

The Implementation of the International  
Covenant on Economic, Social and Cultural  
Rights in Overseas Jurisdictions and Hong Kong

Research and Library Services Division  
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# **The Implementation of the International Covenant on Economic, Social and Cultural Rights in Overseas Jurisdictions and Hong Kong**

## **BACKGROUND**

In early 1995, members of the LegCo Panel on Constitutional Affairs discussed issues relating to the UN hearing on the second periodic report on Hong Kong regarding Articles 10-15 of the International Covenant on Economic, Social and Cultural Rights (ICESCR). During the meeting, members requested that research be conducted on the implementation of the ICESCR in overseas jurisdictions. They would particularly be interested to know if any country has codified rights under the Covenant into one single piece of domestic legislation, similar to the codification of rights under the International Covenant on Civil and Political Rights into the Bill of Rights Ordinance in Hong Kong.

2. Out of the 130 States Parties to the Covenant, some western democracies including Australia, Japan, Canada, France and Switzerland have been selected for this research. The United States, although not a signatory to the Covenant, was also studied. Letters were sent to these countries and the United Nations to seek updated information on the implementation of the ICESCR in each place. Most of these countries responded by sending us their periodic reports on the implementation of the ICESCR.

3. The ICESCR covers a wide spectrum of rights but the focus of the present research is on Articles 10 to 15, that is, the right of the family, motherhood, and childhood to protection and assistance; the right to an adequate standard of living; the right to physical and mental health; the right to education and the right to take part in cultural life. This enables comparison with the second periodic report on Hong Kong regarding Articles 10-15 of the ICESCR. While comparison has been made on the different kinds of measures each country has adopted, this research does not attempt to compare the effectiveness of these measures.

4. The general observation is that no one country under study has codified rights under the ICESCR into one single piece of domestic legislation or tried to cover all the rights in a few pieces of main legislation. In fact, most countries use a combination of constitutional, legislative and administrative measures in enforcing the rights. The difference is the proportion of each type of measures used. Below is a brief description of how each State Party implement the ICESCR. Detailed findings are available upon request.

## **JAPAN**

5. Among all the countries being studied, Japan has the most elaborated framework in protecting the rights of its people. The highest level of safeguard is given by the Constitution. Rights entrenched in this way would be unaffected by reshuffles in the government or changes in legislation. The Japan Constitution enacted in 1947 guarantees the right to collective bargaining, the right to work, the right to minimum standard of living and the right to cultured living. It also guarantees protection to children, freedom of expression and equality among its people.

6. While some of the economic, social and cultural rights under the Covenant have already been protected by the Constitution, Japan provides further safeguards in domestic legislation. Japan has used many more pieces of domestic law than other countries in enforcing the Covenant. For example, in enforcing the right to an adequate standard of living (Article 11), Japan uses 47 different laws such as the Price Control Law, Law on Emergency Measures to Counter the Cornering and Hoarding of Livelihood-related Goods, Consumer Protection Fundamental Law and Daily Life Security Law. Japan tends to regulate various aspects of the livelihood of its people through legislation.

7. But even under such a highly regulated framework, some areas of the Covenant such as the right to adequate clothing and the promotion of research, dissemination of technology, health promotion and encouragement of artistic creativity are left to measures other than legislation. And sometimes legislation has to be supplemented by other measures. For example, in addition to protection of the Mother, Child and Widow's Welfare Law, the government provides widows with counselling services, mother-and-child welfare centres and mother-and-child homes.

## **AUSTRALIA**

8. Australia has established the Human Rights and Equal Opportunity Commission (HREOC) to give force to five international instruments - the International Covenant on Civil and Political Rights (ICCPR), the Declaration of the Rights of the Child, the Declaration on the Rights of Disabled Persons, the Declaration on the Rights of Mentally Retarded Persons and the International Labour Organisation Conventions.

9. Although Australia is a signatory to the ICESCR, it does not have a set up similar to the HREOC in enforcing the Covenant. Nevertheless, part of the economic, social and cultural rights are protected by the Commission since the Declaration of the Rights of the Child and the International Labour Organisation Convention are built on the rights under the ICESCR.

10. When compared to Japan, Australia has left much of the rights to administrative and financial measures. Taking Article 11 as an example, the broad framework is set by the minimum wage legislation which provides some degree of protection to the standard of living for those who are working. Those who are not working are taken care of by the social security system. Australia does not have specific measures in enforcing the other two rights under Article 11 - the right to adequate clothing and the right to adequate food.

## **CANADA**

11. Similar to Japan, Canada has given some of the economic, social and cultural rights supreme status by entrenching the Canadian Charter of Rights and Freedoms in the Constitution of Canada. The Constitutional Act 1982 committed the Government of Canada and the provincial governments to promoting equal opportunities for the well-being of Canadians; furthering economic development to reduce disparity in opportunities and providing essential services of reasonable quality to all Canadians. The Charter provides protection to rights such as equality rights for all individuals, minority language education rights and mobility rights.

12. Canada does not have a single piece of legislation embracing all the rights under the Covenant. Compared to Japan, Canada has relatively smaller number of legislation in enforcing different rights under the Covenant. As Canada is a federal State comprising ten provinces and two territories, the number and type of legislation used in enforcing the rights vary from place to place. For example, the different provinces and territories use between one to eight pieces of domestic legislation in enforcing Article 11 of the Covenant which Japan uses 47 laws.

## **FRANCE and SWITZERLAND**

13. Both France and Switzerland are countries with a "monist" tradition, which means that under their constitutions, treaties duly ratified would automatically become part of the domestic legal system and may be used before the national courts.

14. When an individual invokes the terms of a convention, it is up to the court to decide whether separate legislation is needed to implement the convention. Separate legislation may be needed when a convention provides several options in applying its provisions or a convention only provides a framework on a subject matter and calls for the implementation details.

15. In addition to human rights treaties, France has put the Declaration of the Rights of Man and of the Citizen in the preamble of its Constitution. The Declaration protects rights such as the freedom of speech and property right.

16. In Swiss law, there is no separate declaration or charter listing the fundamental rights guaranteed by international conventions. Most of these rights such as the right to marry, freedom of association, freedom of association and equality between men and women are embodied in the 1874 Constitution. In addition, the Federal Tribunal derives "unwritten" rights from interpreting the Constitution.

## **THE UNITED STATES**

17. The United States ratified the ICCPR in 1992 but the ICESCR is still pending before the US Senate. In addition, the United States has yet to ratify the American Convention on Human Rights and the Additional Protocol on Economic, Social and Cultural Rights. In 1993, the House of Representatives urged the government in a resolution to ratify the three human rights treaties.

18. Some of the human rights and fundamental freedoms are given supreme status in the United States. The "Bill of Rights" was formed by ten amendments to the Constitution proposed by the US Congress in September 1789 and entered into force in 1791.

19. The Civil Rights Division of the Department of Justice of the US government is responsible for enforcing federal civil rights laws including the Civil Rights Acts, Voting Rights Act, Equal Educational Opportunities Act, Equal Credit Opportunity Act and the Rights of Institutionalised Persons Act. A section of the Civil Rights Division concentrates on protecting the rights of indigenous American Indians while another section, the Sex Discrimination Task Force, reviews all federal policies, programs, and procedures with a view to eliminating discrimination against women and obtaining appropriate action.

20. An independent agency, the Equal Employment Opportunity Commission deals with charges and complaints of job discrimination. A second independent agency, the Commission on Civil Rights collects and studies information on discrimination or denials of equal protection of laws.

## **HONG KONG**

21. Hong Kong enacted the Bill of Rights Ordinance in June 1991. However, the Ordinance only covers the ICCPR because the government is of the view that rights under the ICESCR cannot be easily enforced in the courts.

22. The view is reiterated in the second periodic report on Hong Kong regarding Articles 10 to 15 of the ICESCR. The Government says the provisions of the ICESCR "are in the form of objectives to be achieved progressively and are not rights which individuals could easily enforce in the courts. They are not, therefore, well suited for inclusion in a Bill of Rights designed to give people the right of direct action in the courts"<sup>i</sup>. The government claims that the ICESCR is implemented in Hong Kong through a combination of common law, legislation and administrative measures. If talking merely about number, Hong Kong in fact has similar number of legislation when compared to a state or territory in Australia or a state or province in Canada.

23. The Letters Patent was amended in 1991 to require that all domestic laws enacted thereafter shall not be inconsistent with the ICCPR as applied to Hong Kong. However, there is no mention of the rights under the ICESCR in the Letters Patent.

24. The fundamental rights and freedoms of the residents of the future Hong Kong Special Administrative Region are provided for in Chapter three of the Basic Law. Article 39 of the chapter specifically provides for the continued application of the ICCPR and the ICESCR to Hong Kong after 1997.

25. It is worth to note that the ICESCR is at present not applied to Hong Kong in full since the United Kingdom made some reservations upon signature and ratification of the Covenant in 1976. The reservations are as follows:

- The Government of the United Kingdom reserve the right to postpone the application of Article 7 (a) (i) (fair wages and equal remuneration for work of equal value), in so far as it concerns the provision of equal pay to men and women for equal work in the private sector in Hong Kong; and
- The Government of the United Kingdom reserve the right not to apply Article 8 (1) (b) in Hong Kong - the right of trade unions to establish national federations or confederations and the right of the latter to form or join international trade-union organisations

Such reservations are not likely to disappear after 1997 without positive actions.

## **DIFFICULTIES IN THE CODIFICATION OF THE ICESCR IN ONE LEGISLATION**

### ***Wide scope of the rights***

26. None of the countries examined in this paper have codified rights under the Covenant into one single piece of domestic legislation. In fact, several pieces of legislation would be needed to cover rights under one single Article since most of the Articles cover more than one type of right. For example, Article 10 covers the rights of the family, mothers and children. Article 11 recognises the right of everyone to an adequate standard of living including adequate food, clothing and housing, and to the continuous improvement of living conditions. Article 15 covers the right to take part in cultural life, to enjoy the benefits of scientific progress and the protection of the interests of authors. If the ICESCR is codified into one single piece of domestic legislation, the legislative framework would be huge and complicated. The degree of complexity can partly be illustrated the fact that Japan uses 47 different pieces of legislation in enforcing one Article - the right to an adequate standard of living.

### ***Covenant drafted in general terms***

27. In addition to the wide scope of the Covenant, the difficulty of codification is compounded by the fact that the Covenant was drafted in rather general terms. An international human rights lawyer Julia Hausermann said during an academic workshop on the ICESCR that "if economic, social and cultural rights are to be adequately protected by law greater precision needs to be given to the normative standards. The ICESCR was drafted in general terms on the understanding that it would be for the competent specialised agencies of the UN to elaborate the detailed obligations required for the realisation of the rights it protects, as the ILO had begun to do in the field of labour rights."<sup>iii</sup> The Convention on the Rights of the Child which covers the whole range of children's rights was cited as another such example.

### ***The need for a package of appropriate measures***

28. The UN Committee on Economic, Social and Cultural Rights has stressed the importance of having a package of appropriate measures to enforce the rights. The comments were based on experience the Committee gained through examining progress reports by States Parties. Such comments were adopted in February 1989 by the committee at its 19<sup>th</sup> meeting.

29. "The Committee notes that States Parties have generally been conscientious in detailing at least some of the legislative measures that they have taken in this regard. It wishes to emphasise, however, that the adoption of legislative measures, as specifically foreseen by the Covenant, is by no means exhaustive of the obligations of States Parties. Rather, the phrase 'by

all appropriate means' (of Article 2) must be given its full and natural meaning.”

30. "Among the measures which might be considered appropriate, in addition to legislation, is the provision of judicial remedies with respect to rights which may, in accordance with the national legal system, be considered justifiable.”

31. "Other measures which may also be considered 'appropriate' for the purposes of Article 2(1) include, but are not limited to, administrative, financial, educational and social measures.”

## **CONCLUDING REMARKS**

32. To conclude, codifying all the rights under the Covenant into one piece of domestic legislation would be a very complicated task. And this is a task no country has yet accomplished. It needs the political will of the government to draw up the legislative framework as well as to allocate sufficient resources to reduce problems giving rise to poverty and social injustice. Since socio-economic problems would not disappear all at once, legislation may not always be the appropriate measures in ensuring the government is fulfilling its promises. Instead, it is important for a place or State Party to have progressive improvements over the protection of the economic, social and cultural rights of its people and the government is able to give evidence of such improvements. The Government should also be willing to commit itself to a concrete action plan to bring about further improvements.

<sup>i</sup> P.3, Second Periodic Report on Hong Kong regarding Articles 10-15 of the International Covenant on Economic, Social and Cultural Rights.

<sup>ii</sup> In 1988 the Human Rights Group of the Centre for International Policy Studies, Department of Politics, University of Southampton, held two workshops on Economic, Social and Cultural Rights. A total of 35 participants including Julia Hausermann were involved in the workshops. The papers presented during the workshops were later published in the book called Economic, Social and Cultural Rights - Progress and Achievements.

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