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SELF-INCRIMINATION, STATUTORY RESTRICTIONS AND THE HONG KONG BILL OF RIGHTS

The privilege against self-incrimination is a common law right of respectable antiquity. Recent attempts to water down the right by creating "exceptions" have not been successful. However, statutory intervention to modify or remove the privilege is as old as the right itself. In Hong Kong, as in other common law jurisdictions, there are statutes which impinge upon the right in one way or another. The advent of the Hong Kong Bill of Rights may have further implications, as statutory provisions inconsistent with the Bill are deemed to be repealed. This article traces the development of the privilege in the common law and discusses the possible impact of Art 11(2)(g) of the Bill on certain statutory provisions in Hong Kong.

I. Introduction

THE privilege against self-incrimination has been one of the "inveterate principles of English law"[1] for centuries. Though the nature and extent of its application have undergone metamorphosis to varying degrees in common law jurisdictions the world over, the essence of the privilege remains intact: no person should be compelled to expose himself or herself to the peril of conviction as a criminal out of his or her mouth. Such modification as is to be found is the result of legislative intervention which has been, for the most part, sporadic. The privilege, which is in fact a general principle of the law of evidence,[2] has been dealt with on a piece-meal basis in most jurisdictions. The *modus operandi* has been for the legislature to insert a qualified version of the common law principle in various statutes, ordinances or enactments as may be deemed fit. In some jurisdictions, in addition to

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1 *Redfern* v *Redfern* [1886-90] All ER 524; for a sampling of literature in this area see, *inter alia*, the following: Robert Baxt, "Should Company Directors Be Excused from Answering Questions on the Grounds that They May Incriminate Them in Relation to Corporate Collapse?" (1991) 19 ABLR 281; Tom Middleton, "Accountants' Duty of Confidentiality" (1990) 60 Australian Accountant 44; Jeffrey Barnes, "Administrative Law: Investigative Powers – The Federal Courts Balancing Act" (1989) 17 ABLR 312; Joseph n Laplante, "Self Incrimination on Income Tax Returns : A Compelling Dilemma" (1989) 43 Tax Lawyer 225; Heydon, "Statutory Restrictions on the Privilege against Self-incrimination" (1971) 87 LQR 214; and Gerard McCormack, "Self-incrimination in the Corporate Context" (1993) JBL 425.

2 Halsburys Laws of England, (4th ed), Vol. 13, para 92.

individual insertions in various enactments, the general law of evidence has been amended.[3]

However, this is not to say that enactments, ordinances or Acts of Parliament which do not have any specific provision regarding the privilege are *ipso facto* subject to the privilege as found in the common law. On the contrary, a particular statutory provision which is silent as to the application of the privilege may nevertheless be construed by the courts as ousting the general common law privilege if to do so is a necessary implication of the legislation, considering the general tenor of the words used in such provision. Be that as it may, in the absence of an express manifestation either ousting or modifying the common law privilege, the courts have found it a most difficult task to interpret statutory provisions which are claimed to have that effect. The courts resort to well-established rules of statutory interpretation in assisting them in their task. Even so, the problem is exacerbated by the fact that, in some countries, far from removing or modifying the common law principle, it is expressly reiterated and entrenched in the Constitution or the Bill of Rights (in countries where this is in force), whether or not reference to it is also made in individual statutes. The situation then becomes even more complicated because of the overriding principle that all legislation must conform to the Constitution or the Bill of Rights, or be struck down as null and void to the extent of the conflict. It might be thought that the Constitution and the Bill of Rights, being in the nature of paramount law, would automatically override other statutory provisions which may be in conflict with them. However, the position does not appear to be as simple; the provisions of the Constitution and the Bill of Rights are usually couched in very broad terms and the courts not infrequently give a more restricted scope to them than might be gleaned from the tenor of the language used.

In Hong Kong the matter of the privilege against self-incrimination has assumed increasing importance at the present time with the advent of The Bill of Rights Ordinance, 1991, (Cap 383), ("The Bill"), which came into effect on June 8th of that year. The full implications of the Bill are not as yet clear in view of its recent promulgation. The Bill basically provides for the incorporation into Hong Kong law of the provisions of the International Covenant on Civil and Political Rights (United Nations Covenant, 1966) and appears to have far-reaching repercussions for, *inter alia*, the privilege against self-incrimination. This is because, whilst the Bill has a

[3] See, for instance, the Indian, Malaysian and Singapore Evidence Acts, the corresponding provisions of which are *in pari materia* with s 65 of the Hong Kong Evidence Ordinance (Cap 8).

provision which appears to entrench the privilege,[4] there are ordinances[5] which contain references to the privilege in terms which may legitimately be construed as derogating from the requirements of the Bill, a position which is untenable in view of the superiority[6] of the latter.

This article investigates the development and status of the privilege against self-incrimination in the common law and examines how this has been ousted or modified by particular legislation, and considers its effect thereof, focusing on the position in Hong Kong, in view of Article 11(2)(g) of the Bill. In this endeavour, reference is made to pertinent case law and statutory provisions principally from common law jurisdictions, including England, Australia, and Hong Kong.

II. The Common Law Privilege Against Self-Incrimination

A. *The Doctrine*

The privilege against self-incrimination is a legal principle of respectable antiquity. It was recognized in England by the common law courts as early as 1847 in *Reg* v *Garbett*[7] and the courts of equity even earlier, in 1812, in *Paxton* v *Douglas*.[8] Recounting these cases in *Rank Film Ltd* v *Video Information Centre*,[9] a case concerning an application for an *Anton Piller* order, Lord Denning observed,

> ... The privilege against self-incrimination is so deeply imbedded in our law that it cannot be uprooted. The common law was stated with the authority of all the 15 judges in 1847 in *Reg* v *Garbett* ... and the courts of equity did the same, it being declared emphatically by Lord Eldon LC in *Paxton* v *Douglas* (1812)....[10]

Though the privilege itself has been acknowledged as being "deeply imbedded" in the common law, its scope and application have not gone unchallenged. A valiant attempt was made by Lord Denning in his strong dissenting judgment in the *Rank* case to subject the privilege to a number of exceptions, the effect being to whittle down its extent.

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4 Art 11(2)(g) of the Bill.
5 For instance, the Companies Ordinance (Cap 32).
6 Ss 3, 4 and 7 of the Bill.
7 (1847) 2 Car and Kir 474.
8 (1812) 19 Ves 225.
9 [1980] 2 All ER 273.
10 *Ibid*, at 280.

The development of the doctrine has had a chequered history. An analysis of the same is therefore essential to a better comprehension of its operation in Hong Kong. Moreover, inasmuch as the focus of the article is the Hong Kong Bill of Rights *vis-à-vis* the privilege and its impact on Hong Kong laws, the common law position becomes crucial to this analysis.

One of the earliest English cases in which the doctrine was raised and considered is *Redfern* v *Redfern*.[11] The first instance decision in this case was affirmed by the Court of Appeal. This was a divorce case in which the question was whether an order for discovery by means of interrogatories and an affidavit of documents ought to be made against the respondent for the sole object of establishing adultery against that party. In this case Bowen LJ stated the common law on the privilege as follows:

> It is one of the inveterate principles of English law that a party cannot be compelled to discover that which, if answered, would tend to subject him to any punishment, penalty, forfeiture, or ecclesiastical censure. In these days, when the thunders of the Church have become less formidable, the rule, so far as it relates to ecclesiastical censure, seems to wear an archaic form; but adultery is a charge of such gravity as to render it not unnatural that we should find that the doctrine that 'no one is bound to criminate himself' should be applicable.[12]

This case was followed by the Court of Appeal in *Triplex Safety Glass Co Ltd* v *Lancegaye Safety Glass (1934) Ltd*,[13] where du Parcq LJ, delivering the judgment of the court, quoted Bowen LJ in *Redfern* and asserted that there was no real exception to the privilege.[14]

The learned judge then went on to observe that, nonetheless, there was a duty in the court to make sure that the protection of the rule was not accorded to persons who in fact had no claim to it.[15] The judge then said that certain principles had evolved over a period of time governing the claim and summarised them as follows:[16]

> (1) The mere fact that a party or a witness swears that his answer would tend to criminate him is not conclusive. The court has the discretion, notwithstanding the assertion of a claim to privilege, to compel him to answer;

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11 *Supra*, note 1.
12 *Ibid*, at 528.
13 [1939] 2 All ER 613.
14 *Ibid*, at 617.
15 *Ibid*.
16 *Ibid*.

(2) The court will insist upon an answer if, "the witness is trifling with the authority of the court, and availing himself of the rule of law to keep back the truth, having in reality no ground whatever for claiming the privilege";[17] in other words, where the objection taken is clearly *mala fide*; and

(3) Since the decisions of the Court of Appeal in *Re Reynoulds, Ex p Reynoulds*,[18] and *R* v *Boyes*[19] there is no doubt that the power of the court to insist on an answer is not limited to cases of *mala fides*, but extends to cases where there is no reasonable ground to apprehend danger to the witness by the compulsion to answer.

However, despite the above statements as to the operation of the doctrine the *Redfern* case was not followed by the Court of Appeal in *Blunt* v *Park Lane Hotel Ltd and Briscoe*,[20] while the *Triplex* case was the subject of criticism and doubt in the decision of the Court of Appeal in R*e Westinghouse Electric Corporation Uranium contract litigation MDL Docket No 253 (No 2)*.[21] In *Blunt*, the Court of Appeal made it clear that *Redfern* was a divorce case and adultery was, so to speak, the very cause of action, while *Blunt* was a case where an action for slander was commenced upon an allegation by the defendant of the plaintiff's adultery. In the circumstances the court distinguished *Redfern* on the facts and said that it could not be taken as establishing any authority on the general law of discovery.[22] Lord Clauson, the other judge in the case, referred to what Bowen LJ said in *Redfern* was the "historical position"[23] and observed:

> The point (exposure to punishment in the Ecclesiastical Courts) might well have been good in the 18th century when such punishment was still in fact meted out in those courts ... but I feel no doubt that ... this jurisdiction of the Ecclesiastical Courts has fallen into abeyance and must now be treated as obsolete.[24]

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17 *Ibid*, quoting Pollock, C B in *Adams* v *Lloyd* (1858) 3 H & N 351 at 362.
18 (1882) 20 Ch D 294.
19 (1861) 5 LT 147.
20 [1942] 2 All ER 187.
21 [1977] 3 All ER 717.
22 *Supra*, note 20, *per* Lord Goddard, at 189.
23 *Supra*, note 1, at 528; see *supra*, note 9 and text for discussion on the scope of the doctrine.
24 *Supra*, note 20, at 188.

In *Westinghouse* Lord Denning castigated the application of the doctrine in certain circumstances:

> ...privilege should not be allowed in a ... case where there is no real risk of the defendant being prosecuted, and his objection is only put forward as a way of escaping his civil liability.[25]

Speaking of the entitlement of a witness to protection from self-incrimination in the common law, Lord Denning went on to say, in the same case,

> The common law does in some circumstances cast its protection over him. It adopts the maxim *nemo tenetur seipsum prodere*. No one is bound to furnish evidence against himself. It says: 'If a witness claims the protection of the court, on the ground that the answer would tend to incriminate himself and there appears reasonable ground to believe that it would do so, he is not compellable to answer...'[26]

After *Westinghouse* there have been a series of cases, both in the Court of Appeal and the House of Lords, which have consistently upheld the doctrine.[27] One of the latest cases to emanate from the Court of Appeal is *Bishopsgate Investment Management Ltd (in provisional liquidation)* v *Maxwell and another,*[28] which contains a useful recounting of the historical origins of the doctrine and puts the matter beyond any doubt. In this case Dillon LJ, made reference to *Hammond* v *Commonwealth of Australia*[29] (a decision of the Australian High Court) where Murphy J refers to the doctrine as being part of the legal heritage and a response to the horrors of the Court of Star Chamber.[30] In *Hammond*, Brennan J cited, with approval, the following passage in *Brown* v *Walker*,[31] an old United States Supreme Court case:

> The maxim *nemo tenetur se ipsum accusare* had its origin in a protest against the inquisitorial and manifestly unjust methods of interrogating accused persons, which has long obtained in the continental system,

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25 *Supra*, note 21, at 721.

26 *Ibid.*

27 See, *inter alia*, the cases of *Rank Film Distributors Ltd and others* v *Video Information Centre and others* [1981] 2 All ER 76 and *Sociedade Nacional de Combustiveis de Angola UEE and others* v *Lundqvist and others* [1990] 3 All ER 283.

28 [1992] 2 All ER 856.

29 (1982) 156 CLR 188.

30 *Ibid*, at 200.

31 (1896) 161 US 591.

> and, until the expulsion of the Stuarts from the British throne in 1688, and the erection of additional barriers for the protection of the people against the exercise of arbitrary power, was not uncommon even in England ... The change in the English criminal procedure in that particular seems to be founded upon no statute and no judicial opinion, but upon a general and silent acquiescence of the courts in a popular demand. But, however adopted, it has become firmly embedded in English, as well as in American, jurisprudence.[32]

B. *Scope and Application*

Thus, it is beyond dispute that the privilege against self-incrimination is firmly entrenched in the common law as a doctrine. However, what does not appear to be so certain is its exact scope and application. In particular, it is not altogether clear whether the doctrine admits of any exceptions in the common law or by statutory intervention, and if so, when and to what extent.

Despite the assertion of du Parcq LJ in *Triplex*[33] that, "to a rule so stated there is no real exception...,"[34] Lord Denning ventured to spell out several exceptions in *Rank*[35] in a dissenting judgment. In this case, counsel for the plaintiffs submitted that the privilege of self-incrimination was out of date and that, in particular, it was rendered obsolete by the case of *Riddick* v *Thames Board Mills Ltd.*[36] Lord Denning responded by saying that though he would have liked to accept this "wider submission"[37] he did "not feel able to do so"[38] in view of the entrenched position of the privilege. However, the learned judge readily accepted counsel's "narrower submission"[39] that there were several exceptions to the privilege, citing cases of fraud in its various forms. He observed:

> Although counsel for the plaintiffs said that those exceptions disclosed no recognisable principle, I venture to think they do. They show that the courts, which grant the privilege against self-incrimination, will intervene so as to stop any abuse of it. When a defendant is ordered to answer interrogatories or to disclose documents, the court will

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[32] *Ibid*, at 596-597; this passage was also cited, with approval, by Dillon, LJ in *Bishopsgate*, *supra*, note 28.
[33] *Supra*, note 14.
[34] *Ibid*.
[35] *Supra*, note 9.
[36] [1977] 3 All ER 677.
[37] *Supra*, note 9, at 280.
[38] *Ibid*.
[39] *Ibid*.

> allow him the benefit of the privilege against self-incrimination when it is invoked for its legitimate purpose, that is, to save him from having his answer or the document used against him in a criminal court. But the court will not allow the defendant the benefit of the privilege when to do so would enable him to take advantage of his own fraud or other wrongdoing so as to defeat the just claims of the plaintiff in a civil suit.[40]

Rank involved an action for infringement of copyright and the privilege had never been claimed in such actions before. Lord Denning was concerned that if the privilege existed, it would apply not only in Anton Piller cases but in all cases of infringement of copyright, including *inter partes* orders for discovery.[41] However, the case did not appear to be covered by any of the "exceptions" cited by counsel relating to fraud. In the circumstances, Lord Denning, who was clearly disturbed by the prospect of the defendant invoking the privilege, decided to fill the "lacuna" by developing the law by analogy to a statute. The learned judge made reference to section 31 of the Theft Act 1968 and the policy behind the Act and observed that the section applied in terms only to an offence under the Act. However, Lord Denning was not satisfied that the Theft Act was to be so confined and observed,

> Suppose now that the defendant says that he fears that he may be charged not with an offence under the Theft Act 1968 but with conspiracy to defraud the plaintiff of his property. Surely he cannot claim privilege on that account. Section 31 must apply by analogy ... the policy underlying the Act applies with just as much force to copyright as it does to other kinds of property. In the circumstances, I think we should do as our forefathers used to do, develop the law by analogy to the statute...So we have by analogy a further exception to the privilege.[42]

The majority in the case (Bridge and Templeman L JJ) had little difficulty in disposing of the arguments of counsel for the plaintiff. Bridge LJ refused categorically to countenance an exception to the privilege:

> I regret that I am quite unable to accept an exception to the privilege against self-incrimination based on the principle formulated in the judgment of Lord Denning MR that the court will not allow the

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[40] *Ibid.*
[41] *Ibid*, at 279.
[42] *Ibid*, at 281.

> defendant the benefit of the privilege when to do so would enable him to take advantage of his own fraud or other wrongdoing so as to defeat the just claims of the plaintiff in a civil suit. A principle so widely stated, so far from establishing a limited exception to the privilege, could be invoked by a plaintiff seeking discovery from a defendant so as to negate the privilege in every case.[43]

Templeman LJ also expressed difficulty in accepting either submission of counsel for the plaintiff, observing,

> In the present case counsel for the defendants adroitly and properly revelled in the alleged wickedness of his clients. The more criminal their apparent behaviour, the greater their claim to be protected against self-incrimination ... the doctrine of self-incrimination entitles the defendant to concealment and silence. Effective concealment cannot be maintained once discovery has taken place. Any other conclusion would in practice make a mockery of the doctrine against self-incrimination.[44]

The learned judge also emphasised the point that the likely injustice arising out of the application of the doctrine is not confined to particular cases, but is general in nature:

> Where a defendant in a civil action relies on the doctrine against self-incrimination and insists on remaining silent and concealing documents and other evidence relevant to the action, he is relying on his own wrongdoing or on his own apparent or possible wrongdoing to hamper the plaintiff in the proof of his just claims in the suit. That is the inevitable result of the doctrine which can only afford protection of the defendant at the risk or price of causing an injustice to the plaintiff. That injustice is an argument against the whole doctrine as applied to discovery and interrogatories in civil actions. It is not an injustice which is acceptable in relation to some causes of action but not others.[45]

Templeman LJ also held, in effect, that section 31 of the Theft Act 1968 did not cover the situation.

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[43] *Ibid*, at 285.
[44] *Ibid*, at 289.
[45] *Ibid*, at 291.

The appeal[46] of the plaintiffs to the House of Lords was unanimously dismissed, the House affirming the views of the majority in the Court of Appeal. Lord Wilberforce observed that it was "a strange paradox that the worse, *ie*, the more criminal, their activities can be made to appear, the less effective is the civil remedy that can be granted, but that, *prima facie*, is what the privilege achieves."[47] As to the point of extending section 31 of the Theft Act to infringement of copyright, Lord Wilberforce opined that it was not open to the court, by judicial decision, to extend this statutory provision to civil proceedings generally or to the proceedings at hand.[48]

C. *Limitations*

Though the privilege does not admit of any real exceptions in the common law, its scope is nevertheless circumscribed by several restrictions, of which the following may be identified:

(a) The privilege, in terms, does not extend to protection from civil liability.

(b) The privilege applies to the person in question; hence, the probable incrimination of strangers is no ground for allowing it.[49] This point was also emphasised by the House of Lords more recently in *Rio Tinto Zinc Corporation and others* v *Westinghouse Electric Corporation*,[50] where Lord Diplock observed:

> At common law, as declared in section 14(1) of the Civil Evidence Act 1968, the privilege against self-incrimination was restricted to the incrimination of the person claiming it and not anyone else. There is no trace in the decided cases that it is of wider application; no textbook old or modern suggests the contrary. It is not for your Lordships to manufacture for the purposes of the instant case a new privilege hitherto unknown to the law.[51]

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46 [1981] 2 All ER 76.

47 *Ibid*, at 79.

48 *Ibid*, at 81.

49 *Minihane* (1921) 16 Cr App R 38; but see *R* v *All Saints, Worcester Inhabitants* (1817) 6 M & S 194, where there is a dictum by Bayley, J at 201 to the effect that the privilege does extend to answers which may tend to incriminate the spouse; in respect of civil proceedings this has now been adopted by s 14(1)(b) of the Civil Evidence Act 1968.

50 [1978] 1 All ER 434.

51 *Ibid*, at 465.

In *Rio* a company successfully claimed the privilege and it was further argued that answers given by employees of the company which tended to incriminate the company should likewise be privileged. The point was not decided but there are *dicta* in the judgment for and against the proposition that the privilege should be so extended;[52]

(c) There is a conflict of authority as to whether the privilege extends to liability to proceedings under foreign law;[53]

(d) The objection must be taken by the person claiming it and not the court on his or her behalf; though the court in practice usually advises on the matter;[54]

(e) The privilege is not available unless the person claiming it satisfies the court that he or she has reasonable grounds for it; the burden would therefore be on the claimant.[55] However, though there is a duty on the court to ensure that the person claiming is entitled to the privilege,[56] a mere "tendency" to incriminate is sufficient.[57]

(f) However, any remote possibility of exposure to a charge would not do: the risk must be "real and appreciable";[58] moreover, if a person is already at risk, then the privilege will lie only on establishing that the answer will increase such risk;[59]

(g) If it appears that a person will be at risk then, "great latitude should be allowed to him in judging for himself the effect of

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52 *Ibid*, *per* Lord Diplock, at 465; *per* Lord Fraser, at 476; Lord Wilberforce expressly left the "novel and interesting point" open, at 449; while Viscount Dilhorne observed that if the privilege is not extended to employees, the company's privilege will be "of little value", at 460. In the United States, on the other hand, only an individual (and not a company) may claim the privilege: Fifth Amendment to the US Constitution.

53 See, for instance, the cases of *King of the Two Sicilies* v *Wilcox* (1851) 20 LJ Ch 417 and *The United States of America* v *McRae* (1868) LR 3 Ch App 79. In *Rio Tinto*, *supra*, note 59, Lord Diplock referred to s 14(1)(b) of the Civil Evidence Act 1968 (confining the privilege to "the laws of England") as declaratory of the common law.

54 *A-G* v *Radloff* (1854) 10 Ex 84.

55 See, *inter alia*, *Boyes*, *supra*, note 19; *Rio Tinto*, *supra*, note 50.

56 See, *inter alia*, *Re Renoulds*, *supra*, note 18; *Westinghouse*, *supra*, note 21.

57 *Rio Tinto*, *supra*, note 50; "...the test is not a rigorous one. All that is necessary is that it should be reasonable to believe that production would tend to expose (not would expose) ... to proceedings," *per* Lord Fraser at 473.

58 *Westinghouse*, *supra*, note 21, *per* Lord Denning, at 722.

59 *Supra*, note 21.

any particular question;"[60] consequently, reasonable grounds may be gleaned from the circumstances of the case and the person claiming the privilege should not be compelled to go into detail because this may well entail him or her disclosing the very matter to which the objection is taken.[61]

(h) There is a controversy over whether the privilege is confined to legal proceedings or is much wider and may be raised outside of such proceedings. In *Parry-Jones* v *The Law Society*[62] a submission that an inspection under the Solicitors Accounts Rules was in the nature of a judicial proceeding was described by Diplock LJ as "obviously misconceived"[63] and held that such inspection was no more in the nature of a judicial proceeding than an inspection by a factory inspector under the Factories Acts.[64] In the view of the learned judge,

> ...privilege is irrelevant when one is not concerned with judicial or quasi-judicial proceedings because, strictly speaking, privilege refers to a right to withhold from a court, or a tribunal exercising judicial functions, material which would otherwise be admissible in evidence.[65]

In *Pyneboard Pty Ltd* v *Trade Practices Commission*,[66] a decision of the High Court of Australia, the question whether the privilege against self-incrimination was available outside judicial proceedings was directly raised. The court, commenting that there was "a body of authority" for the proposition and "an impressive stream of authority" against it, concluded that, in the light of the competing considerations, it was not prepared to hold that the privilege was inherently incapable of application in non-judicial proceedings.[67]

Thus, it is clear that the privilege against self-incrimination is entrenched in the common law and attempts to introduce case law exceptions have been fruitless. However, whilst the principle itself has been consistently upheld by the courts of the highest authority, parameters have been defined as to its scope and application, as can be seen from the various restrictions considered above.

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60 *Ibid*, *per* Lord Denning, at 721-722, quoting from *Boyes*, *supra*, note 19.
61 *Westinghouse*, *supra*, note 21, *per* Lord Denning, at 721.
62 [1968] 1 All ER 177.
63 *Ibid*, at 179.
64 *Ibid*.
65 *Ibid*.
66 (1983) 45 ALR 609; see also *Police Service Board* v *Morris* (1985) 156 CLR 397.
67 *Ibid*, at 617.

III. Statutory Restrictions and the Bill of Rights

A. *Statutory Restrictions*

It is evident that the legislature may take away the privilege and enact that a person is bound to accuse himself.[68] However, although the legislature may abrogate the privilege, there is a presumption that it does not intend to alter an established common law doctrine or right without clear words to that effect.[69] In *Kempley* v *R*,[70] Starke J in fact went so far as to say that where authority was given by statute to compel examination of persons, the privilege against self-incrimination would apply unless expressly excluded.[71] Whilst recognising that a statute should not be construed as abrogating so valuable a privilege unless an intention to do so clearly appears, the High Court of Australia has opined that it is not necessary that the legislature must do so expressly in every case. It may be the result of a necessary implication.[72]

Thus, the position now appears to be that one starts with the presumption that the rule that confers the privilege is capable of applying to a statutory provision. The question then is whether the particular provision "reveals clearly, either by express words or by necessary implication, that the intention of the legislature was that the privilege should not be available"[73] in relation to that provision.

The privilege against self-incrimination is very much alive in Hong Kong.[74] In common with some other jurisdictions,[75] there are various enactments impinging on the privilege to a greater or lesser degree. Apart

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68 *R* v *Scott* (1856) 169 ER 909.

69 See, *inter alia*, *Newcastle* v *Morris* [1870] LR 4 HL 66; *R* v *Salisbury (Bishop of)* [1901] 1 KB 573; *Nokes* v *Doncaster Amalgamated Collieries Ltd* [1940] AC 1014; and *Black-Clawson International Ltd* v *Papierwerke Waldhof-Aschaffenburg AG* [1975] AC 591.

70 [1944] ALR 249.

71 *Ibid*, at 253; see also *Crafter* v *Kelly* [1941] SASR 237.

72 *Sorby* v *The Commonwealth* (1983) 152 CLR 281 at 288-90.

73 *Police Service Board, supra*, note 66, at 403-5; see also *CAC* v *Yuill* (1991) 172 CLR 319; and *Hammond, supra*, note 29, at 291, where Gibbs, CJ observed: "It would be necessary to find a clear expression of intention before one could conclude that the legislature intended to override so important a privilege as that against self-incrimination."

74 See, for instance, its recognition and application by the High Court in *Lincoln International Ltd* v *Eagleton Direct Exports Ltd* [1982] FSR 161.

75 For example, in the UK: Criminal Evidence Act 1898, s 1(e); Theft Act 1968, s 31(1); Supreme Court Act 1981, s 72; Criminal Justice Act 1987, s 2; Civil Evidence Act 1968, s 14; Insolvency Act 1968, ss 290, 291; Companies Act 1985, ss 434, 436; in Australia: Evidence Act 1977 (Qld), s 10 and corresponding Acts in the various States; in Malaysia: Evidence Act 1950, s 132; see also the conflicting cases of *Television Broadcasts Ltd* v *Mandarin Video Holdings Sdn Bhd* [1983] 2 MLJ 346 and *PMK Rajah* v *Worldwide Commodities Sdn Bhd* [1985] 1 MLJ 85.

from specialised areas, such as for instance, company law, section 65 of the Evidence Ordinance (Cap 8) provides that the privilege is available in "any legal proceedings other than criminal proceedings". Sub-section (1) of section 65 acknowledges the right of a person to refuse to answer any question or produce any document or thing if to do so would tend to expose that person to proceedings for an offence or recovery of a penalty and goes on to state that the right, whilst extending to the spouse, is confined to criminal offences and penalties under the law of Hong Kong.

By sub-section (2) the purview of sub-section (1) is extended to the right of a person to refuse to answer a question under an existing enactment[76] conferring powers of inspection or investigation. Similarly, sub-section (3) states that where an existing enactment provides that a person shall not be excused from answering a question on the ground of self-incrimination, it will also not excuse an answer on the ground that it may incriminate that person's spouse. By the same token, sub-section (4) states that where an existing enactment provides that an answer given shall not be admissible in evidence against a person, the answer shall also be inadmissible against the spouse.

Examples of other enactments touching on the privilege abound; and the manner in which the privilege has been treated is as varied as the enactments themselves. As an illustration, the Companies Ordinance (Cap 32), states, by section 145 (3A), that a person is not excused from answering a question put to him under section 145 on the ground of self-incrimination; as a compromise, the sub-section goes on to state that in such circumstances, neither the question nor the answer shall be admissible in evidence against him in criminal proceedings other than a charge of perjury.

Similarly, in respect of witnesses, the Criminal Procedure Ordinance (Cap 221), section 54(1)(e) limits the privilege by stating that a witness is required to answer questions in cross-examination notwithstanding the fact that the responses provided would be incriminating with respect to the offence charged. However, the privilege is preserved in respect of answers tending to expose the witness to offences other than that for which he is charged, subject to certain limitations therein specified.

In addition, section 19 of the Bankruptcy Ordinance, (Cap 6), though not touching directly on self-incrimination, states that the debtor shall be examined on oath and it shall be his duty to answer all questions put to him or allowed to be put to him. Further, it goes on to state that the answers given may be used in evidence against the debtor. Thus, it could be forcefully argued that the privilege against self-incrimination has been removed by necessary implication.

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[76] Defined by subsection (5) of s 65 as meaning any enactment made before the commencement of the Evidence (Amendment) Ordinance 1969.

There is also controversy over whether the privilege is available in respect of the various powers of the Inland Revenue Department (IRD) in administering the tax regime. The Hong Kong tax legislation, the Inland Revenue Ordinance (Cap 112) does not have any specific provision touching on the matter of the privilege against self-incrimination. However, there is a general section, section 80, which is to the effect that failure to answer questions put under stipulated provisions of the Ordinance without reasonable excuse will result in penalties being imposed. The IRD also has wide powers under the Ordinance to demand and obtain information, and this power is not restricted to the tax payer himself. The main provision, section 51(4), is drawn in extremely broad terms and under this the IRD is entitled to demand information (including documents) from "any person in respect of any matter which may affect any liability or obligation of any person". Section 51(4A) expands the category of persons who can be called upon and the type of information that can be targeted. This section also makes the point that privilege existing between the person under inquiry and the person from whom the information is demanded is no excuse to refuse compliance, except in the case of a solicitor or counsel in possession of privileged information. Similarly, under section 51A the IRD is given powers to demand from a person, a statement of assets and liabilities; while under section 51B the IRD has power of entry and search and to take away relevant documents. These sections also provide that non-compliance will be visited upon with penalties, unless the person concerned has a reasonable excuse. What amounts to "reasonable excuse" has not been defined in the Ordinance and there does not appear to be any local authority on the matter. However, there are English authorities[77] to the effect that the person claiming the excuse must be able to satisfy the court that he or she had acted reasonably and in good faith, the test being objective; hence the matter would have to depend very much on the circumstances of a particular case. An interesting point that arises here is whether, circumstances permitting, a person may be able to claim the privilege of self-incrimination as a defence to a demand from the IRD; in other words, whether the privilege amounts to a "reasonable excuse" to refuse compliance with a demand from the IRD. Again, there are no local authorities on the matter, but the position in England and Australia appears to go against the proposition. In England the matter was raised squarely in the recent case of *Bank of England* v *Riley and another*,[78] a case involving the Banking Act 1987, section 42(1) and (4). In this case, Ralph Gibson LJ observed as follows:

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[77] See the list of examples in David Flux, *Hong Kong Taxation: Law and Practice* (1993-4), (The Chinese University Press.)

[78] [1992] 1 All ER 769; see also other cases to similar effect cited therein; the Australian position is no different: see, *inter alia*, *Controlled Consultants Pty Ltd* v *Commissioner for Corporate Affairs* (1985) 156 CLR 285.

> As to sub-section(4), which affords the defence of reasonable excuse for failing to comply with a requirement, I agree with Morritt J that the presence of that provision does not destroy the necessary implication created by section 42 and in particular sub-section(1) of it ... Parliament, in my judgment, did not intend that section 42 should be operated subject to the continuation of the privilege against self-incrimination.[79]

In the event, the court upheld the proposition that the concept of reasonable excuse was only relevant to cover such matters as physical inability to comply with a requirement for information or documents arising from illness or accidental destruction of relevant documents and did not extend to include the privilege against self-incrimination.[80] Thus, it appears that generally the privilege against self-incrimination is not contemplated in the expression "reasonable excuse".

It is clear that in Hong Kong, as in England, the privilege has been overridden by "unsystematic legislative techniques".[81] As observed by Lord Mustill in the House of Lords,

> Sometimes it is made explicit. More commonly, it is left to be inferred from general language which contains no qualification in favour of the immunity ... there are variations in the effect on the admissibility of information obtained as a result of the investigation. The statute occasionally provides in so many terms that the information may be used in evidence; sometimes that it may not be used for certain purposes, inferentially permitting its use for others; or it may be expressly prescribed that the evidence is not to be admitted; or again the statute may be silent. Finally, the legislation differs as to the mode of enforcing compliance with the questioner's demands. In some instances failure to comply becomes a separate offence with prescribed penalties; in others, the court is given a discretion to treat silence as if it were a contempt of court...[82]

B. *The Bill of Rights*

The advent of the Hong Kong Bill of Rights Ordinance (Cap 383) (hereafter the "Bill") has added fuel to the controversy surrounding the scope and applicability of the privilege against self-incrimination. The problem of the

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79 *Ibid*, at 776.

80 *Ibid*, at 770; see also *Customs and Excise Commissioners* v *Harz* [1967] 1 All ER 177.

81 *R* v *Director of Serious Fraud Office, ex parte Smith* [1992] 3 All ER 456, at 472, *per* Lord Mustill.

82 *Ibid*.

possible availability or otherwise of the privilege in the face of statutory provisions is likely to be compounded by various provisions of the Bill. Its enactment has brought about a number of issues related to the topic at hand as it touches upon the laws of evidence. The Bill, founded upon the International Covenant on Civil and Political Rights (hereafter the "Covenant") had been the source of much debate even before its enactment. It came into operation on June 8th 1991. The inherent uncertainties which it holds will perhaps only be fully explored over the next few years. The significance of the Bill cannot be underestimated as recent judicial pronouncements have indicated. The preamble to the Bill states as follows:

> An Ordinance to provide for the incorporation into the law of Hong Kong of the provisions of the International Covenant on Civil and Political Rights as applied to Hong Kong; and for the ancillary and connected matters.

Hong Kong, being a colony of the United Kingdom, is governed by *Letters Patent* and *Royal Instructions*, which together form the 'Constitution' of Hong Kong. The Hong Kong Letters Patent 1991 (No 2) (as amended) contains the following which is relevant:

> ...No law of Hong Kong shall be made after the coming into operation of the Hong Kong Letters Patent 1991 (No 2) that restricts the rights and freedoms enjoyed in Hong Kong in a manner which is inconsistent with that covenant as applied to Hong Kong.

Equally significant are sections 3 and 4 of the Bill which read as follows:

> 3(1) All pre-existing legislation that admits of a construction consistent with this Ordinance shall be given such a construction.
>
> (2) All pre-existing legislation that does not admit of a construction consistent with the Ordinance is, to the extent of the inconsistency, repealed.
>
> 4 All legislation enacted on or after the commencement date shall, to the extent that it admits of such a construction, be construed so as to be consistent with the International Covenant on Civil and Political Rights as applied to Hong Kong.

Article 11(2)(g) of the Bill casts some doubt as to whether the investigatory powers of the Inland Revenue Department and such other agencies may be enforced. The pertinent provisions of the said Article read as follows:

> ...
> (2) In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality –
> ...
> (g) not to be compelled to testify against himself or to confess guilt.

This Article is consistent with and supports section 54(1)(a) of the Criminal Procedure Ordinance whereby the accused may only be called upon to testify as a witness at his own volition and application. Where doubt arises is when the accused elects to take the stand as there appears to be a conflict between Article 11(2)(g) and section 54(1)(e) of the Criminal Procedure Ordinance as the latter requires the witness to answer questions in cross-examination notwithstanding the fact that the responses provided would be incriminating with respect to the offence charged. It is tempting to generalise that by the same token, as the preponderance of authority favours the availability of the privilege outside of judicial proceedings, all other relevant provisions of particular ordinances, such as, for instance, the Companies Ordinance, should suffer the same fate. However, the Court of Appeal has sounded a caveat against this line of argument:

> Plainly, the adoption of the International Covenant on Civil and Political Rights as part of the domestic law of Hong Kong was never intended to strike these [investigatory provisions] down wholesale.[83]

The implication is perhaps that each individual provision should be considered on its own merits, if and when objection is taken in appropriate proceedings.

On the issue of privilege against self-incrimination there is some authority to the effect that Article 11(2)(g) is irrelevant when considering investigatory powers. In the High Court case of *Re Tse Chu Fai,*[84] Jones J had occasion to consider whether section 145 or at least subsections (1), (2) and (3A) thereof of the Companies Ordinance (Cap 32) were repealed by section 3(2) of the Bill. The applicant had filed an *ex parte* application for leave to apply for judicial review when an inspector appointed by the Financial Secretary,[85] under section 143(1)(c) of the said ordinance requested him to attend some interviews relating to matters arising from the investigation into the Allied group of companies. The applicant challenged the powers vested in the inspector by virtue of section 145 of the

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[83] *In Re Lee Kwok-hung* [1993] 2 HKLR 51, at 54 (*per* Litton, JA).
[84] [1993] 2 HKLR 453.
[85] The Allen Report [abridged version] dated 28 August 1993.

Companies Ordinance; in particular sub-section 3A, which provides the power for the inspector to compel a party to answer a question notwithstanding that the answer might tend to incriminate the person responding. The argument that section 145(3A) was in breach of Article 11(2)(g) of the Bill did not find favour with Jones J. It was argued on behalf of the applicant that the Bill would be rendered nugatory if the narrow construction contended for by the inspector, namely, that the Article was restricted to the rights of persons charged with a criminal offence, was correct. It was further argued that the possibility of exposure to risk of a criminal conviction or the imposition of a penalty (by the court under section 145(3) of the Companies Ordinance) ought to be sufficient to trigger off the protection. However, Jones J held that although the report might subsequently result in criminal charges being brought, no part of the investigation was concerned with the determination of a criminal charge. The learned judge was of the view that no power was conferred on the inspector to prefer a criminal charge and neither was he empowered to hear and determine a criminal charge. The fact that the inspector had the right to refer the matter to the High Court if the person investigated refused to answer did not, in the judge's view, make any difference as that person would not be in any jeopardy unless and until the court found him guilty of contempt.[86]

In the event Jones J dismissed the application, holding that the words in Article 11(2)(g) were unequivocal and were restricted to the rights of a person charged with a criminal offence.

Hot on the heels of *Chu Fai* came the case of *Re Lee Kwok Hung*.[87] This was also a decision of Jones J, but this time it concerned certain provisions of the Securities and Futures Commission Ordinance (Cap 24). However, Jones J found no material differences[88] between the powers of a company inspector and an investigator appointed by the Commission, and ruled once again that Article 11 was irrelevant.

The applicant also relied on the cases of *R* v *Director of Serious Fraud Office, ex parte Smith*[89] and *Istel* v *Tully*.[90] However, the learned judge held that these cases concerned the common law privilege "which was much wider in scope and distinct from the entrenched right provided by Article 11(2)(g)."[91] Consequently, Jones J ruled that Article 11 was restricted to

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86 *Supra*, note 84, at 461.
87 [1993] HKLD A 5; Unreported, MP3039/1992.
88 *Ibid.*
89 *Supra*, note 81.
90 [1992] 3 WLR 344.
91 *Supra*, note 84.

criminal proceedings and that "...the other subparas. of Article 11(2) could only admit of that interpretation."[92]

The applicant pursued the matter to the Court of Appeal[93] but the argument based on Article 11 was abandoned and the appeal was confined to Articles 5 and 14 of the Bill (these relate to liberty of the person and the protection of privacy) and are not pertinent for present purposes. In the event it was unfortunate that the Court of Appeal was deprived of the opportunity of pronouncing on the actual ambit of Article 11(2)(g).

However, the decision by the Court of Appeal in *R* v *Sin Yau-ming*[94] on Article 11(1) of the Bill may throw some light on the construction and application of Article 11(2)(g). This case was considered by Jones, J in *Kwok Hung*, though it is by no means clear[95] what actual impact it had on the decision. It appears that the learned judge accepted the position that the Bill, being in the nature of a constitutional instrument, was required to be given a "generous and purposive interpretation",[96] citing the case of *A-G of the Gambia* v *Jobe*,[97] one of the cases also considered in *Yau-ming*.

It is true that the opening words of paragraph (2) of Article 11 read "In the *determination* of any *criminal charge* against him..." (emphasis added). It must thus be admitted that taking Article 11(2) at face value, investigatory provisions such as those under the Companies Ordinance or the Securities and Futures Commission Ordinance do not appear to come within its purview. On the other hand a provision like section 54(1)(e) of the Criminal Procedure Code seems to be clearly caught by and is likely to be found inconsistent with the Article.

Yau-ming actually involved the issue of whether or not certain presumptions in the Dangerous Drugs Ordinance (Cap 134) were consistent with Article 11(1) of the Bill. However, this is a landmark judgment and highly relevant for our present purposes, not so much for the decision on the particular issue in that case, but for the exposition of what the Court of Appeal has termed "an entirely new jurisprudential view" which was adopted for the interpretation of the Bill, in place of the ordinary canons of construction of statutes. At issue in this case was Article 11(1) of the Bill which reads as follows:

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92 *Ibid*; see also *Duty Free Shoppers Hong Kong Ltd* v *Wong Kwok Pong and Others*, A6091/1991 (also a decision of Jones J, unreported) and *Ng Hung Yiu* v *Government of the United States of America*, MP2007/192 (decision of Penlington, JA, unreported), to the same effect.

93 [1993] 2 HKLR 51.

94 [1992] 1 HKCLR 127.

95 The judgment of Jones J does not make reference to the "entirely new jurisprudential view" expounded in *Yau-ming*.

96 *Supra*, note 94, at 138, *per* Silke, V-P.

97 [1984] AC 689.

> (1) Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.

The Court of Appeal (Silke V-P, Kempster and Penlington JJ A) unanimously decided that the word "law" in Article 11(1) could not refer merely to the domestic law of Hong Kong. Silke V-P, after referring to the interpretation sections of the Bill (sections 2(3) and (5)), observed:

> ...there exists a well established principle of common law relating to the construction of statutes which are intended by the legislature to domesticate an international treaty to which the state...is a party. The words of the statute should be interpreted by the court as being intended to carry out the states international treaty obligations and not in any manner inconsistent therewith provided the words of the statute are reasonably capable of bearing such meaning...we should view the Hong Kong Bill as being *sui generis*. Sections 3 and 4...make it clear that all existing and new legislation is required to be consistent with the Covenant. Therefore the covenant becomes supreme. Not the legislature.[98]

The learned judge then concluded,

> 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 constructions (sic) 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.[99]

Kempster JA, quoted the following, *inter alia*, from the judgment of the European Court in *Salabiaku* v *France*:

> Above all, the national legislature would be free to strip the trial court of any genuine power of assessment and deprive the presumption of innocence of any substance, if the words 'according to law' were construed exclusively with reference of domestic law. Such a situation could not be reconciled with the object and purpose of Article 6,

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98 *Supra*, note 94, at 139, 140.
99 *Ibid*, at 141.

> which, by protecting the right to a fair trial and in particular the right to be presumed innocent is intended to enshrine the fundamental principle of the rule of law.[100]

On the point of interpretation, Penlington JA was also of the opinion that the words "according to law" in section 11(1) of the Bill of Rights included a reference to international treaty obligations as well as domestic law.[101]

The court was influenced more by the Charter[102] jurisprudence in Canada than that developing in the United States. Despite the fact that the Canadian Charter, unlike the Bill, had a specific provision subjecting the guarantees thereunder "...to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society...,"[103] the court held that the Bill should be construed as though there was in fact a such a justification provision. It therefore ruled that legal presumptions were not prohibited *per se* under the Bill. If they were proportionate to what was warranted by the nature of the evil against which they were directed, they would be valid. The court further held that the burden of establishing this, albeit on a balance of probability, lay on the Crown.

Neither was the court impressed by the case of *Ong Ah Chuan* v *Public Prosecutor*,[104] in which the Privy Council considered the compatibility of the Singapore Misuse of Drugs Act (which had a similar reverse presumption) with the Constitution of Singapore, which provided, under Article 9(1), as follows:

> No person shall be deprived of his life or personal liberty save in accordance with law.

However, the court found some difficulty in deciding against applying the judgment in this case, and in particular, the following statement by Lord Diplock in *Ong*:

> Their Lordships would see no conflict with any fundamental rule of natural justice and so no constitutional objection to a statutory presumption (provided that it was rebuttable by the accused)....[105]

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[100] (1988) 13 EHRR 379, at 388-391, quoted in *Yau-ming*, *supra*, note 94, at 158.
[101] *Supra*, note 94, at 166.
[102] Charter of Rights and Freedoms, 1982 (Canada).
[103] *Ibid*, Art 1.
[104] [1981] AC 648.
[105] *Ibid*, at 671.

With respect, both Kempster and Penlington JJ A, appear to have taken a somewhat technical way out of the dilemma posed by Lord Diplock's statement. Both the learned judges took the point that the Singapore Constitution did not contain an equivalent of Article 11(1) of the Bill. Further, Kempster JA observed that Article 11(1) was not based on the "Westminster Model" as was the Singapore Constitution and agreed with Dickson CJC in *R* v *Oakes*,[106] that in *Ong* the Privy Council did not read the principle encapsulated in Article 11(1) into the general due process provisions of the Singapore Constitution.[107] The Canadian courts also inclined towards this view of *Ong* because there was no specific reference to the presumption of innocence in the Singapore Constitution.

Silke V-P, on the other hand, was of the opinion that the Canadian courts had taken too narrow a view of *Ong* and observed:

> With the greatest respect, the presumption of innocence is the fount of the rules of natural justice in relation to criminal trials. I cannot conceive that Lord Diplock was ignoring it – even though it was not spelled out in the constitutional documents that lay for the consideration of the Judicial Committee.[108]

However, this observation did not make any difference to the learned judges' overall decision in the case because of the "new jurisprudential view"[109] adopted for the interpretation of the Bill.

Article 9(1) of the Singapore Constitution is by no means unique: most Commonwealth constitutions have an equivalent provision; and certain courts have interpreted the provision literally. For instance, in the Malaysian case of *Public Prosecutor* v *Yee Kim Seng*,[110] the validity of the Internal Security Act (which permits arrest and detention without trial) has been upheld since the deprivation of liberty is 'in accordance with law'. Similarly, it has also been held in Malaysia that the mandatory death sentence for specified offences is a valid exercise of legislative power.[111] The Malaysian jurisdiction has succumbed to what has been appropriately referred to as 'the austerity of tabulated legalism'[112] and has therefore accepted the narrowest of interpretations.

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[106] (1986) 26 DLR (4th ed) 200.
[107] *Supra*, note 94, at 156.
[108] *Ibid*, at 138, *per* Silke, V-P.
[109] *Ibid*.
[110] [1983] 1 MLJ 252.
[111] *A-G* v *Chiow Thiam Guan* [1983] 1 MLJ 51.
[112] *Minister of Home Affairs* v *Fisher* [1980] AC 319, at 328, 329 (*per* Lord Wilberforce); for quotations from this case in *Yau-ming* see, *supra*, note 94, at 155 (*per* Kempster, JA).

With respect, the argument (apparently canvassed in *Yau-ming*) that a different interpretation is justifiable in the case of Article 11(1) of the Bill as opposed to the position in a Constitution such as that of Singapore is untenable, as the fundamental rights and freedoms found in such a Constitution have also been subjected to international Declarations and Conventions.[113] Furthermore, these rights and freedoms are entrenched, and hence should be no different in status when compared to Article 11 of the Bill. In the premises, the reasons for "side-stepping" *Ong* in *Yau-ming* do not appear to be convincing.

Be that as it may, the point that clearly emerges from the above discussion is that, by the same reasoning, it is arguable that Article 11(2)(g) should be accorded the same new expansive jurisprudential view of interpretation. If the term "law" (albeit located, as it is, in a local statute) is given a "generous and purposive construction"[114] so as to encompass universal concepts of justice and not merely domestic law, it does not appear to be totally out of order that the opening words, "In the determination of a criminal charge" in Article 11(2)(g) should be treated likewise. In other words, too literal an interpretation may not be proper if it confines the scope of the "minimum guarantee" in that Article to situations where a person is actually arraigned in a criminal court. On the contrary, the aims of the Covenant might be better served if the Article is broadly construed so as to bring within its ambit cases where, although a person is not immediately and directly threatened by the spectre of self-incrimination, he or she is nevertheless at substantial risk of that happening as an ultimate consequence. That is, given a purposive construction of the Article, a person should be allowed to refuse to answer any question where the response may be incriminating as to do so would be tantamount to an implicit confession to a crime in potential proceedings. This argument may be supported by the fact that (at least in the original concept as known to the common law) the threats of self-incrimination need not necessarily be direct : it is sufficient if there is a possibility that a person's answer may indirectly tend to expose him or her to prosecution. Consequently, it is sufficient if the answer could be used as a "link" in the chain of evidence, setting "...in train a process which may lead to incrimination or may lead to the discovery of real evidence of an incriminating character"[115] against the person answering. In fact, the director under inquiry in the investigation which resulted in the *Chu Fai*[116] case sought an assurance from the inspector that the answers that he gave

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[113] *Ibid.*
[114] *Supra*, note 94, at 155.
[115] *Supra*, note 46, *per* Lord Wiberforce, at 82.
[116] *Supra*, note 84.

would not be used "derivatively by other authorities" but this was refused.[117] As noted above,[118] Jones J was of the view that the common law concept of self-incrimination was much wider than that contemplated in Article 11(2)(g) and held that cases such as *ex parte Smith*[119] were not relevant. These cases might well be irrelevant, but perhaps not for the reason that the concept is wider at common law; on the contrary, its availability is confined to proceedings *other than criminal proceedings*. In the premises, if it is accepted that Article 11 contemplates purely criminal proceedings, then it envisages a different genre of protection altogether. Consequently the attempt to link the common law concept to Article 11 is itself misconceived.

In *Re Lee Kwok Hung*,[120] Litton JA observed:

> Under the statutory scheme, [concerning insider dealing] the possibility of being made to incriminate himself at a section 33(4) interview as an insider dealer does exist, and it is possible that, on the basis of his answers, he is ultimately found culpable and penalized under section 23(1)(a) of the Insider Dealing Ordinance. But it must be borne in mind that the duties of the Commission are not simply to investigate suspicions of insider dealing ... suspected breaches [of other ordinances] could also trigger off a section 33(4) investigation.[121]

The learned judge then adopted the remarks of La Forrest J in the Canadian case of *Thomson Newspapers* v *Director of Investigation*[122] with regard to the necessity of having in place regulatory schemes in a modern industrial society and opined that those remarks were equally applicable to the situation in Hong Kong. Consequently, the judge ruled that in deciding whether or not a certain provision in a statute is inconsistent with the Bill, the interests of the individual must be balanced against the interests of society, with a bias in favour of the individual, and that in the instant case the interests of society outweighed those of the individual.

Thus, it would appear that even if it is conceded that Article 11(2)(g) is *prima facie* relevant to investigatory powers such as those in the Companies Ordinance, a court is likely to find these provisions reasonable

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[117] *Supra*, note 85, at 8.
[118] *Supra*, note 91.
[119] *Supra*, note 81.
[120] *Supra*, note 93.
[121] *Ibid*, at 61.
[122] [1990] 67 DLR (4th ed) 161; *Re Lee Kwok Hung* concerned Arts 5 and 14 of the Bill (which relate to liberty of the person and protection of privacy) but the remarks are equally relevant to the construction of Art 11(2)(g).

for the implementation of vital and necessary schemes for business regulation. Hence, the interests of society would outweigh the interests of the individual and the provisions are likely to be declared consistent with the Article 11(2)(g).

IV. Conclusion

It is clear from the above analysis that the privilege against self-incrimination is a doctrine of respectable antiquity and is firmly established in the common law. It has no real exceptions and attempts to find some have been fruitless. Although there were some doubts as to the exact scope and application of the doctrine, especially in the early stages of its development, recent cases have delineated its parameters and clarified the position. Even though there are no exceptions as such, the doctrine is nevertheless subject to certain limitations, of which the following may be identified as crucial:

(a) it is confined, in its application, to exposure to criminal liability;
(b) the probable incrimination of strangers is no ground for allowing the privilege;
(c) the risk of exposure to criminal proceedings should be real and appreciable, and if a person is already at risk, an increase in such risk will be required;
(d) though the point is moot, the privilege is probably available even outside of judicial proceedings.

The doctrine, though well-established in the common law, has undergone refinement by the intervention of the legislature, both in Hong Kong and elsewhere. As was observed by Lord Mustill in the case of *ex parte Smith*,

> That there is a strong presumption against interpreting a statute as taking away the right of silence ... cannot in my view be doubted ... Nevertheless, it is clear that statutory interference with the right is almost as old as the right itself.[123]

The courts have consistently encountered serious difficulties in construing particular statutory provisions as the legislative techniques adopted have not been systematic; so much so that the House of Lords has deprecated the value of analysing various statutes in interpreting a particular provision, as, in its view, the statutes do no more than show that the legislature has not shrunk, when necessary, to intervene.[124]

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[123] *Supra*, note 81, at 471-478.
[124] *Ibid.*

The key to tackling the issue, therefore, appears to be to consider each individual statutory provision on its own and applying the canons of construction. The problem is more acute where the legislation is silent on the matter; in this case the courts proceed on the basis that there is a presumption that the legislature does not intend to abrogate an established common law right. The presumption, however, is rebuttable and the courts have not cringed from declaring that the privilege has been modified or removed altogether, as the case may be, if the circumstances warranted such a conclusion.

As has been noted above, there are various ordinances in Hong Kong, the provisions of which impinge upon the privilege in one way or another. At the same time there are other ordinances, like the Inland Revenue Ordinance, for instance, which are silent on the matter.

The problem of the privilege in Hong Kong has been compounded by the passage of the Hong Kong Bill of Rights Ordinance. The Bill contains a provision of sorts in respect of self-incrimination; the point whether it is broad enough to encompass the privilege as contemplated in the common law is moot. If a strict view is taken of the provision, the Bill does not seem to cover it. On the other hand, if a broad view is taken, on the ground that the Bill is in the nature of a constitution and paramount to all other legislation and that special canons of construction should be applied (following the new jurisprudential view adumbrated in *Yau-ming*), the provision might well be wide enough to encompass the notion of self-incrimination as propounded in the common law. There is much to be said for the broader view, particularly after *Yau-ming*; however, it must be borne in mind that, ultimately, a reasonable construction must be given to the Bill. The wording of a particular article cannot be strained so much so that the construction becomes contrived and artificial.

Thus the central issue revolves around the aim, on the one hand, to attain a proper balance between the interest of the State in maintaining practical and effective law enforcement and, on the other, the protection of individual liberties and rights. The rationale for the privilege against self-incrimination lies in the principle that the law should accord general protection for the weak, the inarticulate and the suggestible from having to answer and thereby risking exposure to self-incrimination in a hostile and strange environment.

The judiciary in England in a recent trilogy of cases[125] recognised that there exists a strong need to ensure that statutory objectives are not frustrated by the privilege provided such provisions are clear and unequivocal and have the necesssary safeguards, so that the scales of justice are not unfairly

[125] *Re Jeffrey S Levitt Ltd* [1992] 2 WLR 975; *Bishopgate Investment Management* v *Maxwell* [1992] 2 WLR 991 and *R* v *Kansal* [1992] 3 All ER 844.

tilted. Admittedly, there is no Bill of Rights or its equivalent in England but there is no reason why the rationale in these cases should not equally be applicable to the situation in Hong Kong.

The Bill, although a constitutional document and therefore paramount, should not be construed in an overly liberal fashion so as to undermine or jeopardise the entire regulatory regime which has been set in place to maintain an orderly society. The wholesale repeal of any and all legislation could not have been the objective of the Bill. Accordingly, the better view appears to be that in the endeavour to balance the conflicting interests of the State and the individual one should not lose sight of the possible consequences, economic and otherwise, of an over-zealous across-the-board application of the Bill.

The foregoing is fortified by the fact that the Bill is born of the International Covenant on Civil and Political Rights which is essentially a document on the protection of human rights. Viewed in this context the spirit and intendment of Article 11(2)(g) filters through clearly; the Article is specifically directed to according protection to persons against whom criminal charges have actually been preferred and not to all and sundry. In the event, one can hardly take refuge under the umbrella of Article 11(2)(g) where a regulatory regime has been implemented by the State as freedom is not an absolute concept and the notion of human rights must, of necessity, be construed in its proper perspective.

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