

Application of the International Covenant on Economic, Social and Cultural Rights in Hong Kong



Background

The ICESCR is a multilateral treaty committing its parties to respect, protect and fulfil economic, social and cultural rights. It was adopted by the United Nations General Assembly in 1966 and entered into force in 1976.

The ICESCR was first extended to Hong Kong by the Government of the United Kingdom in 1976 together with a number of reservations and declarations. In line with the Sino-British Joint Declaration on the Question of Hong Kong 1984, the PRC Government notified the United Nations in June 1997 that the provisions of ICESCR as applied to Hong Kong shall remain in force as from 1 July 1997.

BL 39(1) of the HKSAR which came into force on 1 July 1997 provides that the provisions of ICESCR as applied to Hong Kong “shall remain in force and shall be implemented through the laws of the Hong Kong Special Administrative Region”. The CFA held that this provision is declaratory of the position in Hong Kong as understood by the parties to the Sino-British Joint Declaration in 1984 and reflects the dualist principle that international

treaties do not confer or impose any rights or obligations unless they are made part of the domestic law by legislation¹.

China became a party to ICESCR after the NPCSC had ratified the Covenant in February 2001. In April 2001, the PRC Government notified the United Nations that the application of ICESCR to the HKSAR is subject to two reservations².

The implementation of ICESCR by the States parties is monitored by the United Nations Committee on Economic, Social and Cultural Rights (“CESCR”) which consists of 18 independent experts on human rights. The Committee considers periodic reports of all States parties and uses its General Comments and analyses of State reports to clarify the meaning of the ICESCR provisions. It has also relied upon the General Comments in evaluating States’ compliance with their obligations under the Covenant.

Nature of States parties’ obligations

Article 2(1) of the ICESCR requires States parties to take steps, to the maximum of its available resources, with a view to achieving progressively

¹ *GA v Director of Immigration* (2014) 17 HKCFAR 60, paras. 58 and 81-83.

² The first reserves the right to formulate regulations by the HKSAR for employment restrictions, based on place of birth or residence qualifications, for the purpose of safeguarding the employment opportunities of local workers. The other reserves the right to interpret “national federations or confederations” in Article 8(1)(b) of the Covenant as “federations or confederations in the HKSAR” and declares that this Article does not imply the right of trade union federations or confederations to form or join political organizations or bodies established outside the HKSAR.



the full realization of the Covenant rights “by all appropriate means, including particularly the adoption of legislative measures”. Each State party may decide for itself which means are the most appropriate under the circumstances with respect to each of the rights. Apart from legislative measures, administrative, financial, educational and social measures may also be considered “appropriate” for the purposes of Article 2(1)³.

The concept of progressive realization recognizes the fact that full realization of all economic, social and cultural rights will generally not be able to be achieved in a short period of time. Nevertheless, this should not be misinterpreted as depriving the obligation of all meaningful content. States parties are still required to move as expeditiously and effectively as possible towards the full realization of those rights.⁴

The Covenant also imposes various obligations which are of immediate effect. One of these is imposed by Article 2(2) which requires States parties to guarantee that relevant rights will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. However, differential treatment based on the prohibited grounds will not be viewed as discriminatory if the justification for differentiation is reasonable and objective. Thus:

- (i) the aim and effects of the measures or omissions must be legitimate, compatible

with the nature of the Covenant rights and solely for the purpose of promoting the general welfare in a democratic society; and

- (ii) there must be a clear and reasonable relationship of proportionality between the aim sought to be realized and the measures or omissions and their effects.⁵

There is also a general limitation clause in Article 4 the central purpose of which is to ensure that States must not arbitrarily limit ICESCR rights. It provides that a State party may subject the rights “only to such limitations as are determined by law only in so far as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society”.

Domestic application of the ICESCR⁶

The ICESCR does not stipulate the specific means by which it is to be implemented in the national legal order. There is no provision obligating its comprehensive incorporation or requiring it to be accorded any specific type of status in national law. The precise method by which ICESCR rights are given effect in national law is a matter for each State party to decide, provided that the means chosen are appropriate and are adequate to ensure fulfilment of the obligations under the Covenant.⁷

Unlike the ICCPR which has been incorporated into domestic law by the Hong Kong Bill of Rights

³ CESCR, General Comment No. 3, paras. 3, 4 and 7.

⁴ CESCR, General Comment No. 3, para. 9.

⁵ CESCR, General Comment No. 20, para. 13.

⁶ Discussed in Michael Ramsden, “Using the ICESCR in Hong Kong Courts” (2012) HKLJ 839.

⁷ CESCR, General Comment No. 9, paras. 5 and 7.



Ordinance (Cap. 383), the ICESCR has not been incorporated into the domestic law of the HKSAR by a single piece of legislation. Rather, individual provisions of the Covenant are implemented by the relevant provisions of the Basic Law and different pieces of local legislation as well as other non-legislative measures.

Of particular relevance are BL 27 (right to form and join trade unions and to strike), BL 33 (freedom of choice of occupation), BL 34 (freedom to engage in academic research and cultural activities), BL 36 (right to social welfare), BL 37 (freedom of marriage), BL 137 (academic freedom and autonomy of educational institutions) and BL 140 (rights and interests of authors in their literary and artistic creation).

In addition, over 50 ordinances such as the Copyright Ordinance (Cap.528), Domestic Violence Ordinance (Cap.189), Education Ordinance (Cap. 279), Employment Ordinance (Cap. 57), Guardianship of Minors Ordinance (Cap. 13), Housing Ordinance (Cap. 283), Public Health and Municipal Services Ordinance (Cap. 132), the four pieces of anti-discrimination legislation and

the many pieces of environmental protection legislation also give effect to ICESCR rights.

The above legislation is supplemented by administrative, financial and social measures such as the Comprehensive Social Security Assistance Scheme, the Social Security Allowance Scheme, the Protection of Wages on Insolvency Fund, Integrated Family Services, Family and Child Protective Services, the Home Ownership Scheme, the Harmonious Families Priority Scheme of the Housing Authority, support services for students with special educational needs, education services for non-Chinese speaking students, sports and cultural programmes organized by the Leisure and Cultural Services Department, Elderly Health Service and Child Assessment Service provided by the Department of Health.

Although the ICESCR provisions are not directly enforceable in the Hong Kong courts because they have not been directly incorporated into domestic



law,⁸ the Covenant may be used as a framework within which Government decisions or discretions are to be made or exercised.⁹ Our courts may also in appropriate cases refer to the ICESCR and the views of the CESCR in deciding cases that engage the Covenant rights.

For example, in *Kong Yunming v Director of Social Welfare*,¹⁰ the appellant challenged the eligibility criteria for Comprehensive Social Security Assistance. In holding that the seven-year residence requirement was in contravention of the right to social welfare under BL 36, Mr. Justice

Bokhary NPJ had regard to Article 2(1) (nature of States parties' obligations) and Article 9 (right to social security) of the ICESCR, General Comment No. 3 on Article 2(1) issued by the CESCR, the HKSAR's second periodic report to the Committee, and the Committee's Concluding Observations on the HKSAR adopted in 2005.¹¹

In *Clean Air Foundation Ltd v Government of the HKSAR*,¹² the Court accepted that it was arguable that the right to the enjoyment of the highest attainable standard of health under Article 12 of the ICESCR imposes some sort of duty on the Government to combat air pollution, but refrained from deciding what specific steps the Government should take in discharging this duty.

The ICESCR provisions may also in appropriate cases be used as an aid in statutory interpretation. In *Chan Noi Heung v Chief Executive in Council*,¹³ the Court accepted that, in so far as possible, our courts ought to interpret domestic statutes so as to be in conformity with international law. In holding that the Trade Boards Ordinance (Cap. 63) could not be construed as imposing a duty on the CE in C to fix minimum wages to protect workers in the most lowly paid occupations, the Court had regard to the requirements of Article 7 of the Covenant which recognizes the right to just and favourable conditions of work, the Concluding Observations of the CESCR on the HKSAR in 2001, and a subsequent report of the Government to the Committee. Article 7 of the Covenant was of no avail because the Court found that it did not

⁸ *Ubamaka Edward Wilson v Secretary for Security* (2012) 15 HKCFAR 743, para. 43.

⁹ *Chan Mei Yee v Director of Immigration*, HCAL 77/1999, 13 July 2000, para. 46; *Comilang Milagros Tecson v Commissioner of Registration*, HCAL 28/2011, 15 June 2012, paras. 53-55.

¹⁰ (2013) 16 HKCFAR 950.

¹¹ (2013) 16 HKCFAR 950, paras. 173-179.

¹² HCAL 35/2007, 26 July 2007, para. 19.

¹³ HCAL 126/2006, 16 May 2007, paras. 65-74.



impose an obligation on the HKSAR to establish a regime for fixing minimum wages particularly if other effective measures are available.¹⁴

Rights recognized in the ICESCR

The ICESCR recognizes the following rights:

- * the right to work (Article 6);
- * the right to just and favourable conditions of work (Article 7);
- * the right to form and join trade unions and the right to strike (Article 8);
- * the right to social security, including social insurance (Article 9);
- * the right to protection and assistance for the family, and special protection for mothers, children and young persons (Article 10);
- * the right to an adequate standard of living,

including adequate food, clothing and housing, and to the continuous improvement of living conditions (Article 11);

- * the right to the enjoyment of the highest attainable standard of physical and mental health (Article 12);
- * the right to education and the freedom of parents to choose schools for their children (Articles 13 and 14); and
- * the right to take part in cultural life and to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which an individual is the author (Article 15).

We would use the right to education to illustrate how economic, social and cultural rights are protected under the Covenant.

¹⁴ In June 2009, the Government introduced the Minimum Wage Bill to the LegCo to provide for a minimum wage at an hourly rate. The Bill was passed by the LegCo in July 2010.



Right to education

Article 13 of the ICESCR provides for the right to education. After stating the objectives of education at the beginning, the article sets out in detail the requirements for achieving the right to education in respect of different levels of education: primary, secondary, technical and vocational education, higher education and fundamental education.

According to the CESCR, the right to education has four essential features:

- (i) *Availability* – Functioning educational institutions and programmes have to be available in sufficient quantity.
- (ii) *Accessibility* – Educational institutions and programmes have to be accessible to everyone. This has three overlapping dimensions: non-discrimination (accessible

to all in law and fact, without discrimination on any of the prohibited grounds); physical accessibility (within safe physical reach); and economic accessibility (affordable to all).

- (iii) *Acceptability* – The form and substance of education, including curricula and teaching methods, have to be acceptable (e.g. relevant, culturally appropriate and of good quality) to students and, in appropriate cases, parents, subject to the educational objectives and such minimum educational standards as may be approved by the State.
- (iv) *Adaptability* – Education has to be flexible so it can adapt to the needs of changing societies and communities and respond to the needs of students within their diverse social and cultural settings.¹⁵

¹⁵ CESCR, General Comment No. 13, para. 6.



Article 13 also protects the rights of parents in relation to their children's schooling in two ways. The first is that States parties undertake to respect the liberty of parents to ensure the religious and moral education of their children in conformity with their own convictions. The other is the liberty of parents to choose other than public schools for their children, provided the schools conform to the minimum educational standards. In addition, everyone has the liberty to establish and direct educational institutions, provided the institutions conform to the educational objectives and the minimum standards.

Article 13 was relied on by the applicant in *Catholic Diocese of Hong Kong v Secretary for Justice*.¹⁶ In gist, the applicant argued that the new rules

relating to "school-based management" for aided schools were contrary to the right to education protected under the Covenant because Article 13(3) required the Government to take a "hands-off" approach when it comes to regulating schools not in the public sector. The CA rejected this argument and held that the relevant provisions neither breach Article 13 of the Covenant nor infringe the protection afforded by BL 137. In doing so, the Court had regard to General Comment No. 13 of the CESCR which stated that institutional autonomy must be consistent with systems of public accountability, especially in respect of funding provided by the State. Thus, an appropriate balance has to be struck between institutional autonomy and accountability. Institutional arrangements should be "fair, just and equitable, and as transparent and participatory as possible".¹⁷



¹⁶ CACV 18/2007, 3 February 2010.

¹⁷ CACV 18/2007, 3 February 2010, paras. 98-103, citing General Comment No. 13, paras. 38-40. The CFI also held that Article 13 of the Covenant did not give religious organizations a right of veto in terms of educational policy affecting aided schools run by them: [2007] 4 HKLRD 483, para. 194.



In *Secretary for Justice (on behalf of the Secretary for Education) v Commission of Inquiry on Allegations relating to the Hong Kong Institute of Education*,¹⁸ the Court found that freedom of expression must allow for the expression of contrary views, citing General Comment No. 13 of the CESCR which pointed out that the enjoyment of academic freedom carries with it obligations, “such as the duty to respect the academic freedom of others, to ensure the fair discussion of contrary views, and to treat all without discrimination on any of the prohibited grounds”.

Conclusion

Although the ICESCR has not been directly incorporated into domestic law, the HKSAR has an international obligation to respect, protect

and fulfil the rights recognized in the Covenant. Our courts may use the ICESCR provisions and the General Comments issued by the CESCR as an aid in interpreting local laws and relevant provisions of the Basic Law. It is thus important that all relevant stakeholders have a proper understanding of the requirements of the Covenant.



¹⁸ [2009] 4 HKLRD 11, paras. 63-64, citing General Comment No. 13, para. 39.