group of companies.<sup>31</sup> However the Court in a judgment written by Justice Ribeiro resisted the creative forces primarily by applying established common law authority. The case was concerned with the statutory power of an inspector, appointed under the Companies Ordinance (Cap 32), to compel suspects to answer questions and produce documents. The central issue was whether the Financial Secretary was entitled to give the inspector's report together with all of the compelled information to the police for further investigation into possible criminal wrongdoing. The trial judge found that because of the common law privilege against self-incrimination the Financial Secretary had no such entitlement, and in the circumstances of this case where the police had made use of the compelled information it constituted an abuse of process to prosecute the accused. All the charges against the two accused were stayed.

The Court of Final Appeal held that there was no abuse of process, overturned the stay of proceedings, and sent the case back to trial. Although the case was chiefly concerned with the abuse of process doctrine, the Court had to respond to the trial judge's finding that the compelled information could not be given to the police to aid their criminal investigation. The provision conferring the compulsory power expressly abrogated the prohibition against compulsion. It also supplanted the second common law prohibition against

<sup>28</sup> *Lam Tat Ming*, n 1 above, 181.

<sup>29</sup> *Ibid.*, 182–183.

<sup>30</sup> *Lee Ming Tee*, n 24 above.

<sup>31</sup> For a study of the defence strategies used in defending Lee, see S.N.M. Young, "Defending White Collar Crime in Hong Kong: A Case Study of the Lee Ming Tee Case" (2006) 36 *HKLJ* 35.

evidential use with a statutory prohibition that “neither the question nor the answer shall be admissible in evidence against [the person under compulsion] in criminal proceedings”.<sup>32</sup> The Court described this as a “use immunity” conferred by the legislation.<sup>33</sup>

The Court held that the Financial Secretary’s use of the compelled information had to be in accordance with the purposes of the statutory scheme.<sup>34</sup> Having found that the giving of the information to the police was well within the contemplation of the legislation, the analysis could have ended here since it was unfathomable that there could be an abuse of process if the minister was acting in accordance with statute. But Justice Ribeiro also went on extensively in his usual erudite way to address whether the common law of self-incrimination prohibited the “derivative use” of compelled information even after the legislature had abrogated the prohibition against compulsion and conferred a statutory use immunity. His Lordship gave a resounding “no” to the existence of this alleged freestanding derivative use immunity at common law and under the HKBOR.

Justice Ribeiro’s analysis of the common law position seems unimpeachable. None of the authorities go so far as saying that the prohibition on use prohibits all conceivable uses of the compelled information. This prohibition is primarily concerned with the use of the compelled information as evidence to incriminate the maker in the context of a legal proceeding. However, there is one part of Justice Ribeiro’s judgment which is apt to mislead. In his concluding statements, he stated: “Where the privilege against self-incrimination is overridden, in the absence of any binding restriction on use (whether statutory, by judicial order, by undertaking or otherwise), self-incriminating answers thereby obtained are subject to unrestricted use.”<sup>35</sup> If what his Lordship intended to say was that any abrogation would necessarily amount to an abrogation of both the prohibition against compulsion and the prohibition on use, it is submitted that this was going too far.

Whether any of the three prohibitions in the law of self-incrimination have been abrogated is ultimately a question of statutory interpretation. Where the legislation provides as in *Lee Ming Tee* that (i) the person has a duty to answer even if the answer may tend to incriminate, and (ii) the answer given cannot be used against the person in a criminal proceeding, then clearly the legislation was intended to supersede all three common law prohibitions. But if the legislation only imposed a duty to answer without expressly addressing what use if any could be made of the self-incriminatory answers then it cannot be automatically assumed that the answers can be used in criminal

<sup>32</sup> See Companies Ordinance (Cap 32), s 145(3A).

<sup>33</sup> *Lee Ming Tee*, n 24 above, 157.

<sup>34</sup> *Ibid.*, 158.

<sup>35</sup> *Ibid.*, 170.

proceedings against the maker. Elsewhere in the decision, it would appear that Justice Ribeiro had this in mind. For example, when he was summarising the common law position on the derivative use of an inadmissible confession, he recognised that the admission of any derivative evidence against the person who made the confession was “subject always to the court’s general residual discretion to exclude evidence where this is necessary to secure a fair trial for the accused”, citing *Lam Tat Ming*.<sup>36</sup> The existence of the residual discretion to exclude evidence to secure the fairness of the trial was mentioned again when the Court came to the conclusion that “the absence of a derivative use immunity does not mean that an accused will not receive a fair trial”.<sup>37</sup> If this is correct, the self-incrimination principle in *Lam Tat Ming* should be considered another “binding restriction” on use unless and until there is a sufficiently clear abrogation of this restriction.<sup>38</sup> Furthermore, the *obiter* comments by Chief Justice Li and Justice Bokhary in *Fu Kin Chi*, that if the police officer’s compelled answers were used against him in criminal proceedings his protection would lie in the confessions rule “rather than in the privilege against self-incrimination”, should not be read as precluding the possibility of residual exclusion under the self-incrimination limb of *Lam Tat Ming*.<sup>39</sup>

#### *Fortifying the Common Law*

The final set of cases which were decided in the second half of the first decade was concerned with the prohibition against using silence to incriminate. With these cases, we start to see the Court not only maintaining the common law position but doing it in such a way that it would be more accurate to describe the effect of the judgments as fortifying the common law. The Court is obviously mindful of the controversial statutory erosion of this area in England and other places and is keen to resist any judicial erosion along the same path.

In *Li Defan & Another v HKSAR*, the Court had to consider what if anything adverse to the accused could be said in the summing-up about his failure to testify.<sup>40</sup> Lord Hoffmann wrote the leading judgment with which three of the other judges agreed. Justice Bokhary wrote a short concurring judgment consistent with what was said by Lord Hoffmann. It was held that normally nothing more than the standard Judicial Studies Board direction should be given where the accused chose not to testify. This direction is protective of the accused and informs the jury of the accused’s entitlement to remain silent and this silence proves “nothing, one way or the other”.<sup>41</sup> But in “exceptional”

<sup>36</sup> *Ibid.*, 167–168.

<sup>37</sup> *Ibid.*, 177.

<sup>38</sup> *Ibid.*, 170.

<sup>39</sup> *Fu Kin Chi*, n 4 above, 98 (*per* Li CJ) and 106 (*per* Bokhary PJ).

<sup>40</sup> *Li Defan*, n 23 above.

<sup>41</sup> *Ibid.*, para 3.

cases, the judge can and should say more and instruct the jury that they “may – but need not – consider that the prosecution case on a particular issue relevant to guilt is strengthened by the absence of the accused from the witness box”.<sup>42</sup>

On the face of it, the Court in *Li Defan* appeared to do no more than affirm the common law position. However, a closer examination shows that the Court was effectively narrowing the category of cases in which the further direction would be given. Lord Hoffmann was well aware of the modern trend to show restraint in commenting on the accused’s failure to testify and specifically cited the following two reasons behind this trend:

“The first is a recognition that there may be reasons why the accused has not given evidence which are unknown to the judge. The second is the constitutional and human rights dimension; the importance of not undermining the principle that the accused is not a compellable witness by comments which may give the impression that failure to testify is an admission of guilt.”<sup>43</sup>

He also noted the “dangers” of going beyond the standard direction “because the line between treating failure to give evidence as an admission and treating it as ending additional strength to the prosecution case on a particular issue is a fine one and the distinction may not be easy for the jury to understand.”<sup>44</sup> Although he was not prepared to set out exhaustive conditions, Lord Hoffmann stated that “the kind of case in which judge may feel that the jury needs additional comment” is where the following two conditions are met:

- i the defence case involves alleged facts which (a) are at variance with the prosecution evidence or additional to it and exculpatory, and (b) must, if true, be within the knowledge of the defendant;<sup>45</sup> and
- ii the defence is relying by way of answer upon some extra-judicial statement proved by the prosecution which the accused has not supported in evidence.<sup>46</sup>

The second condition contemplates the situation where the accused has presented their defence in the form of a self-serving mixed statement, albeit adduced by the prosecution, while avoiding cross-examination by choosing not to testify. Fairness in such circumstances would seem to justify the further

<sup>42</sup> *Ibid.*, para 29.

<sup>43</sup> *Ibid.*, para 17.

<sup>44</sup> *Ibid.*, para 18.

<sup>45</sup> This was taken from the English Court of Appeal’s decision in *R v Martinez-Tobon* [1994] 1 WLR 388.

<sup>46</sup> *Li Defan*, n 23 above, 333–334.

direction. Giving the further direction in other circumstances will not necessarily be wrong, but now that the Court has set down these markers, relevant cases that fall outside these conditions will surely attract closer scrutiny. When compared to the previous cases on the topic, the tone in *Li Defan* in the judgments of both Lord Hoffmann and Justice Bokhary is clearly towards greater restraint in making comments adverse to the accused.

Close to two years after *Li Defan* was decided, the Court had occasion in *Lee Fuk Hing v HKSAR* to decide if and how silence during police questioning might be used against the accused at trial.<sup>47</sup> This time however the Court doubted “whether there is a real distinction between using silence to infer guilt and using it to attack the weight of an account given at trial but not earlier”.<sup>48</sup> It held that it would be “unfair for a person to have the right to remain silent, and usually to have been reminded of this right through the caution, and then for his silence to be put against him at trial.”<sup>49</sup> The accused was found with two bags of heroin in his light goods vehicle. He was charged with drug trafficking, but he did not disclose his defence (that the drugs belonged to a third party) until he testified at trial. According to the Court, there had been a serious breach of the accused’s “right of silence and to a fair trial according to law” when the judge examined the accused while he was testifying as to why he did not disclose his defence earlier.<sup>50</sup> The judge’s timely direction to the jury to ignore the inadmissible evidence was unable to cure the breach as the direction failed to inform the jury of the accused’s right of silence and there was a danger that the accused’s exercise of his right had become a “source of entrapment”.<sup>51</sup>

*Lee Fuk Hing* was not extending the common law position as previous Court of Appeal decisions had recognised substantially the same position.<sup>52</sup> But what is absent in *Lee Fuk Hing*, when compared to those decisions, is judicial grumbling or dissatisfaction about the common law position, and calls for legislative interference along the lines of section 34 of the Criminal Justice and Public Order Act 1994 (UK).<sup>53</sup> Instead one finds an emphatic statement that the position of no adverse inference whatsoever has always been and will continue to remain the common law position. The Court strengthened the position by leaving little room for applying the curative proviso where there was an error of law and a material irregularity as serious as the one in this case “which render[ed] the appellant’s conviction unsafe”.<sup>54</sup>

<sup>47</sup> *Lee Fuk Hing*, n 22 above.

<sup>48</sup> *Ibid.*, para 55.

<sup>49</sup> *Ibid.*, para 56.

<sup>50</sup> *Ibid.*, para 58.

<sup>51</sup> *Ibid.*, para 61.

<sup>52</sup> See *HKSAR v Del Carmen* [2000] HKEC 805, CA and the cases cited therein.

<sup>53</sup> See eg Justice McMahon’s comments in *HKSAR v Li Lap Sun* [2001] HKEC 1419, CFI.

<sup>54</sup> *Lee Fuk Hing*, n 22 above, 623. Compare with the Court of Appeal’s approach in *Del Carmen*, n 52 above.

The Court reaffirmed the *Lee Fuk Hing* position in *HKSAR v Lam Sze Nga* which involved a factual situation with an important difference.<sup>55</sup> In *Lee Fuk Hing* there was no dispute that the accused had remained silent during his initial detention by the police. In *Lam Sze Nga*, there was evidence adduced by the prosecution that she had given oral and written confessions to the police in respect of the drugs which were found in her home. If the jury accepted this evidence then it would mean that the right to silence had been waived. Lam's position was that the drugs were planted by the police and the confession statements were police-fabricated and coerced from her. This position, however, was not disclosed until some four months after her arrest. During trial, Lam was cross-examined by the prosecution as to her delay in reporting the police misconduct to show that her position was a complete fabrication. On appeal to the Court the issues were whether this cross-examination should have been allowed, and what direction if any should have been given to the jury?

The Court held that since there was a preliminary factual issue of whether or not the accused had in fact availed herself of the right to silence, the cross-examination was proper as it would assist the jury in deciding this issue. But the trial judge erred in failing to direct the jury that no adverse inference could be drawn against the accused if they were to resolve the preliminary factual issue in the accused's favour. This holding was significant as there was at least one previous Court of Appeal authority which could have lent support to what the trial judge had done.<sup>56</sup>

Interestingly, the trial judge at Lam's retrial also committed a similar error, and the Court of Appeal following *Lee Fuk Hing* and *Lam Sze Nga* allowed the appeal and ordered yet another retrial.<sup>57</sup> An attempt by the prosecution to confine the holding of the two cases to only instances where the accused had "intended" to exercise the right to silence was rejected by the court thereby underlining the breadth of the holding.<sup>58</sup> It remains to be seen whether the Court of Final Appeal will allow some degree of cross-examination of the accused (assuming an adequate direction to the jury is given) where there has been a delayed disclosure of a defence that involves allegations of misconduct by the police (eg "the police planted the drugs in my home").

*Lee Fuk Hing* and *Lam Sze Nga* have fortified the common law position on drawing inferences from silence. One might question whether there is an inconsistency with how the Court of Final Appeal has treated silence at trial and silence during police questioning, and whether it is only a matter of time

<sup>55</sup> *HKSAR v Lam Sze Nga* (2006) 9 HKCFAR 190.

<sup>56</sup> See *HKSAR v Lam Wai Ming* [2004] HKEC 1237, CA, leave to appeal to the CFA refused [2004] HKEC 1518, CFA.

<sup>57</sup> See *HKSAR v Lam Sze Nga* [2007] 2 HKLRD 75, CA.

<sup>58</sup> *Ibid.*, paras 49–50.

that the law concerning the former will conform to the standards of the latter.<sup>59</sup> But as has been suggested above, if the holding in *Li Defan* is confined or substantially confined to the mixed statement cases, this would reasonably justify the differential treatment. Another difference is that the decision whether or not to testify will often be made after receiving legal advice. This is unlike the situation of silence during police questioning where there is a greater imbalance in legal knowledge between the state and individual.

The common law right to silence was fortified further in two subsequent Court of Final Appeal decisions. An acquitted defendant may lose the entitlement to costs if the court makes a positive finding that the defendant had brought suspicion upon himself. In *Tsang Wai Ping v HKSAR*, the Court recognised that it would be wrong to say that the defendant brought suspicion upon himself from exercising his right to silence “even if the appellant had never protested his innocence to the police at any stage”.<sup>60</sup> In the second case of *HKSAR v Tam Lap Fai*, the Court had to consider when a person might be guilty of the offence of obstructing a police officer in the due execution of his duty.<sup>61</sup> The Court recognised that the exercise of the right to silence would not normally be regarded as constituting the offence of obstruction “because it is neither the type of criminal conduct contemplated by the statutory provision nor is it willful in the sense that it is deliberate and without lawful excuse.”<sup>62</sup> Both these cases serve to reinforce the point that there should be no adverse consequences, material or immaterial, to one’s exercise of the right to silence.

#### *Engaging the Basic Law: from Silence to Scepticism*

The first decade has seen very little constitutional discourse on the law of self-incrimination. The Court of Final Appeal has rarely invoked the rights provisions of the Basic Law and HKBOR in its self-incrimination cases. Of course it is not for the Court to raise such arguments on their own initiative but for counsel to present them with careful strategy and development starting in the trial courts. Thus the quiet constitutional discourse in the courts is also a reflection of the reluctance on the part of practitioners to raise such arguments.

By 2007 standards, it is remarkable that constitutional rights were not invoked in the two statutory abrogation cases of *Chan Sze Ting* and *Fu Kin Chi*. Practitioners were probably deterred by the Hong Kong courts’ conservative treatment of self-incrimination protections under the HKBOR prior

<sup>59</sup> See the opinion of Professor Michael Hor in M. Hor, “Criminal Due Process in Hong Kong and Singapore: A Mutual Challenge” (2007) 37 HKLJ 65, 77–78.

<sup>60</sup> *Tsang Wai Ping v HKSAR* (2005) 8 HKCFAR 85, para 5, per Bokhary PJ.

<sup>61</sup> *HKSAR v Tam Lap Fai* (2005) 8 HKCFAR 216.

<sup>62</sup> *Ibid.*, para 23.

to 1997.<sup>63</sup> Constitutional norms were also distant from judicial minds in *Fu Kin Chi* where it was said in *obiter* that if the compelled statements from the police officer were used against them in criminal proceedings their protection would lie in the common law confessions rule.<sup>64</sup> Clearly today the Basic Law and HKBOR would have something to say about this.

The first and only serious consideration of self-incrimination under the HKBOR was in *Lee Ming Tee*. The Court's sceptical treatment of the constitutional argument dampened any immediate hopes that there could be constitutional principles affording a greater degree of protection. Admittedly the case was not a strong one for developing such principles. This was not a case where the prosecution was attempting to adduce evidence derived from the compelled information. Recall that the trial judge located the abuse of process in the mere passing of the compelled information to the police for further investigation. Nor was this a case where the predominant purpose for using the compelled powers was to obtain incriminating evidence against the individuals who were subjected to such powers. Nevertheless the Court's approach can still be criticised for failing to think outside the common law box and for too readily looking to justify restrictions on a fundamental right.

In addressing the argument based on Article 11(2)(g) of the HKBOR, the Court adopted a literal interpretation of the article and noted that it was "of much narrower scope than the common law privilege against self-incrimination and had no application at the time of the company inspection since neither respondent had been charged at that time".<sup>65</sup> Even after their charges, it could not be said that they were being "compelled" to testify against themselves or to confess guilt.<sup>66</sup> The Court went on to consider whether it was possible to deduce a derivative use immunity from the right to a fair trial and/or the presumption of innocence in Articles 10 and 11(1) respectively of the HKBOR. It held that it was not. This author takes issue not so much with the conclusion reached but with the approach to explicating constitutional rights. The decision was more concerned with marking the boundaries of the right to reject the arguments presented than in articulating relevant determining principles within the right. The judgment was also too quick to embrace the much criticised Privy Council decision of *Brown v Stott* which held that the compulsory power of police officers to require a driver of a vehicle involved in an accident to disclose her identity was a justifiable restriction on European Convention fair trial rights even if the disclosure was used to incriminate the

<sup>63</sup> See eg *R v Securities and Futures Commission, ex parte Lee Kwok-Hung* [1993] 3 HKPLR 1, HC, aff'd [1993] 2 HKLR 51, CA; *In re Tse Chu-Fai, Ronald* [1993] 2 HKLR 453, HC.

<sup>64</sup> *Fu Kin Chi*, n 39 above and accompanying text.

<sup>65</sup> *Lee Ming Tee*, n 24 above, 171. For the text of article 11(2)(g), see n 16 above.

<sup>66</sup> *Ibid.*, 172.

maker at her criminal trial.<sup>67</sup> *Brown v Stott* has been criticised for its lack of rigour in analysing whether the state has met its onus in demonstrating the necessity and proportionality of the restriction.

After applying the *Brown v Stott* approach, Justice Ribeiro made a general statement which requires clarification:

“in my judgment, there is much to be said for the general proposition 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 admissions. This view accords with common law doctrine based on *R v Warickshall* (1783) 1 Leach 263 and the cases approving it . . .”<sup>68</sup>

It is unclear whether His Lordship was intending to say that the HKBOR (and Basic Law) imposes no restrictions on the admissibility of evidence derived from the compulsorily obtained evidence of the accused. If so then this was an ill-advised attempt to tie down constitutional norms and rights to those of the eighteenth century common law. Such an approach is inconsistent with the very notion of having a constitutional bill of rights. Fortunately there are a number of indicators that suggest that the Court was not intending to make such a sweeping statement. First the case itself was not concerned with the admissibility of derivative evidence and so it was unnecessary to go so far. Instead, given the abuse of process ruling by the trial judge, Justice Ribeiro’s reference to “use of reliable objective evidence” should be construed as use by the police for further investigation rather than use by the prosecution at trial. Secondly, the comment was meant to be *obiter* as it was prefaced by noncommittal language. Thirdly, in the paragraph that follows the above passage, it is clear that his Lordship contemplated the continued application of the residual discretion to exclude at trial:

“Taken in the foregoing context and also in the context of our trial procedures as a whole (*including the court’s residual discretion to exclude evidence to secure the fairness of the trial*), the absence of a derivative use immunity does not mean that an accused will not receive a fair trial. Nor does it undermine the presumption of innocence.” (emphasis added)<sup>69</sup>

<sup>67</sup> *Brown v Stott* [2003] 1 AC 681, PC. For criticisms, see A. Ashworth and M. Redmayne, *The Criminal Process* (Oxford: Oxford University Press, 3rd edn, 2005) 41, 46, 135; B. Sudjic, “Self Incrimination: Has the Fat Lady Sung Yet” 40 *Scots Law Times* 328–330. See also the similar Canadian case of *R v White* [1999] 2 SCR 417 which reached a different result.

<sup>68</sup> *Lee Ming Tee*, n 24 above, 177.

<sup>69</sup> *Ibid.*

Finally, even if Justice Ribeiro was intending his statement to apply to admissibility, his reference to “evidence obtained from an independent source” and merely “facilitated by clues contained in the excluded admissions” was in this author’s opinion an attempt to narrow down the category of admissible derivative evidence. Derivative evidence that could not have been obtained but for the existence of the excluded self-incriminatory evidence should not come within this category.

### *Resisting Canadian Influence*

The Canadian law of self-incrimination is of comparative interest and importance for Hong Kong. In a number of decisions in the 1990s, the Canadian Charter of Rights and Freedoms supplanted the common law in extending and conferring protections against self-incrimination.<sup>70</sup> The Charter has provided a check on statutory abrogations of the privilege against self-incrimination. It has also significantly curbed the use by the state of self-incriminatory evidence. Charter jurisprudence is now the source of law for determining the constitutionality of compulsory powers,<sup>71</sup> the admissibility of compelled evidence and derivative evidence,<sup>72</sup> the admissibility of evidence obtained by undercover agents,<sup>73</sup> and the evidential use of silence both during police questioning<sup>74</sup> and at trial.<sup>75</sup>

The Canadian Charter has two provisions which directly address the issue of self-incrimination:

“Proceedings in criminal and penal matters

11. Any person charged with an offence has the right

...

(c) not to be compelled to be a witness in proceedings against that person in respect of the offence;

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13. A witness who testifies in any proceedings has the right not to have any incriminating evidence so given<sup>76</sup> used to incriminate that witness in

<sup>70</sup> For a succinct overview of the relevant Canadian law, see J. Sopinka, S.N. Lederman and A.W. Bryant, *The Law of Evidence in Canada* (Toronto: Butterworths, 2nd edn, 1999) 389–396.

<sup>71</sup> See *British Columbia Securities Commission v Branch* [1995] 2 SCR 3.

<sup>72</sup> See *R v White*, n 67 above; *R v Jarvis* [2002] 3 SCR 757; *R v RJS* [1995] 1 SCR 451; *R v Collins* [1987] 1 SCR 265; *R v Stillman* [1997] 1 SCR 607.

<sup>73</sup> See *R v Hebert*, n 8 above; *R v Broyles* [1991] 3 SCR 595; *R v Liew* [1999] 3 SCR 227.

<sup>74</sup> See *R v Chambers* [1990] 2 SCR 1293.

<sup>75</sup> See *R v Noble* [1997] 1 SCR 874.

<sup>76</sup> Unlike in Hong Kong, Canadian law requires all witnesses in proceedings to answer questions even if the answer is self-incriminating. In such situations, s 13 of the Charter together with other legislation confers a use immunity to protect the witness in subsequent proceedings. See Canada Evidence Act, RSC 1985, C-5, s 5.

any other proceedings, except in a prosecution for perjury or for the giving of contradictory evidence.”

The restricted scope of these two provisions, however, has resulted in the bulk of the Charter self-incrimination jurisprudence coming within the general section 7 rights:

“Life, liberty and security of person

7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.”

Canadian courts have recognised the “right to silence” and “principle against self-incrimination” as principles of fundamental justice. These principles come into play only where the individual’s rights to life, liberty or security of the person are engaged. It has been recognised that an individual’s right to liberty is engaged when they are under testimonial compulsion to answer questions<sup>77</sup> or have been detained by law enforcement.<sup>78</sup> Through a series of cases, the Supreme Court of Canada has articulated a set of principles and standards of what the right to silence requires when the individual’s liberty interest has been engaged. It is beyond the scope of this article to discuss in detail these constitutional principles, but it is worth mentioning the significant impact this law has had in conferring evidential immunities on grounds of trial fairness.<sup>79</sup> In 2004, the Court identified “three procedural safeguards” that had emerged in its jurisprudence: “use immunity, derivative use immunity, and constitutional exemption”.<sup>80</sup> It defined each of these safeguards in the following manner:

“Use immunity serves to protect the individual from having the compelled incriminating testimony used directly against him or her in a subsequent proceeding. The derivative use protection insulates the individual from having the compelled incriminating testimony used to obtain other evidence, unless that evidence is discoverable through alternative means. The constitutional exemption provides a form of complete immunity from testifying where proceedings are undertaken or predominately used to obtain evidence for the prosecution of the witness. Together these nec-

<sup>77</sup> See *Branch*, n 71 above, paras 33–34. Note that “testimonial” is used here in a broad sense and goes beyond formal legal proceedings.

<sup>78</sup> See *Hebert*, n 8 above.

<sup>79</sup> For further reference see A.D. Gold, “The Right Against Self-Incrimination” in Law Society of Upper Canada (ed), *Special Lectures 2003: The Law of Evidence* (Toronto: Irwin Law, 2004) 569–581.

<sup>80</sup> *Re Application under s 83.28 of the Criminal Code* [2004] 2 SCR 248, para 70.

essary safeguards provide the parameters within which self-incriminating testimony may be obtained.”<sup>81</sup>

Interestingly, most of the Hong Kong common law standards on self-incrimination are as broad and in some ways broader than the Charter standards. Hong Kong’s common law does not have the same liberty interest precondition found in section 7. Thus the right of silence limb of our residual discretion recognised in *Lam Tat Ming* can apply even before there has been detention by law enforcement. The law on pre-trial inference from silence is also very similar in the two jurisdictions. When it comes to evidential immunities on grounds of trial fairness, Canadian standards are more advanced. Hong Kong practitioners, cognisant of the Canadian law in this area, have tried to rely upon this jurisprudence in the Court of Final Appeal, but the initial response has been cold. Justice Ribeiro in *Lee Ming Tee* canvassed some of the Charter jurisprudence and then brushed it aside by stating that the “Canadian case law developed in a highly specific context, responding to the peculiar statutory and constitutional needs and values of that jurisdiction.”<sup>82</sup>

This dismissal of Canadian law is somewhat disappointing and unfair. It is true that the rapid expansion of Charter jurisprudence on self-incrimination was partly a reaction to the narrow pre-Charter common law positions adopted by Canadian courts.<sup>83</sup> However, it would be illogical to use this reason to dismiss outright the comparative value of Canadian law in this area. If there is anything to be gained from Canada, it is the philosophy of the Canadian Supreme Court that constitutional rights can and should extend beyond standards in the common law. In as early as 1990, Justice McLachlin (as she then was) gave the following reasons for taking a broader approach:

“[R]ules such as the common law confessions rule, the privilege against self-incrimination and the right to counsel may assist in determining the scope of a detained person’s right to silence under s 7.

At the same time, *existing common law rules may not be conclusive. It would be wrong to assume that the fundamental rights guaranteed by the Charter are cast forever in the straight-jacket of the law as it stood in 1982.* The reference in s 7 of the Charter is broadly to ‘principles of fundamental justice’, not to this rule or that. Thus Le Dain J wrote in *R v Therens* (1985), 18 CCC (3d) 481 at pp 500–1, 18 DLR (4th) 655, [1985] 1 SCR 613:

<sup>81</sup> *Ibid.*, para 71.

<sup>82</sup> *Lee Ming Tee*, n 24 above, 179.

<sup>83</sup> See eg *R v Rothman* [1981] 1 SCR 640; *R v Wray* [1971] SCR 272; *Marcoux v The Queen* [1976] 1 SCR 763.

'In my opinion the premise that the framers of the Charter must be presumed to have intended that the words used by it should be given the meaning which had been given to them by judicial decisions at the time the Charter was enacted is not a reliable guide to its interpretation and application. *By its very nature a constitutional charter of rights and freedoms must use general language which is capable of development and adaptation by the courts.* For this reason, a fundamental principle of justice under s 7 of the Charter may be broader and more general than the particular rules which exemplify it.'

A second reason why a fundamental principle of justice under s 7 may be broader in scope than a particular legal rule, such as the confessions rule, is that it *must be capable of embracing more than one rule and reconciling diverse but related principles.* Thus the right of a detained person to silence should be philosophically compatible with related rights, such as the right against self-incrimination at trial and the right to counsel.

The final reason why a principle of fundamental justice under s 7 may be broader than a particular rule exemplifying it lies in considerations relating to *the philosophy of the Charter and the purpose of the fundamental right in question in that context. The Charter has fundamentally changed our legal landscape. A legal rule relevant to a fundamental right may be too narrow to be reconciled with the philosophy and approach of the Charter and the purpose of the Charter guarantee.*

These considerations suggest that the task of defining the scope of the right of a detained person to silence under s 7 of the Charter must focus initially on the related rules which our legal system has developed – in this case the confessions rule and the privilege against self-incrimination. However, *that is not the end of the inquiry. The scope of a fundamental principle of justice will also depend on the general philosophy and purpose of the Charter, the purpose of the right in question, and the need to reconcile that right with others guaranteed by the Charter.*" (emphasis added)<sup>84</sup>

All of the reasons found in this passage are equally applicable to Hong Kong's Basic Law and HKBOR. Indeed some of the reasons are already found in Hong Kong's jurisprudence on interpreting Basic Law rights.<sup>85</sup> In other areas of constitutional law, Canadian cases have been influential in developing the

<sup>84</sup> *R v Hebert*, n 8 above, 163–164.

<sup>85</sup> The principle that fundamental rights should be interpreted generously and purposively and restrictions on rights narrowly is well accepted in Hong Kong's Basic Law and HKBOR jurisprudence, see *Ng Ka Ling & Others v Director of Immigration* (1999) 2 HKCFAR 4, 28–29.

jurisprudence of the Basic Law.<sup>86</sup> Once one conquers the length of some of the Canadian judgments, one starts to see that much of the reasoning transcends borders and is neither historically nor geographically contingent.

In *Li Defan*, Lord Hoffmann declined to follow a majority of the Supreme Court of Canada's judgment in *Regina v Noble* because the reasoning was "unconvincing" and it seemed to his Lordship that "Sopinka J deduced from the bare expression 'right to silence' that it entailed there being no adverse consequences from a decision not to give evidence".<sup>87</sup> With respect, Justice Sopinka was not deducing a principle from a bare expression; he was explicating the content of a constitutional right through a process of constitutional discourse and legal reasoning. In such a process, one should not be constrained by the common law "disparate group of immunities" conception, which was obviously underpinning Lord Hoffmann's criticism. Constitutional law by its nature aims to bring a principled and rational approach to addressing some of society's most difficult legal problems. While one might still criticise Sopinka J's judgment for being out of touch with the fairness dynamics of a criminal jury trial, it cannot be impeached for trying to adopt a principled approach to the law.

#### *Inspiration from the Court Below*

It may only be a short while into the dawn of the second decade that the Court of Final Appeal will come to consider self-incrimination again at the constitutional level. In the twilight of the first decade, the Court of Appeal experimented with a more robust vision of self-incrimination protection under the Basic Law.

*Koon Wing Yee & Another v Insider Dealing Tribunal & Another* was concerned with an investigation by the Securities and Futures Commission (SFC) which led to an inquiry before the (now defunct) Insider Dealing Tribunal (IDT).<sup>88</sup> Two different compulsory powers were applied. The first was an investigative power used by the SFC to require persons under investigation to answer the questions of an investigator. While use immunity was conferred, it only applied to the use of self-incriminating answers in criminal proceedings while express permission was given to use such answers in proceedings before the IDT. The second compulsory power was a testimonial one which the IDT could use to require persons to attend and give evidence before the IDT, and to answer all questions put by or with the

<sup>86</sup> See eg *Koo Sze Yiu & Another v Chief Executive of the HKSAR* [2006] 3 HKLRD 455, CFA (temporary suspension of declaration of invalidity in respect of unconstitutionality); *HKSAR v Lee Ming Tee & Securities and Futures Commission* (2003) 6 HKCFAR 336 (disclosure by the prosecution); *Shum Kwok Sher v HKSAR* (2002) 5 HKCFAR 381 (principle of legal certainty).

<sup>87</sup> *Li Defan*, n 23 above, 330–331.

<sup>88</sup> *Koon Wing Yee & Another v Insider Dealing Tribunal & Another* [2007] HKEC 970, CA.

consent of the IDT. No immunity was conferred so the answers given (even self-incriminating ones) could be used by the IDT against the person in deciding whether to identify him as an insider dealer. Such a person was liable not only to disgorge any profits made but also to a penalty of three times the amount profited.

The Court of Appeal found that both compulsory powers could be used in ways that would infringe rights within the HKBOR. It was held that the admission of self-incriminatory evidence obtained using the investigative power would infringe the individual's Article 10 right to a fair trial before the IDT. Further, the IDT's power to compel testimony from an implicated individual infringed the individual's right not to be compelled to testify against oneself or to confess guilt under Article 11(2)(g). Much of the judgment is spent considering whether IDT inquiries involve the determination of a criminal charge, as such a finding is necessary before the Article 11(2)(g) right can apply. Strictly speaking, it was unnecessary for the Court to decide this point in respect of Article 10 as the rights in this article apply (and was likely applicable here) even where the inquiry involves a determination of "rights and obligations in a suit at law". The Court's finding that IDT inquiries are criminal proceedings is both controversial and startling since it had long been understood both in the securities industry and amongst the general public that such proceedings were civil proceedings. Whatever comes of this finding, if it is sustained one can only remark upon the irony that protections against self-incrimination in true criminal proceedings will have been boosted by legal developments in proceedings which had hitherto been considered civil in nature.

For a number of reasons, *Koon Wing Yee* reflects a more robust approach to self-incrimination protection under the constitution than that seen in *Lee Ming Tee* and *Li Defan*. First, there was a clear recognition that the court was concerned with rights under the Basic Law through the vehicle of Article 39.<sup>89</sup> Secondly, there was an apparent willingness to question and over-rule pre-1997 authorities.<sup>90</sup> Thirdly, the Court of Appeal was mindful of the role of the Basic Law as a check on the legislature.<sup>91</sup> Fourthly, the Court was not so quick to follow *Brown v Stott* to restrict rights against self-incrimination.

<sup>89</sup> Article 39 of the Basic Law provides *inter alia* that the International Covenant on Civil and Political Rights as applied to Hong Kong shall be implemented through the laws of Hong Kong, and the rights and freedoms enjoyed by Hong Kong residents shall not be restricted unless as prescribed by law and such restrictions shall not contravene the Covenant as applied to Hong Kong. The relationship between the Covenant, the HKBOR and the Basic Law is discussed in S.N.M. Young, "Restricting Basic Law Rights in Hong Kong" (2004) 34 HKLJ 109.

<sup>90</sup> See *ibid.*, para 63, where Tang VP overruled the pre-1997 case of *R v Securities and Futures Commission ex parte Lee Kwok-Hung*, n 63 above.

<sup>91</sup> See *ibid.*, para 33, where Tang VP stated "[i]n Hong Kong, the power of the legislature is controlled by the Basic Law. Any law passed by the legislature must accordingly be consistent with the Basic Law."

Instead the Court distinguished *Brown v Stott* in finding that the case before them involved a “complete abrogation of the right to silence” and not merely the putting of a “single, simple question”.<sup>92</sup> However, to say that *Lee Ming Tee* was authority for the existence of an entitlement to use immunity in Article 10 is probably incorrect. It was unnecessary for *Lee Ming Tee* to say this since in that case use immunity was already conferred by statute. It would have been better if the Court of Appeal had relied upon the European Court of Human Rights’ decision of *Saunders v United Kingdom* or the Supreme Court of Canada’s decision in *Regina v White*.<sup>93</sup> Fifthly Tang VP stated that the Article 11(2)(g) right “should probably be regarded as an absolute right”.<sup>94</sup> This is a bold statement but makes sense in light of Court of Final Appeal authority such as in *Gurung Kesh Bahadur v Director of Immigration*.<sup>95</sup> Overall the judgment is a promising sign for the future development of protections against self-incrimination under the Basic Law.

Another area in which the Court of Appeal has been active is in defining the power of the trial judge to exclude evidence obtained in breach of an individual’s Basic Law rights. In *HKSAR v Chan Kau Tai*, Chief Judge Ma recognised the need for a broader power than that under the existing common law in order to take account of constitutionally guaranteed rights.<sup>96</sup> The approach was not one of automatic exclusion but would involve a “delicate balancing exercise” of two competing interests: the interest in protecting and enforcing constitutionally guaranteed rights and the interest in the detection of crime and bringing criminals to justice.<sup>97</sup> Ultimately “the objective of the exercise of judicial discretion is to ensure that a fair trial of the accused takes place”, and fair trial here means not only procedural fairness but also refraining from condoning law enforcement conduct that could amount to “an affront to the public conscience or the integrity of the criminal justice system”.<sup>98</sup>

Relevant factors in the balance include the nature of the right breached and the extent of the breach, the seriousness of the crime involved, the probative value of the evidence and its importance to the case, and the difficulty in detecting some types of crime.<sup>99</sup> The Court however also made the astonishing remark that “some rights are more fundamental and important than others”

<sup>92</sup> *Ibid.*, para 66.

<sup>93</sup> *Saunders v United Kingdom* (1996) 23 EHRR 313, ECHR; *R v White*, n 67 above.

<sup>94</sup> *Ibid.*, para 69.

<sup>95</sup> See *Gurung Kesh Bahadur v Director of Immigration* (2002) 5 HKCFAR 480, para 38, where after finding an “abrogation” of the right to travel the Court did not see the need to engage in restriction analysis.

<sup>96</sup> *HKSAR v Chan Kau Tai* [2006] 1 HKLRD 400, CA.

<sup>97</sup> *Ibid.*, paras 116(1)–116(5).

<sup>98</sup> *Ibid.*, para 116(6).

<sup>99</sup> *Ibid.*, paras 116(9)–116(12).

to later undervalue the right to privacy in its analysis.<sup>100</sup> Less objection would be taken if the court was only intending to say that there was a range of seriousness in how rights can be breached, and breaches can be compared objectively for seriousness across different rights. Courts have competence to say whether the breach of right X in case 1 was more or less serious than the breach of right Y in case 2.<sup>101</sup> But where fundamental rights and freedoms have been provided for without discrimination in a constitutional instrument, it is hard to imagine that a court could competently order the rights in some *a priori* ranking of importance. The right to privacy and legal rights generally come within the same category of fundamental yet derogable civil rights.<sup>102</sup> Hong Kong's courts should adopt and adhere to the Canadian position that a "hierarchical approach to rights, which places some over others, must be avoided".<sup>103</sup>

It is unclear how self-incrimination factors into the approach set down in *Chan Kau Tai*. No mention is made of self-incrimination, yet if the objective is to ensure a fair trial for the accused one would expect self-incrimination to be given prominent attention. The explanation for this anomaly lies in the circumstances of the violation in *Chan Kau Tai*. This case along with several others, which subsequently followed the approach, have all been covert surveillance and interception cases which, given the lack of a legal basis at the time, infringed the Basic Law privacy rights of the individuals, whose actions and words were secretly recorded.<sup>104</sup> None of these cases involved any form of state compulsion leading to self-incrimination. Thus it was unnecessary in these cases to address this element specifically. It can be assumed that where the state breaches a constitutional right and that breach has caused or led the individual, whose right has been violated, to create self-incriminatory evidence, the exact approach to discretionary exclusion has yet to be decided. This article expresses the opinion that such cases inherently engage the trial fairness interest and should attract presumptive exclusion pursuant to the self-incrimination limb of the residual discretion. Such cases deserve greater certainty than the *Chan Kau Tai* balancing approach, and presumptive exclusion is more in accordance with the high degree to which protection is valued against self-incrimination at common law and under the Basic Law.

<sup>100</sup> *Ibid.*, paras 116(10), 116(13).

<sup>101</sup> But undertaking such a comparison would not be meaningful since the exercise of the discretion by reference to case law should have regard to like cases, ie cases involving the same right.

<sup>102</sup> The word derogable is used here in the strict sense as used in Art 4 of the International Covenant on Civil and Political Rights and, to the same effect, s 5 of the Hong Kong Bill of Rights Ordinance (Cap 383).

<sup>103</sup> See *Dagenais v Canadian Broadcasting Corp* [1994] 3 SCR 835, 877, per Lamer CJC.

<sup>104</sup> See also *HKSAR v Li Man Tak & Another* [2006] HKEC 1724, CA; *HKSAR v Wong Kwok Hung* [2007] 2 HKLRD 621, CA; *HKSAR v Muhammad Haji* [2007] HKEC 1138, CA.

## Conclusion

In its first decade, the Court of Final Appeal has maintained and fortified the common law protections against compelled self-incrimination. Such a trend seems to be unsustainable in the next decade. Put simply, there is only so much mileage in the common law. As signalled by *Koon Wing Yee*, the next decade will see the emergence and development of constitutional principles to ensure respect for individual autonomy in so far as individuals are not unfairly used to generate evidence for use in their incrimination. Statutory derogations will come under closer scrutiny, making sure that they do no more than necessary to achieve a legitimate societal goal. Some statutory derogations will simply be unacceptable.

The Court will need to revisit the issue of derivative evidence but this time in the context of admissibility in a criminal trial. The eighteenth century decision of *Warickshall* cannot and should not be the final word on this issue in the criminal justice system of today. Another area of development will be the exclusion of self-incriminatory evidence generated as a result of a breach of an individual's Basic Law rights. Beyond privacy rights, there are a host of other legal rights which could be violated during law enforcement investigation, in particular, the individual's right to legal advice and representation. North American jurisprudence has seen an integral relationship between the right to counsel and unfair self-incrimination. Constitutional principles may well hold that before self-incriminatory evidence will be admitted it must not only have been freely and voluntarily made but also after the person has had a fair opportunity to obtain effective legal advice and assistance. However, these and other issues are for another article. In the meantime, let us hope that the Court of Final Appeal will not continue to remain silent on the topic for much longer.

