

RESTRICTING BASIC LAW RIGHTS IN HONG KONG



Simon N. M. Young*

In Bahadur v Director of Immigration, the Court of Final Appeal considered the question of whether rights found in Hong Kong's constitution, the Basic Law, are subject to restrictions. Bahadur concerned the right of residents to travel and enter Hong Kong, which is found in the Basic Law but not in the International Covenant on Civil and Political Rights (ICCPR) as applied to Hong Kong. To its credit, the Court eschewed an approach making such rights subordinate to ordinary legislation. Questions concerning the approach to restrictions on parallel Basic Law rights, ie Basic Law rights that have a parallel right in the ICCPR as applied to Hong Kong, have yet to be determined. It is argued here that these rights and their possible restrictions should have an autonomous interpretation and not have to conform to the minimum standards in the ICCPR.

Introduction

Hong Kong is no stranger to the constitutional protection of human rights. While under British sovereignty in 1991, Hong Kong's constitution, the Letters Patent, was amended to prohibit future laws that restricted rights and freedoms in a manner inconsistent with the International Covenant on Civil and Political Rights (ICCPR) as applied to Hong Kong.¹ At the same time, the Hong Kong Bill of Rights Ordinance (Cap 383) (BORO) was enacted to provide for the incorporation into domestic law of the ICCPR as applied to Hong Kong. Part II of the BORO provided for the Hong Kong Bill of Rights (BOR) which sets out the article-by-article enumeration of rights taken almost verbatim from the text of the ICCPR. Section 3(2) of the BORO declared all pre-existing legislation that did not admit of a construction consistent with the BORO repealed to the extent of any inconsistency.²

* Associate Professor, Faculty of Law, University of Hong Kong. The author acknowledges assistance from a Research Initiation grant provided by the University of Hong Kong. The author is grateful for the comments of the two anonymous reviewers.

¹ See Art VII(3) of the Hong Kong Letters Patent, which can be found amended to 20 Mar 1993 in Byrnes, Andrew and Chan, Johannes (eds), *Public Law and Human Rights: A Hong Kong Sourcebook* (Singapore: Butterworths, 1993), pp 18–26. The International Covenant on Civil and Political Rights, 19 Dec 1966, UNTS 999, 171.

² The pre-1997 jurisprudence of the BORO is discussed in Chan, Johannes M. M., "Hong Kong's Bill of Rights: its Reception of and Contribution to the International and Comparative Jurisprudence" (1998) 47 ICLQ 306 and Swede, Richard, "One Territory – Three Systems? The Hong Kong Bill of Rights" (1995) 44 ICLQ 358.

After the transfer of sovereignty in 1997, The Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China (Basic Law) replaced the Letters Patent as Hong Kong's constitution.³ The Basic Law provides for a number of fundamental rights and freedoms, particularly in Chapter III, entitled "Fundamental Rights and Duties of the Residents".⁴ Rather than becoming the exclusive source of constitutional rights, the Basic Law engrafts the rights and freedoms in the ICCPR as applied to Hong Kong onto itself according to the terms of Article 39. The BORO survived the transfer of sovereignty with only a few minor deletions, and, because of Article 39, it continues to have the same constitutional significance as before.⁵ The result is a complex legal matrix of overlapping constitutional rights both in and outside the Basic Law. As one can imagine, clear elucidation from the courts on how this system should operate is both necessary and welcome.

The Court of Final Appeal's decision in *Gurung Kesh Bahadur v Director of Immigration* is arguably the most important decision to date on the judicial approach to the constitutional protection of human rights in Hong Kong post-1997.⁶ The decision contributes to an understanding of the relationship between express rights in the Basic Law and those in the Hong Kong BOR. It also discusses when restrictions to these two sets of rights might be identified and applied. As the first important decision to embark on this discussion, the extent of the analysis is limited, leaving several important questions unanswered. Perhaps the most important unanswered question is the extent

³ The Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China, 3d Sess., 7th National People's Congress, 4 Apr 1990, reprinted in (1990) 29 *ILM* 1519.

⁴ For example, the Basic Law provides for the right of abode of permanent residents (Art 24), equality before the law (Art 25), right to vote and stand for elections of permanent residents in accordance with law (Art 26), freedoms of speech, press, publication, association, and assembly (Art 27), right to strike (Art 27), freedom of the person and freedom from arbitrary or unlawful arrest, detention or imprisonment (Art 28), freedom from arbitrary or unlawful search or intrusion into one's home or premises (Art 29), freedom and privacy of communication (Art 30), freedoms of movement and to travel (Art 31), freedoms of conscience, religious belief and to conduct and participate in religious activities in public (Art 32), freedom of choice of occupation (Art 33), freedom to engage in academic, artistic and cultural activities (Art 34), rights to confidential legal advice, access to the courts, choice of lawyers and judicial remedies (Art 35), right to institute legal proceedings against executive authorities (Art 35), right to social welfare in accordance with law (Art 36), freedom of marriage and the right to raise a family freely (Art 37), right of arrested persons to a fair trial without delay (Art 87), presumption of innocence until convicted (Art 87), and right to compensation for lawful deprivation of property (Art 105).

⁵ Sections 2(3) [ie duty to have regard to purpose of Ordinance in interpretation], 3(1) [ie duty to construe pre-existing legislation consistently with Ordinance], 3(2) [ie pre-existing legislation that cannot be construed consistently is repealed] and 4 [ie new legislation to be construed consistently] of the original BORO were not adopted. See Decision of the Standing Committee of the National People's Congress on Treatment of the Laws Previously in Force in Hong Kong in accordance with Art 160 of the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China, Annex 2. See generally Wesley-Smith, Peter, "Maintenance of the Bill of Rights" (1997) 27 *HKLJ* 15.

⁶ *Gurung Kesh Bahadur v Director of Immigration* (2002) 5 *HKCFAR* 480, aff'g [2001] 3 *HKLRD* 32 (CA), rev'g [2000] *HKEC* 596 (CFI).

to which Basic Law rights will be constricted by the standards and restrictions in the ICCPR as applied to Hong Kong. It is argued here that contrary to *obiter* comments made by the Court in *Bahadur*, the only sensible and coherent approach is to treat all Basic Law rights as autonomous ones having the potential to bloom beyond the minimum standards of the ICCPR.

The Constitutional Freedom to Travel

Mr Bahadur was a Nepalese citizen who was posted in Hong Kong in the early eighties as a member of the British Army Gurkha Regiment.⁷ After serving in Hong Kong for some time and retiring from the army in 1994, he returned to Hong Kong with his wife a year later. He was given permission to remain as a dependent to his wife who, having been born in Hong Kong, had a right of residence. He was initially permitted to remain for 12 months, but this was extended on a few occasions; the last extension was to expire in January 1999. Between 1995 and 1997, Bahadur ordinarily resided in Hong Kong and became a successful entrepreneur in running two businesses. In October 1997, he flew to Nepal for a short trip, returning to Hong Kong seven days later. Under s. 11(10) of the Immigration Ordinance (Cap 115), the moment Bahadur's plane lifted from the runway in Hong Kong, his permission to remain automatically expired.⁸

On his return in early November 1997, Bahadur's fresh application for permission to land and remain was refused for various reasons, including allegations that he had entered into a "bogus marriage" to obtain dependent status and that he employed "dubious methods" as an immigration consultant.⁹ Bahadur was allowed to stay in Hong Kong so he could be prosecuted for immigration offences on further allegations that he had falsely represented his name and date of birth on attempting to enter Hong Kong between 1992 and 1994. After he was acquitted of these charges, the Director of Immigration nevertheless went ahead to order his removal in December 1998.¹⁰ In 2000, Bahadur brought judicial review proceedings to quash both the refusal of permission to land and the subsequent removal order.

⁷ *Ibid.* The facts reported here are drawn from the decisions of the three levels of court considering the matter

⁸ Section 11(10) of the Immigration Ordinance (Cap 115) provides that "[a]ny permission given to a person to land or remain in Hong Kong shall, if in force on the day that person departs from Hong Kong, expire immediately after his departure."

⁹ See *Bahadur* (n 6 above (CA)), para 18.

¹⁰ The power to remove under s 19 of the Immigration Ordinance (Cap 115) applies to a person who might have been removed following a refusal of permission to land.

Under the Basic Law, persons inside Hong Kong fall within one of three categories: permanent residents, non-permanent residents, and non-residents. The category of permanent residents is defined exhaustively in Article 24.¹¹ Permanent residents alone have the right of abode and the right to vote and stand for election in accordance with law (Articles 24 and 26).¹² Non-permanent residents are “persons qualified to obtain Hong Kong identity cards in accordance with the laws of the Region but have no right of abode” (Article 24).¹³ The residency of non-permanent residents is usually limited in duration and / or by other conditions. Non-residents are generally visitors who have permission to remain in Hong Kong for no more than 180 days. It is technically incorrect to describe non-residents as “aliens” since under Hong Kong law, an “alien” refers to “a person other than a citizen of the People’s Republic of China.”¹⁴

When Bahadur was refused permission to land, he was an alien and a non-permanent resident, since he was not only qualified to obtain, but had in fact held, an identity card since 1995. As a Hong Kong resident, he was accorded a number of fundamental rights under Chapter III of the Basic Law, particularly the rights in Article 31:

Article 31

Hong Kong residents shall have freedom of movement within the Hong Kong Special Administrative Region and freedom of emigration to other countries and regions. *They shall have freedom to travel and to enter and leave the Region.* Unless restrained by law, holders of valid travel documents shall be free to leave the Region without special authorization. [emphasis added]

- ¹¹ The Court of Final Appeal is probably most well known internationally for its earlier jurisprudence on Art 24 and the right of abode. See generally Chan, Johannes M. M., Fu, Hualing and Ghai, Yash (eds), *Hong Kong’s Constitutional Debate: Conflict Over Interpretation* (Hong Kong: Hong Kong University Press, 2000); Hong, F. S., “International Decision: *Ng Ka Ling v Director of Immigration*” (2000) 94 *AJIL* 167; Fokstuen, A. R., “The ‘Right of Abode’ Cases: Hong Kong’s Constitutional Crisis” (2003) 26 *Hastings Int’l Comp LR* 265; Tai, Benny, “*Ng Siu Tung and Others v Director of Immigration*” (2002) 1 *Int’l J Const L* 147; Wesley-Smith, Peter, “Hong Kong’s First Post-1997 Constitutional Crisis” [1999] *Lawasia Journal* 24.
- ¹² Hong Kong permanent residents are not “Hong Kong citizens”. There is no legal category of “Hong Kong citizens” since the concept of citizenship is inappropriate for a special administrative region of the People’s Republic of China. However, Chinese citizenship is recognised and under the Immigration Ordinance (Cap 115), Sch 1, a “Chinese citizen” is a person of Chinese nationality under the Nationality Law of the People’s Republic of China. According to Art 24 of the Basic Law, certain Chinese citizens may also have permanent residency in Hong Kong.
- ¹³ Interestingly, as noted in the *Bahadur* decision, (n 6 above (CFA)), paras 23, 30, this aspect of the Basic Law leaves the legislature enormous discretion in defining who falls within the class of “non-permanent residents”.
- ¹⁴ See Interpretation and General Clauses Ordinance (Cap 1), s 2A(3) and Sch 8, para 20, which were added by Hong Kong Reunification Ordinance (Cap 2601), s 6. Under this definition, even some Hong Kong permanent residents may be considered aliens.

On judicial review, Bahadur argued that both the refusal of permission and the removal order infringed his constitutional right to travel and to enter Hong Kong. After an unsuccessful review in the Court of First Instance, Bahadur succeeded in both the Court of Appeal and the Court of Final Appeal. The latter court unanimously dismissed the Government's appeal in a decision by Chief Justice Li (Bokhary PJ wrote a short separate concurring opinion). The Court of Final Appeal found that to refuse Bahadur, a non-permanent resident whose permitted limit of stay had not expired, permission to land and remain in Hong Kong contravened his fundamental "freedom to travel and enter the Region".¹⁵ For the legislative scheme to remain constitutional, the Court held that it was necessary to read the automatic expiry on departure provision and the fresh permission to land on return provision¹⁶ as being inapplicable to non-permanent residents whose limit of stay remained valid.

The results in the appellate courts are clearly sensible and justified. As Rogers V-P stated in the Court of Appeal:

"[The] freedom to travel is an important aspect of Hong Kong life. International business and commerce has always played a crucial role in Hong Kong life. Hong Kong's prosperity is a consequence of its international commerce and business. Without the ability to travel Hong Kong businessmen [and women] would be severely hampered."¹⁷

As was pointed out by Bahadur's counsel, the legislative scheme as it stood meant that expatriates working in Hong Kong on visa lost their residency status every time they left Hong Kong, even if it was for an afternoon of golf on the mainland. With approximately a million non-permanent residents in Hong Kong, representing 15 per cent of the total population, the decision in *Bahadur* was of great significance for many people.

There is another kind of significance to the Court of Final Appeal's decision in terms of judicial interpretation and application of constitutional human rights. *Bahadur* concerned a right which was found in the Basic Law but not in the Hong Kong BOR. In looking at how the Court rejected the reasoning of the Court of First Instance judge and the Government's arguments, as put forward by English counsel, Mr David Pannick Q.C., important insights and statements are made about how Basic Law rights should be conceptualised and applied, particularly in terms of how such rights might be restricted. In the remaining parts of this article, the jurisprudential significance of *Bahadur* will be discussed.

¹⁵ See *Bahadur* (n 6 above (CFA)), para 37.

¹⁶ See ss 10(1) and 7(1) of the Immigration Ordinance (Cap 115), respectively.

¹⁷ See *Bahadur* (n 6 above (CA)), para 35.

Restrictions on Rights and Article 39

There was little dispute that Bahadur's freedom to re-enter Hong Kong after travelling abroad was impaired by the statutory scheme. What was at issue, at least as perceived by the Government, was whether the restriction on Bahadur's freedom was justifiable. One might ponder why the question of restriction ever arose since the freedom to travel in Article 31 is framed in unqualified terms. However, the primary argument for restriction was not based on Article 31, but on the general clause Article 39:

Article 39

The provisions of the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, and international labour conventions as applied to Hong Kong shall remain in force and shall be implemented through the laws of the Hong Kong Special Administrative Region.

The rights and freedoms enjoyed by Hong Kong residents shall not be restricted unless as prescribed by law. Such restrictions shall not contravene the provisions of the preceding paragraph of this Article.

Article 39 is made up of three sentences, with only the latter two relating to the question of restrictions. The first sentence serves several important purposes. The sentence implements one of the human rights commitments in the Joint Declaration between the United Kingdom and the People's Republic of China, which in 1984 set out a roadmap for Hong Kong's future.¹⁸ Secondly, it imposes a constitutional duty on the Hong Kong Government to incorporate the ICCPR as applied to Hong Kong into domestic law, notwithstanding China's absent ratification of that treaty.¹⁹ On a number of occasions,

¹⁸ Sino-British Joint Declaration on the Question of Hong Kong, 19 Dec 1984, UKTS 1984 No. 26, reprinted in (1984) 23 ILM 1366 [Joint Declaration]. Annex I, section XIII provides that the "provisions of the [ICCPR] and the International Covenant on Economic, Social and Cultural Rights as applied to Hong Kong shall remain in force." For the British, the continued preservation of rights and freedoms in Hong Kong was critical to winning the confidence of the Hong Kong people and for ensuring a smooth transition of sovereignty. The commitment in the Joint Declaration not only contributed to the terms of Art 39, but also to the enactment of the BORO in 1991, with the modifications to the Letters Patent needed to entrench the ICCPR as applied to Hong Kong. Politically, it was the events in Tiananmen Square in 1989 that catalysed the British administration in Hong Kong to enact the BORO. On the history of the Joint Declaration and BORO, see Ghai, Yash, *Hong Kong's New Constitutional Order: The Resumption of Chinese Sovereignty and the Basic Law* (Hong Kong: Hong Kong University Press, 1999), 2nd ed, pp 36–56, 419–422; Byrnes, Andrew, "And Some Have Bills of Rights Thrust Upon them: The Experience of Hong Kong's Bill of Rights", in Alston, Philip (ed), *Promoting Human Rights Through Bills of Rights: Comparative Perspectives* (New York: Oxford University Press, 1999), pp 318–337.

¹⁹ China signed the ICCPR on 15 Oct 1998, but has yet to ratify it.

the Court of Final Appeal has recognised the BORO as effecting the incorporation of the ICCPR as applied to Hong Kong into domestic law.²⁰ Thirdly, when the first sentence is taken together with the third one, the ICCPR as applied to Hong Kong becomes entrenched.

It is important to be clear on the legal effect of this entrenchment. Article 39 does not make the ICCPR as applied to Hong Kong a source of rights and freedoms directly applicable in Hong Kong's domestic law. The first sentence of that Article contemplates that the ICCPR, as an international treaty, will be incorporated into domestic law before the rights contained therein can be legally enjoyed by individuals in Hong Kong.²¹ However, the third sentence has the effect of making the ICCPR as applied to Hong Kong a source of domestic law for the specific purpose of testing constitutionally permissible restrictions on rights and freedoms enjoyed by Hong Kong residents.²² Hence, the entrenched status of the ICCPR as applied to Hong Kong has a unique dual quality. It is entrenched only for the purpose of monitoring restrictions on rights and freedoms, but has no legal effect in providing for enforceable rights and freedoms.

The BORO, on the other hand, does in fact provide for enforceable rights and freedoms. Strictly speaking, the BORO does not enjoy *de jure* entrenched status as there is no mention of it in the Basic Law. It could be stated that it enjoys a *de facto* entrenched status, but there is ambiguity in this statement. It is probably best to think of the BORO as an ordinary statute with a two-fold constitutional significance. It is both the vehicle for incorporating the ICCPR as applied to Hong Kong into domestic law, and more importantly, it confers rights and freedoms that can be enjoyed by Hong Kong residents.²³ By virtue of the last two sentences in Article 39, these "rights and freedoms enjoyed by Hong Kong residents" are protected by two constitutional safeguards, ie that

²⁰ See *Bahadur* (n 6 above (CFA)), para 21; *HKSAR v Ng Kung Siu and Another* (1999) 2 HKCFAR 442, 455 (CFA); *Shum Kwok Sher v HKSAR* [2002] 3 HKC 117, para 53 (CFA); *Lau Cheong and Another v HKSAR* (2002) 5 HKCFAR 415, para 32 (CFA). Statements by some judges that the BOR is the "embodiment of the ICCPR as applied to Hong Kong" (see, for example, *HKSAR v Ng Kung Siu, ibid.*, p 463, per Bokhary PJ) and *Shum Kwok Sher v HKSAR, ibid.*, para 53, per Mason NPJ) are somewhat misleading since *prima facie* they ignore the sections in the BORO outside of Part II which qualify the rights in the BOR.

²¹ On the reception of international law in Hong Kong generally, see Mushkat, Roda, *One Country, Two International Legal Personalities* (Hong Kong: Hong Kong University Press, 1997), pp 163–187.

²² This approach, which treats the ICCPR and the other identified international treaties as justiciable for scrutinizing, under Art 39, restrictions on enjoyed rights and freedoms, was followed by the court in *Lau Kwok Fai v Secretary for Justice* [2003] HKEC 711, paras 140–172 (CFI). In this case, the court applied Art 8 of the Labour Relations (Public Service) Convention 1978, which was binding on Hong Kong, to determine if the Government's action in reducing the salaries of civil servants infringed the Basic Law.

²³ It is submitted that this is what the Court truly meant when it recently stated that the whole of the BOR was "entrenched by article 39 of our constitution the Basic Law", see *Swire Properties Ltd and Others v Secretary for Justice* [2003] HKEC 840, para 53 (CFA).

any restrictions on them must be prescribed by law and not contravene the ICCPR as applied to Hong Kong. If a restriction infringes the BOR and falls afoul of either one of these safeguards, the restriction will have also infringed Article 39 of the Basic Law, at which point, the constitutional duty on the courts to declare the law invalid is triggered.²⁴ Given the present similarity in the content between the BORO and the ICCPR as applied to Hong Kong, an infringement of the former will invariably constitute a contravention of the latter, thereby triggering the second safeguard.²⁵ This explains the mechanism by which the Court of Final Appeal finds “a statutory provision is liable to be constitutionally invalidated on the ground of inconsistency with the BOR.”²⁶ In other words, it is only through the vehicle of Article 39 that a breach of the BOR becomes a breach of the Basic Law.

The BORO is not the only source of rights and freedoms enjoyed by Hong Kong residents as the Basic Law itself provides for a number of express rights and freedoms. In *Bahadur* the Court of Final Appeal had to consider, for the first time, what effect the two restriction clauses in Article 39 had on the application of Basic Law rights. The freedom invoked by *Bahadur* was one expressly provided for in the Basic Law (ie Article 31) but not in the BOR.²⁷ Thus, earlier jurisprudence concerning rights in the BORO was inapplicable.²⁸

At a theoretical level, three different approaches were open to the Court in applying restrictions to Basic Law rights. The first approach, which was the one put forward by the Government, conceives Article 39 as a general limitations clause that permits rights and freedoms to be restricted once the condition in each of the two restriction clauses are satisfied. The second approach, which seems to be the one adopted by the Court, asserts that only those Basic Law rights that overlap with rights in the ICCPR as applied to Hong Kong can be restricted in the manner proposed by the first approach,

²⁴ In *Ng Ka Ling and Others v Director of Immigration* (1999) 2 HKCFAR 4, 25, the Court stated the duty in the following terms: Hong Kong courts “have the jurisdiction to examine whether legislation enacted by the legislature of the Region or acts of the executive authorities of the Region are consistent with the Basic Law and, if found to be inconsistent, to hold them to be invalid. The exercise of this jurisdiction is a matter of obligation, not of discretion so that if inconsistency is established, the courts are bound to hold that a law or executive act is invalid at least to the extent of the inconsistency.”

²⁵ But this would not be the case if additional rights were added to the BORO.

²⁶ See *Lau Cheong v HKSAR* (n 20 above), para 32.

²⁷ The BOR’s Art 8(4), which provides that “[n]o one who has the right of abode in Hong Kong shall be arbitrarily deprived of the right to enter Hong Kong”, did not apply to *Bahadur*, who was not a permanent resident and did not enjoy a right of abode. In *The Association of Expatriate Civil Servants of Hong Kong v The Chief Executive* [1998] 1 HKLRD 615 (CFI), Art 8(3), which protects the right of everyone to leave Hong Kong, was found to have been infringed by an administrative provision that restricted this right for civil servants.

²⁸ The Court of Final Appeal has considered restrictions on the following rights or freedoms under the BOR: freedom of expression (*HKSAR v Ng Kung Siu* (n 20 above)), right to a fair trial (*HKSAR v Lee Ming Tee and Another* (2001) 4 HKCFAR 133) and the right to take part in the conduct of public affairs (*Secretary for Justice and Others v Chan Wah and Others* (2000) 3 HKCFAR 459).

while rights exclusive to the Basic Law are subject to an autonomous restriction analysis. The third approach requires all express Basic Law rights to be subject to an autonomous restriction analysis, irrespective of whether there is a parallel right in the BOR. Under this approach, the two restriction clauses act only as safety nets to ensure, in accordance with the principle of legal certainty, that the level of rights protection does not fall below the standards in the ICCPR as applied to Hong Kong.

While the Court can be applauded for rejecting the first approach, it is regrettable that it did not go beyond the second. As will be argued below, it is the third approach that is most protective of human rights because it removes the ICCPR as a possible impediment to the development of human rights standards in Hong Kong. It is also the one that is most coherent according to general principles of interpretation. Each of these approaches will be discussed in greater detail below.

A) First Approach: Article 39 as a General Limitations Clause

In *Bahadur*, the Government submitted that Article 39 was a general limitations clause that permitted constitutional rights and freedoms to be restricted so long as the two conditions (ie the “prescribed by law” and non-contravention of treaties as applied to Hong Kong conditions) in the last two sentences were satisfied. Accordingly, as accepted by the judge at first instance, the first condition was met because the statutory scheme had been provided by law, and the second condition did not apply since the right was not found in the BOR (and even if it was, the exception clause in s. 11 of the BORO made it inapplicable).²⁹

Wisely, the Court of Final Appeal rejected the suggestion that Article 39 was a general limitations clause. Rather, applying a generous approach, the Court held that the last two sentences of Article 39 are “protective of the rights and freedoms of Hong Kong residents.”³⁰ When concerned with a right exclusive to the Basic Law, it was not enough to apply the two conditions in Article 39 to determine if the right could be validly restricted. In other words, these two provisions were necessary but not sufficient conditions to the valid restriction of an exclusive Basic Law right. This reaffirms the notion expressed earlier that the two restriction clauses should be seen as constitutional safeguards.

The Court’s decision on this point is sensible and protective of individual rights. As the Chief Justice noted, had the Government’s position been

²⁹ See *Bahadur* (n 6 above (CFI)). Section 11 of the BORO implements one of the United Kingdom’s reservations to the ICCPR and provides that “[a]s regards persons not having the right to enter and remain in Hong Kong, this Ordinance does not affect any immigration legislation governing entry into, stay in and departure from Hong Kong, or the application of any such legislation.”

³⁰ See *Bahadur* (n 6 above (CFA)), para 27.

accepted, additional rights in the Basic Law could be “swept away by domestic legislation”.³¹ This made such rights “much less secure than the rights in the [BOR]”, and “[t]his could not have been the intention of the Basic Law.”³² The Chief Justice affirmed that:

“[t]he intention of the Basic Law was to entrench constitutionally the rights and freedoms in chap. III, rights and freedoms which are essential to Hong Kong’s separate system, and the courts have the duty of safeguarding and protecting them by adopting a generous approach to their interpretation.”³³

The correctness of the decision not to interpret Article 39 as a general limitations clause is reaffirmed when one compares the language used in that article to the well-established general limitations clause in s. 1 of the Canadian Charter of Rights and Freedoms (Canadian Charter), which provides that the Canadian Charter “guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.”³⁴ The terms of this section, unlike those of Article 39, make it clear that all Canadian Charter rights and freedoms are subject to reasonable limits prescribed by law. Canadian jurisprudence has developed a single test of limitation that considers two criteria: the sufficient importance of the objective behind the prescribed law and the proportionality between the means used to achieve the objective and the interference with the right or freedom.³⁵

B) *Second Approach: Overlapping Rights*

Central to the second or “overlapping rights” approach, which appears to be the one applied by the Court, is the classification of Basic Law rights. The following critical passage from the decision sets out the scheme of classification:

“A right may be provided for (i) in both the Basic Law and the [BOR]; or (ii) only in the Basic Law and not in the [BOR]; or (iii) only in the [BOR] but not in the Basic Law. An example of (i) is the freedom of speech or the freedom of expression. It is to be found both in the Basic Law (Article

³¹ *Ibid.*, para 29.

³² *Ibid.*

³³ *Ibid.*

³⁴ Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c 11.

³⁵ There are three steps to the proportionality test. First, it must be shown that measures adopted are rationally connected to the objective. Second, the means should impair the right or freedom “as little as possible”. Lastly, even if the first two steps are passed, there must be an overall proportionality between the deleterious effects on the right or freedom in question and the importance of the objective. See generally *Regina v Oakes* [1986] 1 SCR 103, 138–140; Trakman, L. E., Cole-Hamilton, W. and Gatien, S., “R. v Oakes 1986–1997: Back to the Drawing Board” (1998) 36 *Osgoode Hall LJ* 83.

27) and in the [BOR] (Article 16). Here, one is concerned with the right to travel and the right to enter conferred on non-permanent residents. These rights are an example of (ii) above. They are not provided for and are additional to those in the [BOR]. They are created by the Basic Law and are only provided for therein.”³⁶

From this passage, the Court appears to have defined two categories of Basic Law rights. First, there are rights exclusive to the Basic Law, in the sense that they are found only in the Basic Law and not in the BOR. In this article, these rights will be referred to as “exclusive Basic Law rights”. Secondly, there are Basic Law rights that find a parallel right in the BOR. These rights will be referred to as “parallel Basic Law rights”.

In *Bahadur*, the Court was concerned with an exclusive Basic Law right. The Court held that for such rights, the second safeguard in Article 39 had “no application because the rights in question are conferred by the Basic Law and not by the ICCPR as applied to Hong Kong.”³⁷ The first safeguard applied to ensure that any proposed restriction was “prescribed by law”. As already mentioned, the Court rejected the argument that satisfying the first safeguard was sufficient to restrict justifiably an exclusive Basic Law right. On the proper approach to follow, the Court made these important comments:

“The question of whether rights found only in the Basic Law can be restricted and if so the test for judging permissible restrictions would depend on the nature and subject matter of the rights in issue. This would turn on the proper interpretation of the Basic Law and is ultimately a matter for the courts.”³⁸

The comments suggest an autonomous approach to restrictions, specific to the right in question. Clearly, without further guidance, such an approach raises concerns about legal certainty and consistency in decision-making, particularly since most Basic Law rights are framed in unqualified language. Indeed, one of the virtues of the Canadian approach is that a single limitations clause ensures that a consistent and uniform test of justification is applied to all prescribed Canadian Charter breaches. But unlike the Canadian approach, there is a suggestion in the comments that some exclusive Basic Law rights may in fact be absolute and not subject to any restrictions. The Court does not suggest any possible candidates or discuss the manner in which

³⁶ See *Bahadur* (n 6 above (CFA)), para 26.

³⁷ *Ibid.*, para 28.

³⁸ *Ibid.*

an absolute right is to be identified.³⁹ Hopefully, with time, common consistent principles governing the identification of absolute rights and permissible restrictions will develop.

Unfortunately, few insights on the approach to restrictions are gained from the Court's application of the law to the circumstances of *Bahadur*. It is noteworthy that the Court did not adopt, as a knee-jerk reaction, the restriction clause in Art 8(3) of the BOR that applies to the right of everyone to leave Hong Kong. The clause provides that the freedom to leave "shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order (*ordre public*), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in this Bill of Rights." Rather, the Court found it unnecessary to consider whether the rights in Article 31 could be subject to restrictions and if so, the test for determining permissible restrictions. This was because the application of the statutory scheme to *Bahadur* amounted to more than a restriction on his right: it was "totally inconsistent with his rights and indeed had the effect of abrogating the rights in question."⁴⁰ By applying this doctrine of abrogation, distinct from the notion of restriction, the Court was able to declare the legislation as applied to *Bahadur* unconstitutional by looking only at the impact on the right without engaging in any balancing exercise from the point of view of the importance of the legislative objective.

It is laudable for the Court to recognise that rights and freedoms have a tolerance point beyond which no justification on policy grounds can be made for their interference. Nevertheless, a doctrine of abrogation in the context of human rights can be an elusive one. As some rights are defined quite broadly, it is often difficult to determine if and when there is an abrogation. For example, it is very difficult to tell when one's freedom of expression has been abrogated and not merely restricted.⁴¹ Thus, it seems the concept is only meaningful when concerned with rights or freedoms protecting very specific and unqualified conduct or circumstances (eg entering a country), for which their abrogation is more easily discernible.⁴²

³⁹ Some obvious candidates for absolute rights are the non-derogable ones (ie those for which no derogation is possible even in times of public emergency) set out in Art 4 of the ICCPR.

⁴⁰ See *Bahadur* (n 6 above (CFA)), paras 37–38; see also Bokhary PJ's concurring decision, *ibid.*, paras 47–49.

⁴¹ Does a law prohibiting cigarette advertising on television abrogate the advertiser's freedom of expression? Or, is it necessary to have a complete ban on cigarette advertising? Does abrogation require going even further, such as a measure that completely stifles expression of all kind for all purposes?

⁴² Even here, it may not always be so clear. For example, imagine in *Bahadur's* case that the immigration law did not remove *Bahadur's* right to land upon his mere departure but only if he stayed outside of Hong Kong for continuous period of more than two years. Where the resident is prevented from entering after being away for two years, an abrogation is less clear; the more natural reaction is to consider the justification for the two year policy.

As for restrictions on parallel Basic Law rights, the Court made *obiter* comments suggesting that the approach to be followed was the one put forward by the Government, ie the first approach discussed above. In its argument, the Government had relied on the following passage from *Secretary for Justice v The Oriental Press Group Ltd and Others*, a decision of the Court of Appeal: “The effect of Article 39 is to permit restrictions on the rights protected in Chap. III, provided that those restrictions are provided by law (for example, Article 16(3) of the Bill of Rights) and are compatible with various international instruments, including the [ICCPR].”⁴³ This passage appeared to assist the Government as it suggested that the two restriction clauses constituted an exhaustive limitations test.

The Court of Final Appeal properly distinguished this case on the basis that it concerned only a parallel Basic Law right and not an exclusive one. But without further criticism of the substance behind the statement, the Court left the impression that the Government’s approach is the correct one for parallel Basic Law rights. As will be developed below, it is submitted that this approach based on overlapping rights is wrong. The classification exercise which is central to this approach is fundamentally flawed. Without justification, the approach takes all of the United Kingdom’s reservations to the ICCPR for Hong Kong and imports them to parallel Basic Law rights. As well, the approach is inconsistent with the Court of Final Appeal’s stated principle that the ICCPR only provides for minimum standards. Each of these arguments will be discussed in turn.

1. A flawed classification exercise

The most immediate difficulty with the classification exercise is its uncertain definition. In categorising Basic Law rights, the Court on occasion refers to the BOR and, on other occasions, to the ICCPR as applied to Hong Kong as marking the distinction between exclusive and parallel Basic Law rights.⁴⁴ If the Court intended to use “ICCPR as applied to Hong Kong” and “Bill of Rights” interchangeably, this was a mistake. The application of the second safeguard in Article 39 expressly requires reference to the ICCPR as applied to Hong and not to the BOR. The latter, as a creature of statute, can be modified by the legislature, with rights therein being repealed in whole or in

⁴³ [1998] 2 HKLRD 123, 164–165 (CA).

⁴⁴ See generally *Bahadur* (n 6 above (CFA)), paras 26–29. The Court classifies according to the BOR at para 26 (see text accompanying n 36 above). But subsequent to this, the Court classifies according to the ICCPR as applied to Hong Kong on five separate occasions, see *ibid.*, paras 27–29. For example at para 28, the Court writes “[i]n the context of rights contained only in the Basic Law, the second requirement in Art 39(2), which any purported restriction must satisfy, has no application because the rights in question are conferred by the Basic Law and not by the ICCPR as applied to Hong Kong.”

part from time to time.⁴⁵ Indeed, if parallel Basic Law rights were defined by reference to the BOR, then the repeal of the BORO would eliminate the category of parallel rights entirely. All Basic Law rights would then become exclusive rights and this in turn would render the second safeguard otiose since it does not apply to exclusive Basic Law rights. Such interpretive subordination to ordinary legislative change hardly befits a constitutional instrument.

The problem is even more acute when seen from the opposite perspective, ie where the legislature decides to add new but restricted rights to the BOR that are parallel to an exclusive Basic Law right. This could have the effect of conferring a restriction on a previously exclusive Basic Law right without having to amend the constitution.⁴⁶ It follows that any meaningful classification of Basic Law rights for the purposes of applying the second safeguard must be by reference to the ICCPR as applied to Hong Kong. As stated earlier, the importance of the BORO lies in its conferral of rights and freedoms enjoyed by Hong Kong residents. This importance should not be underestimated, since there must be an enjoyed right or freedom before the two safeguards in Article 39 are applied to determine if there is a constitutional breach.

If the classification of Basic Law rights is to be clear and coherent, the phrase, "ICCPR as applied to Hong Kong", requires an autonomous meaning. Up to this point, there have been few judicial authorities which have attempted to treat this phrase in this manner. There has been a tendency to treat "ICCPR as applied to Hong Kong" synonymously with "BORO". But while the latter incorporates the former and confers enjoyed rights and freedoms, they should not be considered the same since the content of the BORO can be subject to ordinary legislative change.⁴⁷

⁴⁵ While, practically speaking, this seems unlikely to occur; theoretically, it is conceivable. Nevertheless, there would be international and domestic legal consequences. To the extent that other laws and policies fail to provide for the protection required by the ICCPR as applied to Hong Kong, there could be consequences under the international law of state responsibility. More significantly, it could be said that the legislature is in breach of its constitutional obligation under Art 39 of the Basic Law to implement and maintain in force the provisions of the ICCPR. But in this respect, the legislature would probably have a considerable margin of discretion in deciding how to effect the implementation.

⁴⁶ Take the example of the freedom to travel. Presently Art 8(4) of the BOR only confers the right to enter Hong Kong on persons who have a right of abode (*see* n 27 above). If Art 8(4) was amended to apply to all residents (whether or not they had the right of abode), there would be a parallelism between this article and Art 31 of the Basic Law. If the erroneous approach of identifying parallel Basic Law rights by reference to the BOR was followed, it would mean that Art 31 becomes a parallel right. Imagine further that the legislation, in extending Art 8(4) to all residents, imposed a restriction that, if non-permanent residents were to enjoy the right, they would need to show "close personal ties" to the HKSAR. Following the overlapping rights approach, this qualification enacted by ordinary legislation would, by virtue of Art 39 of the Basic Law, automatically adhere to the parallel Basic Law right.

⁴⁷ *See generally*, Byrnes (n 18 above), pp 333–335 on the historical significance of Art 39 for the enactment of the BORO which tends to support this position.

The attribution of an autonomous meaning to “ICCPR as applied to Hong Kong” naturally begins with the ICCPR itself. The challenge lies in identifying the departures from the ICCPR based on the qualifier, “as applied to Hong Kong”. Theoretically, departures from the ICCPR can result in either a net increase or decrease in the protection of civil and political rights. Good examples of departures resulting in a decrease in protection are the reservations made by the United Kingdom in respect of Hong Kong upon ratification of the ICCPR in 1976.⁴⁸

A more difficult issue concerns departures appearing in the implementing legislation. More specifically, does the qualifier “as applied to Hong Kong” absorb further restrictions appearing in the legislation intended to implement the treaty obligations? In the context of the BORO, a good example is section 7, which restricts the scope of the rights, beyond that of the ICCPR, by making them only applicable against governmental authorities.⁴⁹ However, to include such departures would be tantamount to defining the ICCPR as applied to Hong Kong by the BORO, and, as already argued, the vagaries of ordinary legislation should not be allowed to control the meaning of a constitutional concept and phrase.⁵⁰ It follows from this that even enhanced rights and freedoms implemented by the legislature (although none is presently apparent in the BORO) should not be included within the scope of “ICCPR as applied to Hong Kong”. Consequently, it is submitted that the only

⁴⁸ At the time of the handover, there were nine reservations and declarations applicable to Hong Kong, which were originally made by the United Kingdom on ratification. These reservations were accepted by China and continue to apply. China did not insist on imposing any further reservations. The nine reservations pertain to the supremacy of the United Nations Charter if conflict arises concerning self-determination, restrictions on armed forces personnel and persons detained in penal establishments, the mixing of adults and juveniles in custody, movement from one territory or dependency to another, the application of immigration legislation to persons not having the right to enter and remain, removal of procedural rights in alien deportation procedures, the right not to introduce further legislation to prohibit propaganda for war and advocacy of hatred, a sufficient connection precondition in nationality laws, and Art 25(b) not requiring an elected Executive or Legislative Council in Hong Kong. The text of the reservations can be found in Byrnes and Chan (n 1 above), pp 261–262.

⁴⁹ In its interpretation of s 7, the Hong Kong Court of Appeal confirmed that the BOR did not apply to inter-citizen disputes in *Tam Hing Yee v Wu Tai Wai* (1991) 1 HKPLR 261 (CA). For background on and criticism of s 7, see Byrnes, Andrew, “The Hong Kong Bill of Rights and Relations between Private Individuals”, in Chan, Johannes and Ghai, Yash (eds), *The Hong Kong Bill of Rights: a Comparative Approach* (Singapore: Butterworths, 1993), pp 71–105. A private member’s bill to reverse the effect of *Tam Hing Yee*, never came into force, see Hong Kong Bill of Rights (Amendment) Ordinance 1997 (107 of 1997), suspended by Legislative Provisions (Suspension of Operation) Ordinance 1997 (126 of 1997), and repealed by Hong Kong Bill of Rights (Amendment) Ordinance 1998 (2 of 1998). On the horizontal obligations of the ICCPR, see Joseph, S., Schultz J. and Castan, M., *The International Covenant on Civil and Political Rights: Cases, Materials, and Commentary* (Oxford: Oxford University Press, 2000), pp 23–24.

⁵⁰ Indeed the Court of Final Appeal applied this principle in *Commissioner of Rating and Valuation v Agrila Ltd and Others* (2001) 4 HKCFAR 83, 112 (CFA) where it held that the meaning of “rateable value” in Art 121 of the Basic Law was not confined to the same meaning given to the expression as found in ordinary legislation. The principle was also applied in *Prem Singh v Director of Immigration* [2003] 1 HKLRD 550, paras 6–8 per Bokhary PJ, para 63 per Ribeiro PJ (CFA).

sensible and constant meaning for “ICCPR as applied to Hong Kong” is the body of rights in the ICCPR subject to any applicable reservations. In other words, the ICCPR as applied to Hong Kong should simply be read as the ICCPR with all its applicable reservations to Hong Kong.⁵¹

The theory behind the classification exercise and the overlapping rights approach is that where the same right or freedom is found in the Basic Law and ICCPR as applied to Hong Kong, all the express and implied restrictions on the right or freedom in the latter should be applied to that of the former. This theory assumes it is possible to find the identical right or freedom in the two instruments (ie the existence of a parallel right). However, the assumption is attenuated by a number of factors. Most significantly, the rights in the two instruments are often cast in such different language that the task of finding identical rights is more fiction than reality. Take the presumption of innocence. Framed as the right of a person charged with a criminal offence to be “presumed innocent until proved guilty according to law” in Article 14(2) of the ICCPR, the Basic Law requires that those lawfully arrested be “presumed innocent until convicted by the judicial organs” (Article 87). Are these meant to be the same right, or do the subtle differences in wording, particularly having regard to the Chinese origins of the Basic Law, have significance? Sometimes the right in the ICCPR uses qualified language which is non-existent in the similar Basic Law right.⁵² Sometimes it is the other way around.⁵³

The arrangement of rights can also vary. For example, Article 27 of the Basic Law compacts a number of different freedoms together, including the freedom of speech, association and assembly.⁵⁴ Contextually, one would aim to achieve some consistency in interpreting the rights and freedoms in a single article. However, the ICCPR separates these freedoms into three separate articles each with a distinct limitations clause.⁵⁵ In addition, Article 27 contains other specific freedoms not expressly included in the ICCPR, such as the freedom of the press, of publication, of procession, of demonstration and to strike. Again, as a matter of interpretation, the presence of these additional freedoms in the same article could very well affect the meaning and applicable restrictions on all the freedoms in the article.

⁵¹ Professor Ghai maintains the same understanding, see Ghai (n 18 above), pp 51, 406–409.

⁵² For example, the right to vote and be elected in Art 25(b) of the ICCPR has the qualifier “without unreasonable restrictions”, which is absent from the similar right in Art 26 of the Basic Law. Instead, Art 26 has the more ambiguous clause, “in accordance with law”.

⁵³ For example, the freedom and privacy of communication in Art 30 of the Basic Law is qualified by a clause permitting restrictions for reasons of public security or criminal investigation. The similar right in Art 17(1) of the ICCPR has no identical qualification.

⁵⁴ Art 27 provides that “Hong Kong residents shall have freedom of speech, of the press and of publication; freedom of association, of assembly, of procession and of demonstration; and the right and freedom to form and join trade unions, and to strike.”

⁵⁵ See Arts 19(3) [freedom of expression, etc], 21 [right of peaceful assembly] and 22(2) [freedom of association] of the ICCPR.

Another important right that presents challenges to the classification exercise is the right to legal representation. It is protected in strong unqualified terms in Article 35 of the Basic Law:

“Hong Kong residents shall have the right to confidential legal advice, access to the courts, choice of lawyers for timely protection of their lawful rights and interests or for representation in the courts, and to judicial remedies.

Hong Kong residents shall have the right to institute legal proceedings in the courts against the acts of the executive authorities and their personnel.”

While the whole of Article 35 is not found in the ICCPR, aspects of it are found in Articles 14(3)(d) (ie pertaining to the right of criminal defendants to defend themselves through legal assistance of their choosing, to be informed of this right and to have legal assistance assigned where the interest of justice so requires) and 14(3)(e) (ie pertaining to the right to examine witnesses in criminal cases). The chapeau of Article 14(3) describes these rights as only “minimum guarantees”. Does the classification exercise require the rights in Article 35 to be treated as parallel ones when exercised in criminal proceedings and exclusive ones in all other situations? If so, this could lead to different approaches to restrictions and possibly to different levels of protection depending on the factual context. It is difficult to accept that the scope of protection under Article 35 might vary depending on the context in which it is exercised, especially if the change in context is only from criminal to non-criminal proceedings. More difficult to understand is why such a unique and broad statement of the right to legal representation in the Basic Law should have to be bound to a much more circumscribed right in the ICCPR.

There seems to be an artificiality to the classification of Basic Law rights for the purpose of determining the approach to restriction. While it is true that a number of Basic Law rights are easily discernible as exclusive ones, the problem lies in trying to identify a coherent class of parallel Basic Law rights when there is so much variability in how rights and freedoms are expressed in the two instruments.⁵⁶ This is a problem that probably cannot be resolved since parallel Basic Law rights and ICCPR rights have fundamentally different origins.

⁵⁶ In addition to the freedom to travel (Art 31), some other obvious exclusive rights include the right of abode (Art 24), freedom of the press (Art 27), freedom of procession and of demonstration (Art 27), right to strike (Art 27), freedom from arbitrary or unlawful imprisonment (Art 28), freedom from arbitrary or unlawful search of the body of any resident (Art 28), right to judicial remedies (Art 35), right to institute legal proceedings against executive authorities (Art 35), and right to compensation for lawful deprivation of property (Art 105). For additional economic, social and cultural rights, see n 59 below.

The rights and freedoms in the ICCPR arose out of a multilateral process in the United Nations, which was ignited by the atrocities in the Second World War and solidified in the 1950s to 1960s during the time of the Cold War. It was also a process that treated civil and political rights separately from economic, social and cultural rights, the latter rights seen as being more promotional in nature and the subject of aspiration rather than enforcement.⁵⁷ This contrasts sharply to the historical background of the rights and freedoms in the Basic Law. Basic Law rights are traced to obligations in the bilateral Joint Declaration. These traceable rights and freedoms are mentioned in the Joint Declaration separately and distinctly from the single reference to the ICCPR.⁵⁸ Another important difference is that the Joint Declaration and Basic Law guarantee civil and political rights along side social, economic and cultural rights.⁵⁹ Professor Yash Ghai has noted this unique quality of the Basic Law:

“The Bill of Rights is confined to what might be called civil and political rights. The reach of the Basic Law is wider, encompassing economic, social and cultural rights also. The Basic Law represents a much better balance of rights, entitlements and duties, and is more sensitive to the truth that human dignity is a matter not merely of abstract rules but of social and economic conditions when these abstract rules become real.”⁶⁰

As one might imagine, the drafting process behind the Basic Law was also quite different from that of the ICCPR. The drafting of the Basic Law, as a Chinese statute, was a local exercise conducted by a body known as the Basic Law Drafting Committee, consisting of members from both the mainland and Hong Kong.⁶¹ Thus, the distinct origins of the Basic Law and ICCPR support a theory that the differences seen in how rights in the two instruments are expressed and arranged were intended to have legal significance. This theory renders the classification exercise futile.

2. Unjustified importation of reservations

The overlapping rights approach permits restrictions on parallel Basic Law rights if the restriction is prescribed by law and not in contravention of the

⁵⁷ On the drafting history of the ICCPR, see Nowak, Manfred, *U.N. Covenant on Civil and Political Rights: CCPR Commentary* (Kehl: N. P. Engel, 1993), pp XVII–XXVIII.

⁵⁸ See Joint Declaration (n 18 above), clause 3(5) and Annex I, section XIII.

⁵⁹ Some notable economic, social and cultural rights in the Basic Law include the right to strike (Art 27), freedom of choice of occupation (Art 33), freedom to engage in academic research, literary and artistic creation, and other cultural activities (Art 34), right to social welfare (Art 36), traditional rights and interests of indigenous inhabitants (Art 40), right to compensation for lawful deprivation of property (Art 105), and educational freedoms (Art 137).

⁶⁰ See Ghai (n 18 above), pp 422–423.

⁶¹ See generally, *ibid.*, pp 35–60.

ICCPR (amongst other treaties) as applied to Hong Kong. Reservations to the ICCPR have the effect of precluding contraventions of the ICCPR. It follows that the overlapping rights approach effectively imports all of the United Kingdom's reservations on ICCPR rights and freedoms to the parallel rights and freedoms in the Basic Law.⁶² Some Hong Kong courts have already applied ICCPR reservations to Basic Law rights. In cases involving family separation due to immigration removal, lower courts have applied the reservation immunising immigration legislation to the family rights provision (Article 37) of the Basic Law, irrespective of whether the family member invoking the right has the right to remain.⁶³ It is submitted that this importation is without justification and could not have been intended by the Basic Law.

Reservations to the ICCPR were intended to attach, and should remain attached, only to the rights and freedoms in the ICCPR. There is no indication in the Basic Law or Joint Declaration to suggest that these reservations, which were imposed by one sovereign, were to be parasitic on the rights and freedoms in a constitutional instrument made by another sovereign. The reservations reflected in the ICCPR as applied to Hong Kong continue to have significance because most have been directly incorporated in the BORO. This has the effect of limiting what rights and freedoms can be enjoyed by Hong Kong residents and others under the BORO. But it is neither intuitive nor logical that these same reservations should restrict the rights enjoyed under the Basic Law, whose origins are so markedly different from those of the ICCPR.

More significantly, the Basic Law includes some express language from time to time to indicate restrictions and qualifications on certain rights.⁶⁴ Had the Basic Law intended the reservations to the ICCPR to apply to the rights in Chapter III and elsewhere, it could have easily made express reference to such reservations. An example to illustrate this point is the right of permanent residents to vote and stand for elections. The right in the ICCPR as applied to Hong Kong was specifically reserved so as not to "require the establishment of an elected Executive or Legislative Council in Hong Kong".⁶⁵ However, there is no clear indication in either the Joint Declaration or Basic Law that this same reservation was intended to apply to the

⁶² See summary of reservations (n 48 above).

⁶³ See *Santosh Thew and Another v Director of Immigration* [2000] 1 HKLRD 717, 721–722 (CFI), foll'd in *Rai and Another v Director of Immigration* [2000] 1 HKLRD C19 (CFI), but see *Chan Mei Yee and Another v Director of Immigration and Another* [2000] HKEC 788 (CFI), which seems to cast doubt on this approach.

⁶⁴ See the example mentioned (n 53 above). Also, the Basic Law uses the phrase "in accordance with law" in selective places suggesting a qualification on rights, see Arts 4, 6, 24, 26, 36, 41, 105, 141 and 154.

⁶⁵ See summary of reservations (n 48 above).

similar Basic Law right in Article 26. On the contrary, the Joint Declaration provides that the “legislature ... shall be constituted by elections”, and the Basic Law directs that the method of elections be in “light of the actual situation” in Hong Kong, “in accordance with the principle of gradual and orderly progress”, and ultimately “by universal suffrage”.⁶⁶ The transfer of sovereignty appears to have occasioned a political and jurisprudential shift in conceiving the relationship between political rights and an elected legislature. So while the British, by its reservation to the ICCPR, perceived political rights as being inconsistent with an elected legislature, the Chinese Government, by its promulgation of the Basic Law, perceives political rights in Hong Kong as being in harmony with an elected legislature.⁶⁷

One might suggest that Article 39 demonstrates an intention to import all the ICCPR reservations to the Basic Law. Recall the language of that article, that “[t]he rights and freedoms enjoyed by Hong Kong residents shall not be restricted unless as prescribed by law” and that “[s]uch restrictions shall not contravene the provisions of the [ICCPR as applied to Hong Kong]”. It is noteworthy that these two restriction clauses are framed in the negative, rather than in the positive or permissive form. Hence from the plain language of these clauses, it follows that a precluded contravention of the ICCPR due to a reservation applied to Hong Kong simply means that the prescribed law has failed to breach Article 39 of the Basic Law. It says nothing about breaching the Basic Law article conferring the right or freedom in question; this is a separate issue. Recall that this was the interpretation of Article 39 applied by the Court of Final Appeal in relation to exclusive Basic Law rights. However, there is no reason why the interpretation should not be the same for all Basic Law rights. As Article 39 is “protective of rights and freedoms” according to the Court, the two restriction clauses should be seen as constitutional safeguards providing a safety net for, rather than a bar on, human rights standards.

Finally, one might argue that by its acceptance of the continued application of the ICCPR with all its reservations, China intended the reservations to apply generally to all rights and freedoms enjoyed in Hong Kong.⁶⁸ The difficulty with this argument is that while this may in fact represent the political intention and policy of China, for that intention to translate into a

⁶⁶ See Joint Declaration (n 18 above), Annex I, section I; Basic Law, Art 68.

⁶⁷ On the evolving meaning of the right to vote, see Young, Simon, “The Meaning of the Right to Vote in Hong Kong” (1997) 42 *McGill Law Journal* 649.

⁶⁸ By contrast, an intention of this kind was made particularly clear in the context of the Convention on the Rights of the Child, adopted 20 Nov 1989, UNTS 1577, 3. China became a party to this Convention in 1992. At the time of the handover, China notified the Secretary-General of the United Nations that the Convention with an earlier reservation made by China would also apply to Hong Kong. In the notification, China made further declarations reserving rights. Two of those declarations were the same ones applying to the ICCPR in respect of immigration legislation and the mixing of juvenile and adult detainees (see n 48 above).

restriction on enforceable rights, it must pass the test of legality. Article 39 requires all restrictions on rights and freedoms to be prescribed by law, and this condition requires a “sufficient degree of precision”, in terms of both the content of the restriction and its applicability, to give the individual “some indication as to how he may regulate his conduct”.⁶⁹ As already stated, neither the Basic Law nor the Joint Declaration contains a sufficiently clear indication that the reservations to the ICCPR were meant to be of general application.

3. ICCPR provides only minimum standards of protection

In *Bahadur*, the Court stated that the “ICCPR as applied to Hong Kong as incorporated by the [BOR] only provides for minimum standards for rights which are internationally recognised. The Basic Law can provide for rights additional to such minimum standards.”⁷⁰ While the Court made this statement in reference to exclusive Basic Law rights, it seems applicable to all Basic Law rights. If this is so, the Basic Law has the potential to provide a higher standard of protection, even for rights which appear to have a counterpart in the ICCPR. This position would seem to be sensible when one has regard to the origins and nature of the ICCPR and the contextual development of a constitutional instrument.

The marked differences in the origins of the ICCPR and Basic Law have already been discussed. The ICCPR was forged at a time when world opinion was far more divergent on the content of fundamental human rights and the means by which to secure them. Yet, the gross human rights violations seen in the Second World War compelled states to come together to try to find common denominators for the legal protection of human rights at both the international and domestic level. The climate of polarised economic and political ideologies at the time inevitably pushed the process towards agreement on generally the lowest possible common denominators. Indeed, the facility of allowing reservations was an indicator that this process had valued universality of participation at the cost of varied standards of protection and enforcement.⁷¹ The jurisprudence of the Human Rights Committee in applying the ICCPR also strives to achieve minimum universality. As one former member of that Committee has written:

⁶⁹ See *Bahadur* (n 6 above (CFA)), para 34, applying *Shum Kwok Sher* (n 20 above), paras 60–65. More recently, see *Lau Wai Wo v HKSAR* [2004] 1 HKLRD 372, para 36 (CFA).

⁷⁰ See *Bahadur* (n 6 above (CFA)), para 25. In *Director of Lands v Yin Shuen Enterprises Ltd and Another* [2003] 2 HKLRD 399, para 1 (CFA), Bokhary J] stated, in relation to Art 105, that the Basic Law “extends beyond preserving old rights and includes conferring new ones.”

⁷¹ It is only in recent times that it has been possible to have widely accepted human rights related treaties that do not permit reservations, see the Rome Statute of the International Criminal Court, 17 Jul 1998, UN Doc A/CONF.183/9*, reprinted in (1998) 37 *ILM* 999.

“[t]he treaty bodies aim at consistency in their own interpretation of the instruments and the standards they include, and consistency in the application of those standards by States Parties, whatever their region or stage of development. The [Human Rights Committee], for example, considers that the rights and freedoms of the Covenant are universal minimum standards, which should have the same meaning for everyone.”⁷²

The ICCPR itself contemplates that states may on their own enact (or have enacted) greater protections for human rights, and accordingly, Article 5(2) prohibits restrictions on or derogations from such rights on the basis that the ICCPR does not recognise them or recognises them to a lesser extent.

The rights and freedoms in the Basic Law, in their varied nature ranging from civil and political rights to social, economic and cultural rights, do not purport to be merely minimum standards; they form the very fabric of Hong Kong’s civil society. The Court of Final Appeal has recognised on several occasions that the rights in Chapter III of the Basic Law are “constitutional guarantees for the freedoms that lie at the heart of Hong Kong’s separate system.”⁷³ The Basic Law is Hong Kong’s constitution for 50 years (from 1997) and possibly beyond. The suggestion that over the course of this significant period of time, the Basic Law cannot confer a higher degree of protection for civil and political rights than those found in the ICCPR is inimical to the widely accepted notion that constitutions are living instruments whose meaning can evolve in light of changing social circumstances and values.⁷⁴

C) *Third Approach: Basic Law Rights as Autonomous Rights*

Given the many deficiencies with the first two approaches, the third approach, which conceives an autonomous restriction analysis for all Basic Law rights, is probably the most coherent one. Under this approach, the permissible restrictions on all Basic Law rights are matters of interpretation and will “depend on the nature and subject matter of the rights in issue”.⁷⁵ The two restriction clauses in Article 39 serve a more limited purpose, as safeguards requiring that all permissible restrictions be prescribed by law and not fall below the human rights standards protected in the ICCPR as applied to Hong Kong. In this respect, Article 39 becomes a safety net to ensure that the protection standards in the Basic Law do not fall below generally accepted international standards. Given the enactment of the BORO in 1991, these were standards

⁷² See Elizabeth Evatt’s foreword to Joseph, Schultz and Castan (n 49 above), p viii.

⁷³ See *Ng Ka Ling* (n 24 above), pp 28–29, repeated in *Bahadur* (n 6 above (CFA)), para 3; *Lau Cheong* (n 20 above), para 37; *Director of Immigration v Chong Fung Yuen* (2001) 4 HKCFAR 211, 224.

⁷⁴ The Court of Final Appeal approved of the living instrument principle in *Ng Ka Ling*, *ibid.*, p 28.

⁷⁵ See text accompanying n 38 above.

existent in Hong Kong prior to the transfer of sovereignty. With this approach, the ICCPR as applied to Hong Kong avoids becoming an impediment on the growth and development of the Basic Law as a living instrument. This is important for the development of robustly framed rights such as the right to legal representation in Article 35.

The third approach also divorces the Basic Law from the ICCPR reservations made by the United Kingdom for Hong Kong. The difficulty with reservations to human rights treaties is that they act as trump cards which exclude the application of the right or freedom in question without any argumentation or judicial consideration of the policy reasons for exclusion in the particular circumstances of the case. With an autonomous approach to restrictions, the Government remains free to raise underlying policy arguments, supported by evidence, to justify restrictions on rights, but the acceptance of such arguments is left for judicial balancing on a case by case basis. It follows from this analysis that political and family rights in the Basic Law must be taken seriously and not be trumped merely by playing the reservation 'card'.⁷⁶

If Basic Law rights are seen as autonomous ones with the potential of providing a higher degree of protection than those in the Bill of Rights, the inevitable practical consequence is that claims will flood towards the Basic Law, leaving the ICCPR and BOR to recede slowly into the shadows, like movie stars whose time has come and gone. However, the BOR will not become entirely irrelevant since it presently confers a number of rights which cannot be found in the Basic Law.⁷⁷ Infringement of such rights, as infringements of the ICCPR as applied to Hong Kong, will contravene Article 39 and form the basis for constitutional relief.

Conclusion

It is to be expected that one of the criticisms of the third approach is its inability at present to offer a clear picture of when and how Basic Law rights will be restricted. This degree of uncertainty is not surprising given that the

⁷⁶ Giving a narrow construction of the exception clause in respect of an elected Legislative or Executive Council (BORO, s 13), Hong Kong courts had begun to take ICCPR political rights seriously before the transfer of sovereignty, see *Lee Miu Ling and Another v Attorney General (No 2)* (1995) 5 HKPLR 181, 197–198 (HC). The Court held that s 13 was essentially a “dead letter” given that the British administration had already conferred a system of elections for electing legislators.

⁷⁷ Some notable examples in the BOR include the prohibition against retrospective crimes and penalties (Art 12(1)), right to the lighter penalty (Art 12(1)), right to compensation for unlawful arrest or detention, and miscarriage of justice (Arts 5(5) and 11(5)), prohibition against imprisonment for inability to fulfill contract (Art 7), right to bail (Art 5(3)), right to a public hearing (Art 10), right to be present at trial (Art 11(2)(d)), freedom from double jeopardy (Art 11(6)), right to free interpreter assistance (Art 11(2)(f)), and right to privacy generally (Art 14).

life of the Basic Law is still very much in its infancy. *Bahadur* was the first case before the Court of Final Appeal on the question of restrictions on Basic Law rights other than the right of abode. The Court must be applauded for eschewing the extremely narrow approach put forward by the Government. A fair reading of the judgment suggests that the Court has yet to embrace definitively the overlapping rights approach to restrictions, or at least has not shut the door entirely on the third approach. As this article has argued, any approach that artificially holds back the development and growth of Basic Law rights should be strongly avoided.

With time, there is no doubt the Court of Final Appeal will develop a set of consistent principles for determining permissible restrictions, most likely in the same vein as the balancing test seen in Canada and other jurisdictions. In previous cases, the Court has already applied such a test in the context of rights in the BOR.⁷⁸ More interesting will be the articulation of principles for deciding when and which Basic Law rights may not be subject to restrictions, ie so-called absolute rights. Here the Court will need to tread carefully since the idea of absolute rights, like that of abrogation, shuts out argumentation and judicial consideration of relevant public interests and policies. Just as reservations to human rights treaties can trump rights with little substantive consideration, an overly broad approach to absolute rights and abrogation can trump important societal goals without engaging in a reasoned and careful balancing of competing legitimate interests.

⁷⁸ See cases mentioned (n 28 above).