

**Daly & Associates¹ Submissions to
the United Nations Committee on Economic, Social and Cultural Rights**

January 2023

1. Introduction

The purpose of this report is to assist the Committee on Economic, Social and Cultural Rights (“**the Committee**”) in its consideration of State reports on the implementation of the International Covenant on Economic, Social and Cultural Rights (“**ICESCR**”) during the upcoming 73rd session.

In general, there has been a lack of attention to the scope and effect of ICESCR rights and their relevance in constitutional adjudication in Hong Kong. Unlike the ICCPR which has been domesticated by the Hong Kong Bill of Rights Ordinance (Cap. 383) (“**HKBORO**”), the ICECSR has not been similarly incorporated into domestic legislations of the HKSAR. Therefore, the provisions in the ICESCR are not given the force of law in the city. Indeed, in our experience, the Hong Kong courts have been reluctant to give effect to the guarantees under the ICESCR.

Recent changes in Hong Kong have presented significant challenges in the protection of human rights. Such changes include, *inter alia*, the introduction of the National Security Law, the amendment of the Immigration Ordinance (Cap. 115), the updated removal policy targeting non-refoulement claimants, as well as the legal aid reform which sets a cap on the number of cases that each solicitor/barrister can take on a legally aided basis. In its concluding observations on the fourth periodic report of Hong Kong, China, the Human Rights Committee raises concerns that the legal aid reform “*further restricted the rights to access to legal aid and to counsel of one’s choice... by hindering people seeking legal aid from choosing their own criminal lawyers and limiting the number of judicial review cases which solicitors and barristers are allowed to take annually*”.² In most changes to these significant legislative and government policies, the government had proposed reform without first consulting the general public and legal profession in Hong Kong.

2. Overall Review: A Gap Between Rhetoric and Reality in the Implementation of ICESCR Rights

It is the claim of the government that even the ICESCR is not directly enforceable in Hong Kong, individual provisions of the Covenant are implemented by the relevant provisions of the Basic

¹ Daly & Associates is committed to upholding the cause of justice and access to justice and takes on meritorious cases on a pro bono basis. With decades of experience in strategic litigation, Daly & Associates has been a driving force in shaping human rights protections and continues to bring landmark challenges to the highest Courts in Hong Kong. All the cases mentioned in this submission are handled by our firm unless otherwise stated.

² Human Rights Committee, *Concluding observations on the fourth periodic report of Hong Kong, China* at para 33

Law³ and different pieces of local statutes as well as other administrative, financial and social measures.⁴ See the government's fourth report to the Committee dated 19 Dec 2019 ("**the Fourth Report**"):

*"Although both the rights recognized in the Covenant and those recognized in the ICCPR are fundamental human rights, they are different in nature. Many of the rights enunciated in the Covenant are given protection under the Basic Law (for example, Articles 27, 34, 36, 37, 137, 140, 144 and 145) as well as various legislative measures."*⁵

The government also claims that the Covenant may be used as a framework within which government decisions or discretions are to be made or exercised.⁶ The courts may also refer to the Covenant and the views of the Committee in deciding cases involving ICESCR rights.

In particular, concerning the right to protection and assistance for the family under Article 10 of the Covenant, the government has stated in that it "*recognises that family is the cornerstone of social harmony*" and "*the assessment of family implications has become a mandatory requirement and integral part of the policy-making process within the Government since 1 April 2013*".⁷

Yet, the government's practice in reality has been proven to the contrary at both the judicial and administrative levels.

First, at the judicial level, the Court of Final Appeal ("**CFA**") (i.e. the highest court in Hong Kong) has ruled that BL39 (1), which provides that the provisions of the ICESCR as applied to Hong Kong before 1 July 1997 shall remain in force and shall be implemented through the laws of the HKSAR, is only a declaration of the position of 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 legislation.⁸ Furthermore, the immigration reservation under section 11 of the HKBORO ("**the Reservation**") has been frequently invoked to bypass the protection of fundamental human rights safeguarded in the ICESCR.

³ The relevant rights include: the right to form and join trade unions and to strike (BL 27); freedom to choice of occupation (BL 33); freedom of marriage (BL 37); freedom to engage in academic research and cultural activities (BL 34); right to social welfare (BL 36); academic freedom and autonomy of education institutions (BL137) and rights and interests of authors in their literary and artistic creation (BL 140).

⁴ Department of Justice, "Application of the International Covenant on Economic, Social and Cultural Rights in Hong Kong (Basic Law Bulletin Issue No. 17, December 2015) <https://www.doj.gov.hk/en/publications/pdf/basiclaw/basic17_3.pdf>

⁵ Committee on Economic, Social and Cultural Rights, 'Fourth periodic report submitted by Hong Kong, China, under articles 16 and 17 of the Covenant, due in 2019' (CESCR, 5 August 2020) <docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=4slQ6QSmIBEDzFEovLCuW%2BALqOml1btoJd4YxREVF2WjpwJ5xuSazynvUP%2BVA66SfbNNeqzL1hWIBNJJ50mCiX%2FN8HVRnXYqPgP4wkduktGrtgVJiki34wqUKqfbXq3B>para 11

⁶ *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.

⁷ Fourth Report para 102

⁸ *GA v Director of Immigration* (2014) 17 HKCFAR 60, paras. 58 and 81-83

Notably, in *GA v Director of Immigration* [2014] HKCFA 14 (“**GA**”), where we fight for the refugees’ right to work under Article 6 of the ICESCR (which we will elaborate later), the government makes it clear to the CFA that:

"ICESCR, being a treaty which has never been incorporated into the domestic law of Hong Kong by a specific piece of implementing legislation, has no direct domestic effect...Further, the application of the provisions of Art 6 of the ICESCR under Art 39 of BL is subject to the provisions of the reservation that allows employment restrictions based on place of birth or residence qualification. So far as Art 39 of BL is concerned, following the approach in *Ubamaka* (see §135), so long as the UK Government viewed its reservation as effective in applying the ICESCR to Hong Kong, the reservation must be given effect and applied. It may also be relevant to note in this regard that the PRC Government made a reservation to Art 6 of ICESCR in relation to the HKSAR in similar terms. In any event, it is not accepted that any right to work under ICESCR has been infringed..."

Another example can be found in the landmark case of *Comilang Milagros Tecson and Another v Director of Immigration* [2019] HKCFA 10 (“**Comilang**”), where we represent mothers of young children who challenged the Director of Immigration’s refusal to allow extension of time for them to remain and take care of their children. The government contended that:

"The Director (of Immigration) cannot be under a duty to take into account fundamental rights that are not even engaged in the first place...the applicants’ reliance upon their family circumstances is essentially an appeal to broad humanitarian considerations."

Regrettably, the highest court in Hong Kong concurs with the government’s position in both *GA* and *Comilang*.

In *Comilang*, the CFA held that:

"77. ...Even accepting that the provisions of ICESCR 10 have been incorporated into domestic legislation through BL 37, BOR 19 and BOR 20, as explained above, those rights, properly construed, are subject to the immigration reservation in s.11 and therefore reliance on ICESCR 10 cannot give the appellants any greater rights than under those provisions so construed. It is an established principle that ‘any legitimate expectation has to give way to contrary statutory provisions’: see *Ng Siu Tung v Director of Immigration* (2002) 5 HKCFAR 1 at [132]. In the present case, there can be no greater expectation than that arising under the provisions of BL 37, BOR 19 or BOR 20, all of which are qualified by s.11. This excludes the appellants’ reliance on ICESCR 10 whether directly or indirectly by way of legitimate expectation."⁹

In *GA*, the CFA concluded that “whatever the effect or ambit of Article 6 of the ICESCR, even if it provides for the general and unrestricted right to work which the Applicants advance as its effect,

⁹ *Comilang Milagros Tecson and Another v Director of Immigration* [2019] HKCFA 10, para 77.

this Article does no tenure to their benefit. It has not been incorporated into Hong Kong domestic legislation."¹⁰

Second, at the administrative level, far from showing its recognition for family as the cornerstone of social harmony or its commitment to integrate the assessment of family implications in its decision-making process, as pledged in the Fourth Report, the government has denied these significant rights.

On a daily basis, we have been assisting desperate clients with dependant visa applications and requests for rescinding deportation orders in the hope of staying in Hong Kong together with their families. A frequently seen justification for refusal put forward by the government is that the ICESCR rights are not applicable and such refusal does not prevent our clients from uniting with their families elsewhere outside HK, even though most of the time, the families have nowhere else to go or to be, except Hong Kong. The spouses (as sponsors) are often permanent residents with a stable job in Hong Kong while the children of the family are born and raised in Hong Kong.

We have dealt with cases in which the wife has suffered acute depression due to the constant fear and worry of the imminent removal of her husband following the Immigration's rejection of their dependant visa application. We have also encountered cases involving ill or disabled children or wives who clearly demand the presence and company of their fathers or husbands in Hong Kong as sources of physical assistance and emotional support. Nevertheless, the government pays no heed to these specific circumstances of the family and the devastating impact of family disruption in concluding that "*there is no strong compassionate or humanitarian reasons or other special extenuating circumstances warranting exceptional consideration*". Notably, in one of our recent cases, our client, a Hong Kong Permanent Resident, suffered two miscarriages and developed chronic depression and the treating doctor has certified that the repeatedly failed dependant visa applications of her husband is contributing to her stress. The failed applications have also led to multiple suicide attempts of the client, which were fortunately intercepted by her husband, whose presence remained integral to her well-being.

The above examples are just the tip of the iceberg which demonstrates the discrepancy between the government's aspirational rhetoric in relation to the rights enshrined in the ICESCR, and the practical realization of these rights. This continues to significantly hinder Hong Kong's protection of the most vulnerable in the society.

¹⁰ *GA v Director of Immigration*, para 61.