

**Comparative Constitutional Law –
The Protection of Human Rights under the
Hong Kong Basic Law**

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Contents

Contents	II
Bibliography	III
List of Abbreviations	VI
Table of Laws	VII
1. Introduction	1
2. Background of the Legal System in Hong Kong	1
2.1 Resumption of Chinese Sovereignty and the Joint Declaration.....	1
2.2 Legislative History of the Basic Law	2
2.3 Concept of “One Country, Two Systems”	3
3. Protection of Human Rights in Hong Kong	4
3.1 The Rule of Law	4
3.2 Sources of Human Rights Treaties and their Application	5
3.3 The Role of the Court	7
4. The Basic Law	7
4.1 Human Rights in the Basic Law.....	7
4.1.1 Rights for Whom and Against Whom	8
4.1.2 Scope of Protection.....	9
4.2 Restrictions on Rights.....	11
4.2.1 Scope of Article 39 of the Basic Law and the Status of the ICCPR.....	12
4.2.2 Position of the Courts.....	13
4.2.3 Suspension of Rights.....	14
4.2.4 International and Local Remedies	15
4.3 Interpretation of the Basic Law	15
4.3.1 Division of Power under Article 158 of the Basic Law	16
4.3.2 Different Approaches of Interpretation.....	17
4.4 Specific Rights	18
5. Conclusion	19

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List of Abbreviations

CA	Court of Appeal
CAT	Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment
CEDAW	Convention on the Elimination of All Forms of Discrimination Against Women
CFA	Court of Final Appeal
CFI	Court of First Instance
Et al.	Et alii (and others)
HKCFAR	Hong Kong Court of Final Appeal Reports
HKEC	Hong Kong Electronic Citation
HKLJ	Hong Kong Law Journal
HKLRD	Hong Kong Law Reports & Digest
HKSAR	Hong Kong Special Administrative Region
i.e.	Id est (that is)
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
NPCSC	Standing Committee of the National People's Congress
SDO	Sex Discrimination Ordinance
v.	versus

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Basic Law	Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China, Hong Kong, 1997: Hong Kong Legal Information Institute, http://www.hklii.org/hk/legis/en/ord/2101/ .
Bill of Rights Ordinance	Hong Kong Bill of Rights Ordinance, Hong Kong, 1991: Hong Kong Legal Information Institute, http://www.hklii.org/hk/legis/en/ord/383/ .
CAT	Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, New York, 1984: Bilingual Laws Information System, http://www.ohchr.org/english/law/cat.htm .
CEDAW	Convention on the Elimination of All Forms of Discrimination Against Women, New York, 1980: Bilingual Laws Information System, http://www.ohchr.org/english/law/cedaw.htm .
European Convention on Human Rights	Convention for the Protection of Human Rights and Fundamental Freedoms, Rome, 1950: European Court of Human Rights, http://www.echr.coe.int/echr/ .
ICCPR	International Covenant on Civil and Political Rights, New York, 1966: Bilingual Laws Information System, http://www.ohchr.org/english/law/ccpr.htm .
ICESCR	International Covenant on Economic, Social and Cultural Rights, New York, 1966: Bilingual Laws Information System, http://www.ohchr.org/english/law/cescr.htm .
Joint Declaration	Joint Declaration of the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the People's Republic of China on the Question of Hong Kong, Beijing, 1984: Hong Kong Legal Information Institute, http://www.hklii.org/hk/legis/en/ord/2301/ .

SDO Sex Discrimination Ordinance, Hong Kong, 1995: Hong Kong Legal Information Institute, <http://www.hklii.org/hk/legis/en/ord/480/>.

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the European Community

1. Introduction

Human rights have gained substantial importance in the past years. Therefore it is consequential that every state protects human rights in an effective and legitimate way. In Hong Kong human rights have always been a main issue and for that reason should not be compared to China, where the protection of human rights is uncertain.

In this term paper the protection of human rights under the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China (Basic Law) is relevant. In a first step, the background information is basic to understand the affair of Mainland China and Hong Kong, along with the conclusion of the Basic Law.

Furthermore the protection of human rights in Hong Kong will be examined under a more general point of view, before the scope will be narrowed down to the range of the Basic Law. In that main part, it is central to understand the whole constitution of the Basic Law and the influence of Mainland China.

2. Background of the Legal System in Hong Kong

The legal situation in Hong Kong is unique. As a British colony Hong Kong was formal under complete British influence, but at the same time autonomous to a large extent.¹ Therefore Hong Kong has experienced Western traditions and a common law influence. Hong Kong is one of the top leading financial centres of the world, and because of it China depends on Hong Kong's economical system. At the same time China has realized, that it can gain huge profit and success through Hong Kong's economical stability.² However this was problematic concerning the return of sovereignty to China, since a way had to be found where Hong Kong's success would not be undermined.³

2.1 Resumption of Chinese Sovereignty and the Joint Declaration

The Sino British Joint Declaration was signed in 1984 between the United Kingdom and China.⁴ China accordingly resumed sovereignty over the entire territory of Hong

¹ HORLEMANN, Die Rückgabe Hongkongs und seine neue Verfassung, 101.

² DAVIS, Constitutional Confrontation in Hong Kong, 4.

³ DAVIS, Constitutional Confrontation in Hong Kong, 5.

⁴ Joint Declaration of the Government of the United Kingdom of Great Britain and the Northern Ireland and the Government of the People's Republic of China on the question of Hong Kong 1984.

Kong in July 1997, and the region was transformed from a British colony to a Chinese Special Administrative Region.⁵

China and Britain have had high expectations for Hong Kong's future.⁶ One of the main principles is that Hong Kong remains stable under a liberal, capitalist, common law system and receives a high degree of autonomy.⁷ However, a high degree of autonomy does not mean that Hong Kong is totally independent from the Mainland.⁸ China still has control over Hong Kong and treats it as a subordinate administrative division.⁹ This all is possible under the policy of "one country, two systems".

Some other features of the Joint Declaration hold great emphasis on constitutionalism, self-governing of Hong Kong, more democracy, an independent judiciary and a strong importance of human rights. The Joint Declaration allows China to draft a Basic Law for Hong Kong, and provide a framework for the governing of the Hong Kong Special Administrative Region (HKSAR). As a result most of the commitments under the Joint Declaration were stipulated in the Basic Law.¹⁰

2.2 Legislative History of the Basic Law

The drafting process of the Basic Law was quite different compared to other laws enacted in the HKSAR. The drafting was conducted by the Basic Law Drafting Committee, which consisted of members from both the Mainland of China and Hong Kong.¹¹ Chief Judge CHAN described the nature of the Basic Law as a unique document; "It reflects a treaty made between two nations. [...] Hence, it has at least three dimensions: international, domestic and constitutional. [...] It was drafted in the Chinese language with an official English version but the Chinese version takes precedence in case of discrepancies".¹²

Therefore there were two different perspectives while drafting the Basic Law. On the one hand there is Hong Kong, that is still attached to Britain's system of liberal capitalism, and on the other hand the socialist system of Mainland China. The British influence is evident, considering the liberal tradition of natural rights under a capital-

⁵ WESLEY-SMITH, *An Introduction to the Hong Kong Legal System*, 9.

⁶ DAVIS, *Constitutional Confrontation in Hong Kong*, 5.

⁷ DAVIS, *Constitutional Confrontation in Hong Kong*, 1.

⁸ CHAN/CLARK, *The Hong Kong Basic Law*, 41.

⁹ According to article 1 of the Basic Law the HKSAR „is an inalienable part of the People's Republic of China“.

¹⁰ DAVIS, *Constitutional Confrontation in Hong Kong*, 6.

¹¹ GHAI, *Litigating the Basic Law*, 9.

¹² *Ma Wai Kwan David v. HKSAR* [1997] HKLRD 761, para 772.

ist system of private ownership.¹³ This liberal system also includes a strong governmental commitment to uphold rights. But the Chinese drafters also bring their point of view into consideration. Subsequently rights are looked at as a gift from the state, which and can be changed by the state.¹⁴ The Chinese weight is especially obvious in the chapter of Fundamental Rights and Duties, as will be shown in the following. In order for these two perspectives to function, a special concept had to be considered.

2.3 Concept of “One Country, Two Systems”

The intention of the principle of “one country, two systems”, is that two distinct legal systems can function and co-exist next to each other.¹⁵ The legal basis is to be found in the Constitution of the People’s Republic of China, which allows the state to “establish a special administrative region when necessary”.¹⁶ However it is not clear to what extent a new special administrative region could be established legitimately.¹⁷ Since the sovereignty lies by the Chinese authorities and the superiority of the Constitution of the People’s Republic of China is clear, the constitutionality of the Basic Law may be questioned. By taking into account, that China is a unitary state, there can only be one constitution: the Constitution of the People’s Republic of China.¹⁸ Yet different facts indicate that the Basic Law is a self-contained provision.¹⁹ For example, Mainland laws, which are inconsistent with the Basic Law, cannot be enforced in Hong Kong, because laws, which contravene the Basic Law, are unconstitutional.²⁰ And according to chapter VII of the Basic Law, Hong Kong is allowed extensive external affair powers. Still the constitutionality of the Basic Law is controversial.

A major theme of the concept is that the previous social, economic and legal system remains basically unchanged after the modification of sovereignty.²¹ This is particularly important to assure that the rights and freedoms of the people will remain protected, since Hong Kong and China distinctly distinguish themselves through the different perceptions and practices of human rights.²² On the one hand there is the

¹³ DAVIS, *Constitutional Confrontation in Hong Kong*, 7.

¹⁴ EDWARDS et al., *Human Rights in Contemporary China*, 43.

¹⁵ CHAN, 37 HKLJ 407, 407.

¹⁶ Article 31 of the Constitution of the People’s Republic of China.

¹⁷ FU et al., *Interpretating Hong Kong’s Basic Law*, 3.

¹⁸ CHAN/CLARK, *The Hong Kong Basic Law*, 41.

¹⁹ GHAI, *Litigating the Basic Law*, 45.

²⁰ Compare to article 11 and article 18 of the Basic Law.

²¹ CHAN, 37 HKLJ 407, 430.

²² GHAI, *Hong Kong’s New Constitutional Order*, 401.

Chinese communist system that is still in the process of finding the proper legal system and does not practice a separation of powers. The Chinese attitude about law and human rights is almost completely opposed to the standards in Hong Kong.²³ Because on the other hand, in the HKSAR a common law system based on Western liberalism is followed, where the judiciary is the guardian of human rights and the Rule of Law.²⁴ In contrast to the Chinese view, the rights in Hong Kong are inherent in individuals and therefore universal and inalienable.

By opting for “two systems” China had to accept the Hong Kong version of rights.²⁵ China was forced to produce a political-legal system that is fundamentally different of its own legal system. Yet Hong Kong residents feared a limitation of their civil liberties and wanted to safeguard the established principles of the common law system from China’s socialist planned economy.²⁶ For that reason a comprehensive constitutional protection of human rights was important to gain the individuals confidence.

3. Protection of Human Rights in Hong Kong

The Basic Law is not the only source that implements human rights in Hong Kong. Besides the tradition of the Rule of Law, an international standard has been adopted, to protect the rights and freedoms of citizens. The courts of the HKSAR also play an important role by taking a wide and liberal approach towards the protection of rights.²⁷

3.1 The Rule of Law

The central source for the protection of individual’s liberties is the legal system, which is supposed to uphold the citizens’ rights.²⁸ The Rule of Law can be described as a constitutional principle and recommendation for official behaviour. As long as the legal system follows the Rule of Law, civil liberties will be protected.

²³ CHAN/CLARK, *The Hong Kong Basic Law*, 37.

²⁴ CHAN, 37 HKLJ 407, 408; GHAI, *Litigating the Basic Law*, 5.

²⁵ GHAI, *Hong Kong’s New Constitutional Order*, 454.

²⁶ FU et al., *Interpreting Hong Kong’s Basic Law*, 2.

²⁷ For example see the case of *Gurung Kesh Bahadur v. Director of Immigration* (2002) 5 HKCFAR 480, para 24.

²⁸ WESLEY-SMITH, *Protecting Civil Liberties in Hong Kong*, 11.

There are several different principles describing the application of the Rule of Law.²⁹ For example the law has to be certain and predictable. This means, that all law is published and available to all people, so it can be applied equally. Every citizen, including the government and authorities, must obey the law. Besides that fact, judges have to be independent of political or personal pressure. Governmental authority is only exercised legitimately when it is in accordance with written law that has been adopted and enforced rightfully. The law applies equally to everyone, regardless of their status. Every citizen has access to the legal system and the right to be heard, to know the allegations against them, and to have their conduct assessed by impartial judges. Beyond that, law is beneficial to the individual, because it provides for order and security, and respects human dignity. All this is stipulated in the Rule of Law.

According to WESLEY-SMITH, the ideal legal system following the Rule of Law would be characterized by its neutrality, rationality, formality, impartiality, and impersonality.³⁰ However there will always be some exceptions to the principles, because they cannot be absolutely maintained.³¹ Even though the Hong Kong legal system does not reach an ideal of the Rule of Law principles, it is still built into the system and constitutes an aspiration.³²

3.2 Sources of Human Rights Treaties and their Application

While Hong Kong was under British sovereignty, the Letters Patent served as Hong Kong's written constitution. Yet it only became significant after 1991, when the Hong Kong Bill of Rights Ordinance was enacted.³³ Before that, there were no human right treaties for Hong Kong citizens and Britain denied the right of access to the European Commission and the European Court of Human Rights to Hong Kong inhabitants.³⁴ The Bill of Rights Ordinance is not applicable to inter-citizen relations; instead it only binds government, public authorities, public officers and employees of public authorities. The Bill of Rights Ordinance is especially important, because it incorporates the International Covenant on Civil and Political Rights, as applied to Hong Kong (ICCPR) into domestic law in its Part II, called the Hong Kong Bill of

²⁹ WESLEY-SMITH, *Protecting Civil Liberties in Hong Kong*, 12; also compare to DWORKIN, *Political Judges and Rule of Law*, Chapter 1; and WESLEY-SMITH, *the Hong Kong Legal System*, 16.

³⁰ WESLEY-SMITH, *Protecting Civil Liberties in Hong Kong*, 13.

³¹ WESLEY-SMITH, *The Hong Kong Legal System*, 17.

³² WESLEY-SMITH, *Protecting Civil Liberties in Hong Kong*, 14.

³³ CHAN, 37 HKLJ 407, 409.

³⁴ JAYAWICKRAMA, *The Bill of Rights*, 63.

Rights.³⁵ Therefore it provides for enforceable rights and freedoms for Hong Kong residents.

The ICCPR is the centrepiece of the international system for the protection of rights and obliges states to promote self-determination.³⁶ In 1997 the ICCPR was additionally entrenched through article 39 of the Basic Law. The impact of the ICCPR is remarkable. Especially the courts rely on international judgments concerning the treaty.³⁷ The ICCPR is treated as a link between the Basic Law and international standards. Through the recognition of the ICCPR in article 39 of the Basic Law, it has become one of the most powerful elements for the protection of human rights. Thereby Hong Kong is connected to an international standard of human rights and stays attached to a universal approach.³⁸

The importance of other treaties is not quite as clear. The International Covenant on Economic, Social and Cultural Rights (ICESCR) plays a comparatively small role, even though it is incorporated in article 39 of the Basic Law in the same manner as the ICCPR. This derives to the outdated view of the treaty and the perception that the ICESCR does not contain justiciable rights.³⁹ In addition to this, the treaty is only referred to rarely in cases. Even though the ICESCR is almost fully incorporated into domestic Law through provisions in the Basic Law, it has not been copied into a domestic Ordinance.⁴⁰ Consequently economic, social, and cultural rights are influenced seldom by international human rights law.

Furthermore judges have referred to the Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment (CAT) and the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) in court.⁴¹ The CAT was ratified by the United Kingdom in 1988 and extended to Hong Kong in 1992.⁴² The prohibition of torture is in addition implemented through article 28 of the Basic Law along with other local ordinances. However provisions in the CAT go beyond simply preventing torture in the territory.⁴³ For example no person

³⁵ YOUNG, 34 HKLJ 109, 115.

³⁶ GHAI, Hong Kong's New Constitutional Order, 406; JAYAWICKRAMA, 25 HKLJ 171, 172.

³⁷ PETERSEN, Embracing Universal Standards, 34.

³⁸ PETERSEN, Embracing Universal Standards, 37.

³⁹ PETERSEN, Embracing Universal Standards, 34, 45.

⁴⁰ For example in articles 27, 36, 37, 137, 144, and 149 of the Basic Law.

⁴¹ PETERSEN, Embracing Universal Standards, 34.

⁴² BYRNES/CHAN, Public Law and Human Rights, 316.

⁴³ PETERSEN, Embracing Universal Standards, 40.

shall be returned to another state “where there are substantial grounds for believing that he would be in danger of being subjected to torture”.⁴⁴

The CEDAW and the domestic Sex Discrimination Ordinance (SDO) were applied to Hong Kong since 1996. The SDO does not expressly state that it incorporates the CEDAW, but its intention is to comply with international law.⁴⁵ Therefore the CEDAW is used as a guide to interpret the SDO and relied on in judging cases.⁴⁶

The ICCPR, as well as the CAT and the CEDAW enjoy an elevated status.⁴⁷ Consequently civil liberties are protected and interpreted, according to a universal standard.

3.3 The Role of the Court

One of the main roles of the courts in Hong Kong is to guard the fundamental rights and freedoms under the Basic Law. For this reason, the first theme of the court is to position itself as a liberal and constitutional court protecting fundamental rights. The second theme is to sustain the continuity of the previous system.⁴⁸

The Basic Law guarantees a high degree of judicial independence.⁴⁹ Accordingly Hong Kong courts are allowed to make final decisions, as long as internal arrangements are concerned. But over all, the principle source for the protection of human rights is the Basic Law.

4. The Basic Law

After the Chinese resumption of sovereignty in 1997, the Basic Law was enacted and replaced the Letters Patent. The Basic Law should not be considered as a completely independent constitution, because the Constitution of the People’s Republic of China is superior. Yet no law enacted by the HKSAR legislature shall contravene the Basic Law, which has precedence.⁵⁰

4.1 Human Rights in the Basic Law

The reach of the Basic Law is wide since it guarantees civil and political rights along side social, economic and cultural rights. Thus a great balance of rights, entitlements and duties are assured, especially since the Basic Law also considers social and eco-

⁴⁴ Article 3 of the CAT.

⁴⁵ PETERSEN, *Embracing Universal Standards*, 42.

⁴⁶ For example *EOC v. Director of Education* [2001] 1 HKLRD 690, (CFI).

⁴⁷ PETERSEN, *Embracing Universal Standards*, 49.

⁴⁸ CHAN, 37 HKLJ 407, 422.

⁴⁹ GHAI, *Litigating the Basic Law*, 5.

⁵⁰ Article 11 of the Basic Law.

conomic conditions.⁵¹ In Chapter III of the Basic Law, entitled „Fundamental Rights and Duties of the Residents“, several rights and freedoms are listed to be protected. The Court of Final Appeal has asserted 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.“⁵²

The Basic law provides a general framework and principle source of rights and freedoms of the residents of Hong Kong.⁵³ Apart from the main substantive provisions of rights and freedoms in Chapter III of the Basic Law, the provisions are spread throughout the constitution. Accordingly, the rights of property and ownership appear in Chapter V and the right to trial by jury is stated in Chapter IV. But not all rights are specifically provided for. By way of example, some rights are incorporated by reference to previous laws in force.⁵⁴

There are noticeable similarities between the constitutions of China and the HKSAR. For example the title of the rights chapter is the same, even though hardly any duties are listed in the Basic Law. But for the Chinese, duties seem to be more important than rights.⁵⁵ In fact there are various rights provisions that are similar to the Constitution of the People’s Republic of China; especially the phrasing is often the same.⁵⁶ Most rights are protected in a positive way⁵⁷ and not in a negative, which would mean a limitation for the government. This style of formulation seems to reflect the Mainland attitude towards rights. Therefore rights are still seen as a gift given by the state, instead of a boundary for the state.⁵⁸

4.1.1 Rights for Whom and Against Whom

According to the Basic Law, there are three different categories of individuals: permanent residents, non-permanent residents and non residents.⁵⁹ Basically all residents enjoy the same rights and freedoms under the Basic Law, except for the right to vote and the right to serve in public service, which are only guaranteed to certain

⁵¹ GHAI, Hong Kong’s New Constitutional Order, 422.

⁵² Amongst others see *Ng Ka Ling and Others v. Director of Immigration* (1999) 2 HKCFAR 4, paras 28-29; *Gurung Kesh Bahadur v. Director of Immigration* (2002) 5 HKCFAR 480, para 3; *Lau Cheong and Another v. HKSAR* (2002) 5 HKCFAR 415, para 37 (CFA).

⁵³ GHAI, Hong Kong’s New Constitutional Order, 403.

⁵⁴ For example article 39 of the Basic Law.

⁵⁵ HORLEMANN, Die Rückgabe Hongkongs und seine neue Verfassung, 145.

⁵⁶ DAVIS, Constitutional Confrontation in Hong Kong, 23.

⁵⁷ For example residents „shall have the freedom of speech“ or residents „shall be equal before the law“.

⁵⁸ DAVIS, Constitutional Confrontation in Hong Kong, 23.

⁵⁹ Compare to article 24 of the Basic Law.

permanent residents.⁶⁰ However non residents “shall, in accordance with the law, enjoy the rights and freedoms of Hong Kong residents”.⁶¹

The Basic Law does not specifically state that the rights are only protected against public authorities. But according to general principles and practice of the courts, the protection should be restricted to public authorities.⁶²

4.1.2 Scope of Protection

The scope of the protection of human rights under the Basic Law is extensive. The rights and freedoms can be assigned to seven categories: political, personal, civil, legal, economic, social and cultural.⁶³ In the following the general range of the protection will be shown.

According to article 25 of the Basic Law, all residents shall be treated equally before the law. The right to vote and stand for election is guaranteed to permanent residents only.⁶⁴ But political rights are not protected in a comprehensive manner. There is no right for political organizations or bodies. In fact any contact to foreign organizations is prohibited.⁶⁵ One reason named is that Hong Kong is vulnerable to outside influences and political activities against China have to be avoided.⁶⁶

The main personal rights that are guaranteed; are the freedom of the person, the protection of communication, the freedom of marriage and family, the right of movement, travel and emigration along with the right to choose the occupation.⁶⁷ The right to the freedom of choice of occupation is guaranteed, but that does not mean that every resident has an assured job or occupation.⁶⁸ However the only right that is inviolable is the freedom of the person in article 28 of the Basic Law. Most other rights are either “protected by law” or guaranteed, “unless restrained by law”. It can be asserted, that in the Bill of Rights the personal rights are protected in a broader way than in the Basic Law.⁶⁹ Especially the right of liberty in the Bill of Rights provides a number of safeguards and confirms the comprehensive manner of the protection of rights.

⁶⁰ GHAI, Hong Kong’s New Constitutional Order, 424.

⁶¹ Article 41 of the Basic Law.

⁶² GHAI, Hong Kong’s New Constitutional Order, 427.

⁶³ GHAI, Hong Kong’s New Constitutional Order, 427-442.

⁶⁴ Article 26 of the Basic Law.

⁶⁵ HORLEMANN, Die Rückgabe Hongkongs und seine neue Verfassung, 102; compare to article 23 of the Basic Law.

⁶⁶ HORLEMANN, Die Rückgabe Hongkongs und seine neue Verfassung, 143.

⁶⁷ Compare to articles 28, 30, 37, 31 and 33 of the Basic Law.

⁶⁸ Article 33 of the Basic Law; GHAI, Hong Kong’s New Constitutional Order, 436.

⁶⁹ GHAI, Hong Kong’s New Constitutional Order, 428.

Civil rights are mainly protected in article 27 of the Basic Law where the “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” are guaranteed. However, the restrictions on the media are large. For example electronic media and films are censored. The reason is that the government wants to prevent the media from broadcasting matters which could harm the relationship to China.⁷⁰ In addition particularly religious rights are protected in an expansive manner.⁷¹

The Basic Law provides for access to the legal system in various provisions. Amongst others, confidential legal advice and access to courts and lawyers are protected.⁷² As well as a fair trial and the presumption of innocence are guaranteed.⁷³ Nonetheless, the rights in respect of the legal process are arranged in a more comprehensive manner in the Bill of Rights.⁷⁴

Property rights are protected extensively in the Basic law since the protection of property seems to be very important in a capitalist market system.⁷⁵ For example, the “private ownership of property in accordance with the law” and leases beyond 1997 are protected.⁷⁶ Besides, certain achievements, patents, discoveries, inventions and artistic creations are protected.⁷⁷ In addition trade union rights are protected which include the right to strike as well as welfare benefits and retirement security of the labour force.⁷⁸

The right to social welfare is protected in article 36 of the Basic Law, but according to article 145 of the Basic Law the previous system constitutes the basis of the rights. Unfortunately under the previous system social welfare or social security were not one of the main issues, hence the scope of welfare rights are not exactly defined.⁷⁹

Article 138 and article 136 of the Basic Law hold, that the HKSAR is required to “improve medical and health services” and to “formulate policies on the develop-

⁷⁰ CHAN/CLARK, *The Hong Kong Basic Law*, 50.

⁷¹ So as articles 32, 141, 148 and 149 of the Basic Law; GHAI, *Hong Kong's New Constitutional Order*, 431.

⁷² Article 35 of the Basic Law.

⁷³ Article 87 of the Basic Law.

⁷⁴ GHAI, *Hong Kong's New Constitutional Order*, 433.

⁷⁵ GHAI, *Hong Kong's New Constitutional Order*, 434.

⁷⁶ Article 6 of the Basic Law and articles 120-122 of the Basic Law; However according to the Joint Declaration the HKSAR may not grant leases beyond the year of 2047.

⁷⁷ Article 139 and article 140 of the Basic Law.

⁷⁸ Article 27 and article 36 of the Basic Law; Due to article 39 of the Basic Law, a wide range of labour conventions are applied to Hong Kong.

⁷⁹ GHAI, *Hong Kong's New Constitutional Order*, 438.

ment and improvement of education". Both the medical services and the educational institutions have already been well established in the previous system.⁸⁰ For that reason medical service and education are provided for in a comprehensive way.

Finally the Basic Law guarantees the protection of cultural rights. For example, by providing subventions to non-governmental organizations for arts, culture, education and sports in article 144. But also the ICESCR protects cultural rights comprehensively.

Consequently the phrasing of the Basic Law provisions indicates, that the rights and freedoms are given and protected by the law. Unfortunately rights are often centralized under the same provision in dependence on the Chinese Constitution. However, in many cases the rights and freedoms are qualified by a superior interest of public security or criminal investigation, which would allow a restriction of rights.⁸¹

4.2 Restrictions on Rights

The Basic Law does not provide a general scheme for the limitations on rights.⁸² This makes it difficult to determine the scope of restrictions. However the court has developed some general principles considering the restrictions of rights.

The court uses different approaches in applying restrictions to Basic Law rights. According to the Chief Justice "the 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."⁸³ Concluding, it is more important to protect human rights than to give the government the possibility to restrict rights and freedoms of citizens. Nonetheless rights will be restricted, which makes it important to define the circumstances under which restrictions shall be legitimate.

In addition to the explicitly mentioned provisions in the Basic Law, a number of human rights instruments are entrenched. According to article 39 of the Basic Law, no restrictions on rights and freedoms may be imposed, which contravene these instru-

⁸⁰ GHAI, *Hong Kong's New Constitutional Order*, 440.

⁸¹ CHAN/CLARK, *The Hong Kong Basic Law*, 51.

⁸² GHAI, *Hong Kong's New Constitutional Order*, 424.

⁸³ *Gurung Kesh Bahadur v. Director of Immigration* (2002) 5 HKCFAR 480, aff'g [2001] 3 HKLRD 32 (CA), rev'g [2000] HKEC 596, para 29 (CFI).

ments.⁸⁴ For that reason the scope of article 39 has to be considered to argue about the restriction of rights.

4.2.1 Scope of Article 39 of the Basic Law and the Status of the ICCPR

The Hong Kong Government has the duty to incorporate the ICCPR, as applied to Hong Kong into domestic law. Consequently the ICCPR becomes entrenched, but does not become a direct applicable source of rights and freedoms.⁸⁵ Yet, according to the third sentence of article 39 of the Basic Law, the ICCPR can be a source of domestic law when the purpose is to test constitutionally permissible restrictions on rights and freedoms.⁸⁶ In view of that, any restrictions on rights and freedoms must be prescribed by law and are not allowed to contravene the implementation of the ICCPR nor the ICESCR.

As noted above, the ICCPR is incorporated in the Bill of Rights. Consequently if a restriction breaches the Bill of Rights, it will at the same time have infringed article 39 of the Basic Law, because this would contravene to the ICCPR, as applied to Hong Kong.⁸⁷ As a result, the ICCPR enjoys a special constitutional status as it is incorporated into the Basic Law.

Where there is an overlapping right in the Basic Law as well as in the ICCPR, the same restrictions should be applied to the right or freedom.⁸⁸ Yet it is difficult to determine, if the rights in two different instruments are actually identical. Furthermore parallel rights in the Basic Law and the ICCPR have fundamentally different origins.⁸⁹

On the other hand reservations attached to rights of the ICCPR should not restrict rights enjoyed under the Basic Law, since the instruments were made by two different sovereigns.⁹⁰ And neither the Basic Law nor the Joint Declaration indicates that reservations of the ICCPR shall be of general application.

In another approach, where Basic Law rights are understood as autonomous rights, restrictions are a matter of interpretation and depend on the nature of the rights in

⁸⁴ GHAI, *Litigating the Basic Law*, 6; *HKSAR v. Ng Kung Siu* (1999) 2 HKCFAR 442, CFA para 39.

⁸⁵ YOUNG, 34 HKLJ 109, 115.

⁸⁶ Compare to the approach of the court in *Lau Kwok Fai v. Secretary for Justice* [2003] HKEC 711, paras 140-172 (CFI).

⁸⁷ GHAI, *Hong Kong's New Constitutional Order*, 445.

⁸⁸ YOUNG, 34 HKLJ 109, 124.

⁸⁹ YOUNG, 34 HKLJ 109, 125.

⁹⁰ YOUNG, 34 HKLJ 109, 127.

issue.⁹¹ But it is criticized that this approach does not decide clearly when and how Basic Law rights can be restricted.⁹²

For these reasons, article 39 of the Basic Law should not be interpreted as a general limitations clause and as a bar on human rights standards, but rather be seen as a constitutional safeguard.⁹³ Rights and freedoms have certain tolerance points, beyond which no justification can be made for their interference. Accordingly the court did not take an extremely narrow approach on the question of restrictions on the Basic Law, but recognized the importance of protecting human rights.

4.2.2 Position of the Courts

In the case of *Bahadur*⁹⁴ the Court of Final Appeal had to decide the range of the protection of human rights, and under which conditions restrictions were justifiable. Bahadur, a non-permanent resident, was refused permission to land and stay in Hong Kong, even though his permit to stay had not expired. He argued that this contravened his fundamental freedom to travel and enter the Region, which was guaranteed in article 31 of the Basic Law. The court held that the principle of proportionality should apply to restrictions on the right to travel and the right to enter.⁹⁵ As a result the legislative objective has to be sufficiently important to justify limiting a right, the measures have to be rationally connected to it and the restriction has to be no more than necessary to accomplish the objective.

The court has repeated the importance of a generous interpretation of fundamental rights.⁹⁶ As a result, any restriction on fundamental rights has to be prescribed by law and at the same time be necessary for the protection of some legitimate interests.⁹⁷ To define the reach of the necessity, the proportionality test in a democratic society has to be applied.⁹⁸ The restriction is therefore proportionally justified, when it is connected to a legitimate purpose, and when it does not intervene in the right more than necessary to accomplish that purpose. A legitimate purpose can be to protect the public order and to prevent crime. Though, the French term of “ordre public” covers a wider range and can mean a whole sum of rules and fundamental principles.⁹⁹ The

⁹¹ *Gurung Kesh Bahadur v. Director of Immigration* (2002) 5 HKCFAR 480, para 28.

⁹² YOUNG, 34 HKLJ 109, 131.

⁹³ YOUNG, 34 HKLJ 109, 128.

⁹⁴ *Gurung Kesh Bahadur v. Director of Immigration* (2002) 5 HKCFAR 480.

⁹⁵ *Gurung Kesh Bahadur v. Director of Immigration* (2002) 5 HKCFAR 480, para 33.

⁹⁶ *Leung Kwok Hung v. HKSAR* [2005] 3 HKLRD 164 at 178, para 16.

⁹⁷ CHAN, 37 HKLJ 407, 423; Also compare to GHAI, Hong Kong's New Constitutional Order, 446.

⁹⁸ *Leung Kwok Hung v. HKSAR* [2005] 3 HKLRD 164, paras 182, 185.

⁹⁹ CHAN, 37 HKLJ 407, 429.

Court of Appeal held that the “ordre public” included “the existence and the functioning of the state organization, which not only allowed it to maintain peace and order in the country, but ensured the common welfare, by satisfying collective needs and protecting human rights.”¹⁰⁰

To satisfy the principle “prescribed by law”, the law must be adequately accessible to the citizen and formulated with sufficient precision.¹⁰¹ As an example, the Court of Final Appeal judged about the power of the police to restrict or prohibit a demonstration, due to a distress of the ordre public.¹⁰² The court held that the powers, which the Public Order Ordinance gave to the police were unascertained, and did not meet the requirements that a restriction must be prescribed by law. In this sense the court asserted, that the freedom of assembly is a fundamental right, and that any restriction of it must be no more than necessary to attain the legitimate purpose.

With these qualifications for restricting rights, the court applies conditions, which can be compared to the practice of the European Court of Human Rights. Thereafter, the interference has to be prescribed by law and a legitimate intention has to be pursued. In addition the interference has to be necessary and proportional in a democratic society, which accordingly constitutes a pressing social need.¹⁰³

4.2.3 Suspension of Rights

The suspension of rights can be justified during the state of war or during turmoil, which endangers national unity or security.¹⁰⁴ According to article 18 of the Basic Law, the Standing Committee of the National People’s Congress (NPCSC) has to decide that the Region is in a state of emergency. As a result the HKSAR authorities do not have any emergency powers and there are no restrictions of the limits of emergency powers. This can be contradicting to the human rights provisions in the Basic Law, especially if absolute rights are dispended. However, the provisions in article 39 and article 159 of the Basic Law protect the rights and freedoms of the residents by prohibiting any amendment that would contravene the established policies of the People’s Republic of China regarding Hong Kong.¹⁰⁵

¹⁰⁰ *Wong Yeung Ng v. Secretary for Justice* [1999] 2 HKLRD 293, (CA).

¹⁰¹ I.a. *Shum Kwok Sher v. HKSAR* (2002) 5 HKCFAR 381; *Noise Control Authority v. Step In Ltd* [2005] 1 HKLRD 702.

¹⁰² *Leung Kwok Hung v. HKSAR* [2005] 3 HKLRD 164, (CFA).

¹⁰³ WILDHABER/ BREITENMOSER, IntKomm, Art. 8, N 525.

¹⁰⁴ CHAN/CLARK, The Hong Kong Basic Law, 44.

¹⁰⁵ GHAI, Hong Kong’s New Constitutional Order, 448.

4.2.4 International and Local Remedies

The question is, what remedies are available when human rights are violated. The Law must be capable of being enforced in order to protect people from the abuse of governmental power.¹⁰⁶ For example the European Commission of Human Rights allows individuals to complain, that the contracting party has violated rights guaranteed in the Commission.¹⁰⁷ Unfortunately, there is no international mechanism in the HKSAR that can be compared to the remedies under the European Commission of Human Rights.¹⁰⁸ This makes it more difficult for the individual to complain against a government, when personal rights have been violated.

The duty to provide local, practicable remedies is a general principle for human rights treaties.¹⁰⁹ Only when there is an effective procedure, the balance between individual rights and community interests can be maintained.¹¹⁰ The private law and the public law offer different remedies that enforce individual's rights. In article 35 of the Basic Law, Hong Kong residents have the right to "judicial remedies". Through the incorporation of the ICCPR, the relevant reporting procedures allow HKSAR inhabitants to secure their rights. However a complementary complaint system, that allows effective remedies, is still being aspired.¹¹¹

4.3 Interpretation of the Basic Law

Considering the dual nature of the Basic Law the doctrine has discussed the proper principles of interpretation extensively. Especially the broad scope, the loose drafting and ambiguities of the Basic Law provide a wide field for interpretation.¹¹²

The Basic Law forms the connection between the two systems and at the same time defines their differences. Therefore by interpreting the Basic Law, the relationship between the HKSAR and Mainland China, as well as the scope of the protection of human rights can be defined.¹¹³ If Hong Kong can interpret the Basic Law independently, human rights will be guaranteed in the aspired way. But as will follow, the Mainland China has a strong influence on the interpretation of the Basic Law.

¹⁰⁶ WESLEY-SMITH, *the Hong Kong Legal System*, 23.

¹⁰⁷ Article 34 of the European Commission of Human Rights.

¹⁰⁸ MUSHKAT, *One Country, Two International Legal Personalities*, 127.

¹⁰⁹ MUSHKAT, *One Country, Two International Legal Personalities*, 132.

¹¹⁰ WESLEY-SMITH, *Protecting Civil Liberties in Hong Kong*, 22.

¹¹¹ MUSHKAT, *One Country, Two International Legal Personalities*, 134.

¹¹² GHAI, *Litigating the Basic Law*, 9.

¹¹³ FU et al., *Interpreting Hong Kong's Basic Law*, 1.

4.3.1 Division of Power under Article 158 of the Basic Law

According to article 158 of the Basic Law, the NPCSC and the courts of Hong Kong are the only two institutions with jurisdiction to interpret the Basic Law. The first paragraph gives the NPCSC the power to interpret the Basic Law. But the adjudication of cases, within the autonomy of the region is left to the Hong Kong courts.¹¹⁴ The courts have the power of interpretation in the course of litigation, except if the provision concerns affairs, which are the responsibility of the Central People's Government, or the relationship between the Central Authorities and the HKSAR. And if there is no further appeal, the court must refer to the NPCSC. This can be compared to the collaboration of the judging of the national courts of the European Union and the European Court of Justice in Luxembourg. Whenever the judgment concerns the interpretation of the Community Law, the national courts may refer to the European Court of Justice.¹¹⁵ And if the question pending before the national court against whose decision there is no judicial remedy, that court is obligated to bring the matter before the European Court of Justice. In that way the unity of interpretation and application of the community law can be secured.

Article 158 has become the most controversial link between the two systems, because the key power of interpretation lies within the NPCSC. This power of the NPCSC challenges the independence and jurisdiction of the courts in Hong Kong.¹¹⁶ Even so, the principles of interpretation of the Basic Law are a compromise of two different constitutional systems.¹¹⁷ On the one hand, the Chinese vest the power of interpretation in the Legislature, and on the other hand Hong Kong relies on the Judiciary.¹¹⁸

However, the fundamental question for the approach of interpretation, is whether the Basic Law is an independent instrument that provides the essential framework for the Hong Kong legal system.¹¹⁹ Because by answering this question, the principles of interpretation would be clear. But as noted above, it is controversial, if the Basic Law is a self-contained provision. Consequently the courts interpretation has to adapt to Mainland principles.

¹¹⁴ GHAI, *Litigating the Basic Law*, 33.

¹¹⁵ BIEBER/EPINEY/HAAG, *Die Europäische Union*, 243; Article 234 of the Treaty establishing the European Community.

¹¹⁶ FU et al., *Interpreting Hong Kong's Basic Law*, 4.

¹¹⁷ GHAI, *Litigating the Basic Law*, 34.

¹¹⁸ CHAN, 37 HKLJ 407, 417.

¹¹⁹ GHAI, *Litigating the Basic Law*, 45.

4.3.2 Different Approaches of Interpretation

The NPCSC and the Court of Final Appeal each apply a different type of approach to interpret the Basic Law.¹²⁰ For example, the NPCSC treats legislative material based on the original intent of those drafting the Basic Law, as a primary source for interpretation. On the other hand the courts of the HKSAR operate within the common law system and for that reason also follow common law principles of interpretation.¹²¹ The Court of Final Appeal uses legislative materials only as an aid, but rather concentrates on the text and the provisions of the Basic Law. The interpretative approach of the Court of Final Appeal can as a result be looked at as a textual-purposive approach.¹²²

In the case of *Ma*, CHAN CJHC pointed out that a generous and purposive approach should be adopted, since the Basic Law is a constitutional document and states general principles for a multiplicity of people.¹²³ However this generous and purposive approach does not work for all provisions in the Basic Law, and it was questioned if common law rules are appropriate to interpret a Law with Chinese influence.¹²⁴ Even so, in a further case the court held that considering the intention of the instrument as well as the context, a broad and purposive approach should be adopted, instead of a literal, technical, narrow or rigid approach.¹²⁵ In that way Hong Kong residents are able to enjoy the full measure of fundamental rights and freedoms.

In order to find the purpose of the Basic Law provisions, the courts concentrate on the plain meaning of the words and the context of the rest of the Basic Law.¹²⁶ Actually, it is up to the court to decide on the central purpose of the Basic Law. As stated above these different approaches can make judicial decisions controversial.

Furthermore the Court of Final Appeal held that whenever a provision guarantees rights, it should be given a generous interpretation. According to the court, it has to be differed between provisions guaranteeing rights and other provisions. A generous approach for rights seems justified because it is the constitutional duty of the courts to protect rights and freedoms.¹²⁷

¹²⁰ YOUNG, *Legislative History, Original Intent, and the Interpretation of the Basic Law*, 15.

¹²¹ CHAN, 37 HKLJ 407, 417.

¹²² YOUNG, *Legislative History, Original Intent, and the Interpretation of the Basic Law*, 17.

¹²³ *HKSAR v. Ma Wai Kwan David* [1997] HKLRD 761, para 324.

¹²⁴ GHAI, *Litigating the Basic Law*, 25.

¹²⁵ *Ng Ka Ling v. Director of Immigration* [1999] 1 HKLRD 315.

¹²⁶ GHAI, *Litigating the Basic Law*, 29.

¹²⁷ GHAI, *Litigating the Basic Law*, 27.

However, the courts approach of interpreting the Basic Law has been criticised, since the complex provision of article 158 of the Basic Law has to be respected.¹²⁸ Whereas the Court only has limited authority of interpretation, compared to the NPCSC, it would be benefiting to adapt the same approach in order to avoid conflicts and legal instability.¹²⁹ This alignment however contradicts the principle of Hong Kong's high degree of autonomy and separate legal system. For that reason, Hong Kong should be allowed to have an appropriate interpretative approach of the Basic Law.

Nonetheless the final power of interpretation is vested in the NPCSC. Consequently, the court had to adopt a more cautious and less liberal tone, since the interpretation of the NPCSC is binding with Hong Kong.¹³⁰ This division of powers between the HKSAR and the Mainland should be followed up at all times by the court.¹³¹ Even though the court is an independent tribunal, it still has to respect the general principles of the Central Government. As a result, it is important that the court takes a sensitive approach towards the power of interpretation of the NPCSC.

4.4 Specific Rights

To conclude, one specific right shall be described according to a judgment of the Court of Final Appeal. The Freedom of speech belongs to one of the core principles of human rights and is protected in article 27 of the Basic Law.

In the case of *Yeung May-Wan & others v. HKSAR*¹³² the Court of Final Appeal judged a case concerning the freedom to demonstrate, which is closely associated with the freedom of speech. The appellants were 16 Falun Gong members who had held a peaceful demonstration in front of the Liaison office of the Central People's Government. In the following the members were arrested and charged with obstruction of a public place.

The court held that obstructions should be allowed on public places, when the use is reasonable.¹³³ This means the time and duration, as well as the purpose of the obstruction have to be reasonable. Since the freedom to demonstrate is a fundamental right there should be an appropriate appreciation of values. In this concerning case

¹²⁸ CHAN, 37 HKLJ 407, 414.

¹²⁹ YOUNG, Legislative History, Original Intent, and the Interpretation of the Basic Law, 17.

¹³⁰ CHAN, 37 HKLJ 407, 420; *Chong Fung Yuen v. Director of Immigration* [2001] 2 HKLRD 533.

¹³¹ CHAN, 37 HKLJ 407, 445.

¹³² *Yeung May-Wan & others v. HKSAR* [2005] 2 HKLRD 212.

¹³³ *Yeung May-Wan & others v. HKSAR* [2005] 2 HKLRD 212, para 134.

the court held, that the small demonstration did not constitute an offence and was therefore reasonable.

An arrest is lawful when the officer suspects the person of having committed an offence punishable by imprisonment, and has reasonable grounds for such suspicion.¹³⁴

However the Court held that the officers did not have reasonable grounds for that suspicion, wherefore the members were arrested unlawfully. This shows that the Court of Final appeal is willing to uphold rights, even for Falun Gong members.

5. Conclusion

After the resumption of Chinese sovereignty, everyone hoped that human rights would be protected in a comprehensive manner in Hong Kong. Because of the common law influence and self government of Hong Kong, the protection of human rights was especially important and one of the main issues to be followed. Therefore it was important that the previous system would remain unchanged.

The concept of “one country, two systems” is based on the co-existence and separation of two economic, social, political and legal systems under one sovereign. The most interesting part of the Basic Law is that it connects and at the same time separates these two systems.

In fact, the Basic Law provides a substantial source for the protection of human rights. Another benefiting fact is the incorporation of the ICCPR into the Basic Law. It allows a universal standard for the protection of human rights and prevents restrictions on rights. However, through the assimilation of the “Rights and Duties” chapter with China’s Constitution, and through the influence of the NPCSC, Hong Kong’s autonomy is restricted. The courts in Hong Kong must respect the division of powers and the principles of the legislation of Mainland China. As a result, human rights cannot be protected in that extensive manner as wished for.

China has always been suspicious about rights and democracy, wherefore there has been a noticeable drawing back from the Joint Declaration and restrictions on the exercise of rights.¹³⁵ For China, property and contractual rights are primary, since the market can also function without rights of democracy. But rights and freedoms are the foundation of the economical success of Hong Kong. The people of Hong Kong never had the chance to determine their own future. And now, after the change of

¹³⁴ *Yeung May-Wan & others v. HKSAR* [2005] 2 HKLRD 212, para 150.

¹³⁵ GHAI, Hong Kong’s New Constitutional Order, 454.

sovereignty, it is in the hands of China to allow Hong Kong a high degree of autonomy.¹³⁶ The future of the people and the human rights in Hong Kong are inseparable from the future of China.¹³⁷ Consequently, there has to be a limit to the interventions of the Central Authorities. Only under these conditions human rights can be protected in a comprehensive manner.

Since the HKSAR is not absolutely independent from China, it is difficult to follow principles that are not followed by the own sovereign. Nonetheless there are various approaches of a wide-ranging protection of human rights. For example the "General Principles" in the first part of the Basic Law constitute a certain safeguard of the socialist policies. And the generous approach of the Court in interpreting rights and freedoms of the Basic Law is very benefiting. Accordingly the importance of safeguarding rights instead of restricting them has been recognized.

Mainland China, as well as Hong Kong, is interested in a success of the Basic Law. It can be anticipated, that they will find a suitable approach in interpreting the Basic Law provisions and protect human rights instead of undermining them.

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Nicole Furrer

¹³⁶ YIU-TING, *The Development of Constitutionalism in Hong Kong*, 93.

¹³⁷ WACKS, 24 HKLJ 372, 374.