

For discussion on
18 September 2001

**PANEL ON ADMINISTRATION OF JUSTICE
AND LEGAL SERVICES OF THE LEGISLATIVE COUNCIL**

**Paragraph 27 of the Concluding Observations
of the United Nations Committee
on Economic, Social and Cultural Rights**

Introduction

This paper informs Members of the views of the Administration on paragraph 27 of the Concluding Observations of the United Nations Committee on Economic, Social and Cultural Rights (“the Committee”) issued on 11 May 2001 on the Report submitted by the Hong Kong Special Administrative Region (“the HKSAR”) under the International Covenant on Economic, Social and Cultural Rights (“the Covenant”).

Background

2. The hearing on the Report submitted by the HKSAR took place on 27 and 30 April 2001 in Geneva. The Hong Kong delegation which was led by the Secretary for Home Affairs comprised 10 officials from the Department of Justice, Education and Manpower Bureau, Health and Welfare Bureau, Housing Bureau, and Home Affairs Bureau. The delegation presented the report and answered the Committee’s questions.

3. The Concluding Observations of the Committee were issued on 11 May 2001. The Committee identified 11 positive aspects of the report, including for instance, the withdrawal of reservations to Articles 1 and 7 of the Covenant, the fact that the Human Rights Unit of the Department of Justice frequently consults the Committee’s General Comments and the assurance that all rights enshrined in the Covenant contain certain justiciable aspects and that the Covenant is invoked in Hong Kong courts.

4. The Committee also expressed several concerns and made a number of suggestions and recommendations in the Concluding Observations.

Paragraph 27 of the Concluding Observations

5. Of particular concern to the members of this Panel is the statement made by the Committee in paragraph 27 of the Concluding Observations which reads as follows:

“The Committee reminds the HKSAR that the provisions of the Covenant constitute a legal obligation on the part of the States parties. Thus, the Committee urges the HKSAR not to argue in court proceedings that the Covenant is only “promotional” or “aspirational” in nature.”

The meaning of the terms ‘promotional’ or ‘aspirational’ in the judgments

6. The opinion that the Covenant was “promotional” or “aspirational” in nature was expressed by the Courts in the context of three immigration cases¹ which involved applications for judicial review of removal orders issued by the Director of Immigration against persons who had no legal right to stay in Hong Kong.

7. The provision in issue under the Covenant in all three cases was Article 10(1) of the Covenant, which provides that the “widest possible protection and assistance should be accorded to the family, which is the fundamental group unit of society”.

8. The Courts considered the effect of the application of three international covenants, namely, the International Covenant on Civil and Political Rights (“ICCPR”), the Convention on the Rights of the Child (“CRC”) and the Covenant in those cases, noting that there are reservations under the ICCPR and the CRC in respect of the application

¹ Chan Mei Yee v Director of Immigration HCAL 771/1999; Chan To Foon & Others v Director of Immigration HCAL 58/1998; Mok Chi hung & Another v Director of Immigration [2001] 2 HKLRD 125.

of immigration legislation relating to persons who do not have the right to enter or remain in Hong Kong.

9. The Courts took the view that the effect of those reservations under the ICCPR and CRC is that the provisions under the respective convention and covenant cannot be invoked so as to affect, as regards any person not having the right to enter and to remain in Hong Kong, any immigration legislation governing his entry into, stay in or departure from Hong Kong.

10. No similar reservation has been entered in respect of the Covenant. In the opinion of the Courts, this may be due to the “promotional” or “aspirational” nature of the Covenant.

11. In Chan Mei Yee v Director of Immigration, the Court after having taken into account the views of various legal experts, came to the view that the Covenant is ‘promotional’ in nature, in the sense that the obligations under the Covenant are progressive with steps to be taken by State parties with a view to achieving progressively the full realization of the rights concerned having regard to the maximum of its available resources.²

12. It was further held that, because of the unique position faced by Hong Kong, the Director of Immigration’s decisions were lawful even in the absence of a reservation. The result is that provisions under the ICESCR cannot be invoked as the basis of legitimate expectation that the government would take the rights under the Covenant into account when immigration decisions were made against those who do not have a right to enter or remain in Hong Kong.

13. In Chan To Foon v Director of immigration, a similar view was expressed by the Court on the progressive nature of the Covenant:

“Hong Kong may therefore recognise the rights protected by the ICESCR. But they are rights which, having regard to this Territory’s existing social difficulties, may only be guaranteed progressively; that is, as and when those difficulties are overcome. Matters of immigration, our courts have

² At pages 23-5 of the judgment.

recognised, remain a major problem. If unchecked, it is clear that, in the informed opinion of the Director, the problem will threaten the Territory's social fabric. **As a result, in respect of immigration matters, the Government of Hong Kong is unable at this time to guarantee the rights protected in the Covenant when they relate to matters of immigration.** I believe it may be taken that it is for this reason that no reservation was entered in respect of the ICESCR: it is an aspirational covenant, not one that creates absolute obligations.” (Emphasis added.)³

Progressive realization of the rights as envisaged under Article 2(1) of the Covenant

14. The principal obligation under Article 2(1) of the ICESCR is to take steps “with a view to achieving progressively the full realization of the rights recognized” in the Covenant. The concept of “progressive realization” has been explained in paragraph 9 of General Comment No.3 of the Committee⁴:

“...The concept of progressive realization constitutes a recognition of the fact that full realization of all economic, social and cultural rights will generally not be able to be achieved within a short period of time. In this sense the obligation differs significantly from that contained in article 2 of the International Covenant on Civil and Political Rights which embodies an immediate obligation to respect and ensure all of the relevant rights. Nevertheless, the fact that realization over time, or in other words progressively, is foreseen under the Covenant should not be misinterpreted as depriving the Covenant of all meaningful content. It is on the one hand a necessary flexibility device, reflecting the realities of the real world and the difficulties involved for any country in ensuring full realization of economic, social and cultural rights. On the other hand, the phrase must be read in the light of the overall objective, indeed the raison d’être of the Covenant which is to establish clear obligations for State parties in respect of the full realization of the rights in question. It thus imposes an obligation to move as expeditiously and effectively as possible towards that goal...”. (Emphasis added.)

³ Chan To Foon & Others, at page 29F-M.

⁴ Fifth session, 1990, [UN Doc.E/1991/23.

15. Indeed, the above passage had been referred to and relied on by the Courts in coming to the view that the Covenant is “promotional” or “aspirational” in nature.⁵

The views of the Administration

16. The Administration accepts that there is an obligation under international law to implement the rights under the Covenant. However, an international covenant is not part of the domestic law in the absence of its incorporation into the domestic legal system. Accordingly, the Administration considers that the international obligation to implement the rights in the Covenant does not create any domestic right or legitimate expectation that those rights would be taken into consideration by the Government in respect of immigration decisions on persons who do not have the right to enter or remain in Hong Kong.

17. The question of the precise nature of the Covenant may, in future arise in domestic legal proceedings in many different contexts. In each case in which it does arise, it must be our independent judiciary that decides that question. The courts will be best assisted in that task if all legitimate arguments are put to them by counsel appearing for the parties.

18. There are distinguished legal experts who hold the view that the Covenant is promotional in nature. Where the nature of the Covenant arises in legal proceedings, the courts may well be aided in their task by being informed of those views.

19. The Administration, and counsel acting for it, have a privilege to defend the government’s position by the statement of every fact and the use of every argument that is permitted by the principles and practice of the law. That privilege is recognised in the Code of Conduct of the Bar of the Hong Kong Special Administrative Region. The Code of Conduct also contains express provisions as to the information that

⁵ Paragraph 9 of General Comment No.3 has been quoted in page 284 of Henry Steiner’s book titled *International Human Rights in Context* which the Courts have referred to in Chan Mei Yee v Director of Immigration HCAL 77/1999, at page 24G-N and Chan To Foon & Others (ibid), at page 28K-S.

counsel is required to give to the Court.

20. A copy of the Concluding Observations issued by the Committee has already been sent to the Judiciary for its information by the Administration.

21. The Administration is committed to the implementation of its obligations under the Covenant and treats the Concluding Observations of the Committee with the greatest respect. The fact that it has taken steps to implement previous recommendations of the Committee has been noted by the Committee with appreciation.⁶ The Administration will continue to take steps to achieve progressively the full realization of the rights under the Covenant in the manner envisaged by Article 2(1) of the Covenant.

22. The Administration's response to paragraph 27 of the Concluding Observations has previously been stated in the reply by the Secretary for Justice to the question asked by the Honourable Ms. Audrey Yu at the Legislative Council meeting on 20 June 2001. A copy of the relevant question and answer is attached at the Annex.

Department of Justice
September 2001

(#37293 v3)

⁶ For instance, the Committee notes with satisfaction that the Equal Opportunities Commission is effectively carrying out its mandate without interference from the government and it also welcomes the establishment of the Women's Commission. It further notes with appreciation that training programmes are conducted for unskilled and unemployed workers and commends the HKSAR government for its efforts to provide adequate housing for Hong Kong residents: see paragraphs 6, 7, 10 and 11 of the Concluding Observations.

LEGCO QUESTION No. 1

(Oral Reply)

Date of sitting : 20.6.2001

Asked by : Hon Audrey Eu

Replied by : Secretary for Justice

Question :

After considering the initial report submitted by the People's Republic of China on the implementation of the International Covenant on Economic, Social and Cultural Rights in the Hong Kong Special Administrative Region ("SAR"), the United Nations Committee on Economic, Social and Cultural Rights adopted its Concluding Observations on 11 May this year. The Committee expressed concern that the provisions of the Covenant had not yet been incorporated into the laws of the Hong Kong SAR, and stated that it was a mistaken understanding of the legal obligations arising from the Covenant on the part of the States parties to hold the opinion that the Covenant is "promotional" or "aspirational" in nature. In this connection, will the Government inform this Council whether:

- (a) it has implemented the Covenant through the laws of the Hong Kong SAR, in accordance with Article 39 of the Basic Law; if not, whether it has assessed if the Hong Kong SAR has contravened this Article, and whether it will consider incorporating the provisions of the Covenant into the laws of the Hong Kong SAR; if it will consider, of the details; if not, the reasons for that; and
- (b) it will follow the advice of the Committee to not argue in court proceedings that the Covenant is only "promotional" or "aspirational" in nature?

Reply :

Madam President,

With regard to the first part of this question, the relevant Concluding Observation was that –

‘The Covenant’s status in HKSAR’s domestic legal order continues to be different from that of the International Covenant on Civil and Political Rights, the provisions of which have been incorporated into domestic legislation.’

The Administration understands that the difference referred to is the different manner in which the two Covenants have been implemented in domestic law. The ICCPR has been implemented largely through one particular Ordinance, namely the Hong Kong Bill of Rights Ordinance. There is no equivalent single Ordinance that implements the International Covenant on Economic, Social and Cultural Rights.

However, provisions of the latter Covenant are incorporated into our domestic law through many Articles in the Basic Law, and through provisions in over 50 Ordinances.

Article 39 states that the provisions of the International Covenant on Economic, Social and Cultural Rights as applied to Hong Kong shall remain in force and shall be implemented through the laws of the Hong Kong Special Administrative Region. That is the case. The Administration does not therefore consider that there has been a breach of Article 39 of the Basic Law in this respect.

However, the Covenant requires the Administration to take steps with a view to achieving progressively the full realisation of the rights recognised in it by all appropriate means. This process is an ongoing one, and the possibility of enacting further legislative provisions for this purpose is always kept in mind. For example, the Administration is currently considering the desirability of proposing an increase in the age of criminal responsibility, and is reviewing the issue of racial discrimination.

With regard to the second part of the question, the Administration notes that the Committee on Economic, Social and Cultural Rights has urged the Hong Kong SAR not to argue in court proceedings that the Covenant is only ‘promotional’ or ‘aspirational’ in nature. The question of the precise nature of the Covenant may, in future, arise in domestic legal proceedings in many different contexts. In each case in which it does arise, it must be our independent judiciary that decides that question. The courts will be best assisted in that task if all legitimate arguments are put to them by counsel appearing for the parties.

The Administration, and counsel acting for it, have a privilege to defend the Administration’s rights by the statement of every fact and the use of every argument that is permitted by the principles and practice of the law. That privilege is recognised in the Code of Conduct of the Bar of the Hong Kong Special Administrative Region.

With the greatest respect to the Committee on Economic, Social and Cultural Rights, there are distinguished legal experts who hold differing views as to the nature of the ICESCR. Where the nature of the Covenant arises in legal proceedings, the courts may well be aided in their task by being informed of those differing views. It would not therefore be appropriate for the Administration to undertake to withhold such views from the courts, or to undertake not to support those views in any circumstances.