USING THE ICESCR IN HONG KONG COURTS

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This article will examine the role that the International Covenant on Economic, Social and Cultural Rights (ICESCR) should play in the adjudication of public law disputes in Hong Kong. It will consider possible usages of the ICESCR as a source of constitutional rights, as an aid to constitutional and statutory interpretation and its potential influence on the development of the common law. Despite not being directly incorporated into domestic legislation, it will be argued that the ICESCR enjoys constitutional status under the Basic Law. The view that the ICESCR is merely “progressive” or “aspirational” will also be challenged as a mischaracterisation of the legal nature of the covenant, which unduly hinders its enforcement in Hong Kong courts.

1. Introduction

This article will examine the role that the International Covenant on Economic, Social and Cultural Rights (ICESCR) should play in the adjudication of public law disputes in Hong Kong. In Art 39(1) of the Basic Law, the ICESCR is mentioned immediately alongside the International Covenant on Civil and Political Rights (ICCPR). Yet, unlike the ICCPR, the application of the ICESCR in Hong Kong law has received little judicial and scholarly attention.¹ This may be due to the fact that, in a dualist system such as

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¹ As to discussion on the relationship between the ICCPR, Bill of Rights Ordinance (Cap 383) and the Basic Law, see generally Dinusha Panditaratne, “Basic Law, Hong Kong Bill of Rights and the ICCPR”, in
Hong Kong, the ICESCR as an unincorporated treaty is said to have only limited effect on the plane of domestic law. It may also be because of a common view amongst Hong Kong judges that the ICESCR is merely “aspirational”, to be progressively realised taking account of the State’s wide discretion to formulate and prioritise socio-economic policies. The view of successive Chief Justices that the court is not the appropriate forum for the adjudication of socio-economic issues, which typically engage the ICESCR, has also undoubtedly influenced judicial deference in this area. Whilst these constitutional objections do have some weight, this article will aim to show that the ICESCR ought to be viewed as a source of domestic law and has a role to play in the future development of Hong Kong’s public law jurisprudence.

This article will start by comparing the protection of economic, social and cultural rights (hereinafter “socio-economic rights”) under the Basic Law and ICESCR. This analysis reveals some key differences in the way that socio-economic rights are articulated and protected under these respective instruments. These findings suggest that individuals will continue to rely on the ICESCR in Hong Kong courts. The article will then go on to explore possible usages of the ICESCR: as a source of constitutional rights under the

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3 See eg *Mok Chi Hung v Director of Immigration* [2001] 2 HKLRD 125 (CFI), pp 133C/D to 134A and 135E to H (Cheung J).


Basic Law, its relevance to constitutional and statutory interpretation and its potential influence on the common law. The constitutional objections to the ICESCR being applied in Hong Kong courts, as mentioned above, will also be assessed.

2. Comparing the ICESCR and Basic Law

At the outset, the Basic Law and ICESCR differ significantly in their scope of protection of socio-economic rights. Under the Basic Law, fundamental rights are provided for in Chapter III, which confers rights on “residents”. By contrast, the fundamental rights of non-residents are provided “in accordance with law”, being that prescribed by legislation or the common law. The ICESCR by contrast guarantees rights to “everyone” and thus in principle draws no distinction based on residency. The ICESCR also prohibits discrimination on the grounds of, amongst other characteristics, national or social origin. Whilst the Basic Law also contains an equality provision in Art 25, this must be read in context of Chapter III that is limited to residents.

A comparison of rights under these respective instruments also reveals key differences in the scope of protection. The right to work is protected under both the Basic Law and ICESCR. Article 33 of the Basic Law enshrines resident’s “free choice of occupation”. In essence, this protects against conscription of individuals to particular fields of

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6 Article 41, Basic Law;  Fok Chun Wa v Hospital Authority [2011] 1 HKLRD A1 (CA), para 70 (Stock V-P); Gurung Kesh Bahadur v Director of Immigration [2002] 2 HKLRD 775 (CFA), p 788 (Li CJ).

7 Article 2(2), ICESCR.
occupation.\textsuperscript{8} Article 6 of the ICESCR not only embraces this negative freedom, but also goes further in stipulating that the State should take positive steps to achieve the “full realisation” of the right by providing “technical and vocational guidance and training programmes”.\textsuperscript{9} The State should also implement “policies and techniques to achieve steady economic, social and cultural development and full and productive employment under conditions safeguarding fundamental, political and economic freedoms to the individual.”\textsuperscript{10} However, the application of the ICESCR right to work in Hong Kong must take into account the reservation entered by the United Kingdom, reserving the right to interpret Art 6 as not precluding the imposition of restrictions based on place of birth or residence qualification.

Alongside the right to work, both instruments also provide varying degrees of protection to labour rights. Article 27 of the Basic Law provides for the “right to form and join trade unions, and to strike.” Article 8 of the ICESCR goes further and includes a right to establish national federations or confederations and to form or join an international trade union organisation.\textsuperscript{11} Article 8 also protects trade unions as entities in functioning freely from State interference unless constitutionally justified. Further, unlike the ICESCR, the Basic Law does not provide any guarantees on fair work conditions. Article 7 of the ICESCR embraces a right of everyone to just and favourable conditions of work.\textsuperscript{12} This includes a “decent living for themselves and their families”, “safe and healthy working

\textsuperscript{9} Article 6(2), ICESCR.
\textsuperscript{10} Ibid.
\textsuperscript{11} Article 8(1)(b), ICESCR. The UK reserved the right not to apply this provision to Hong Kong.
\textsuperscript{12} Article 7, ICESCR.
conditions”, “equal opportunity for everyone to be promoted” and “rest, leisure and reasonable limitation of working hours and periodic holidays with pay, as well as remuneration for public holidays.”

The right to social welfare is protected under both instruments. Article 36 of the Basic Law enshrines the right to social welfare in accordance with law and protects the welfare benefits and retirement security of the labour force. Similarly, Art 9 of the ICESCR recognises the right of “everyone to social security, including social insurance”. However, the ICESCR goes further than the Basic Law in setting out minimum standards of living. Thus Art 11 of the ICESCR provides a right for everyone to an adequate standard of living, including adequate food, clothing, housing and living conditions. This includes ensuring that everyone is free from hunger. By contrast, the Basic Law does not set minimum standards for the social welfare system, save for Art 145 that calls for the “development and improvement of this system in light of economic conditions and social needs”. Article 145 appears in a miscellaneous chapter of the Basic Law and does not as such confer a right on individuals to social welfare. Therefore, “development and improvement” need not necessarily be focused on what is beneficial to individuals, but more generally to the “system”. It is possible that development and improvement may call for a reduction in the level of social welfare provision, or indeed a more efficient

13 Ibid.
14 Article 11(1), ICESCR.
15 Article 11(2), ICESCR.
administration of such system. The extent of social welfare may therefore go either way under this provision: it may expand or contract.\textsuperscript{16}

A comparison between the Basic Law and ICESCR with respect to the rights to health and education also reveals differences in the requisite standards to be attained in these areas. Thus Art 12 of the ICESCR recognises the right of everyone to the “highest attainable standard of physical and mental health.” This requires specific measures for reduction of stillbirth rate of infants and preventative measures to control epidemic, endemic, occupational and other diseases.\textsuperscript{17} The Basic Law provides no such specific guarantees, instead mandating Hong Kong to “improve medical and health services”.\textsuperscript{18} The courts have been reluctant to articulate more specifically what this term entails, instead preferring to note in general terms that enhancements to the system are anticipated as and when required in light of changing social and economic conditions.\textsuperscript{19} Article 13 of the ICESCR provides specific guarantees with regard to the content of the right to education. This includes free education at primary and secondary stages and progressive introduction of free education at higher education level. Article 13 also respects parents’ right to choose their children’s schools.\textsuperscript{20} Under the Basic Law, protection of the right to education appears weaker. There is no free-standing right to education under Chapter III, rather the Basic Law provides for the government to

\begin{itemize}
  \item \textsuperscript{16} Kong Yun Ming v Director of Social Welfare [2009] 4 HKLRD 382 (CFI), paras 48, 50 (Andrew Cheung J); Kong Yunming v Director of Social Welfare [2012] HKEC 229 (CA), paras 64–67 (Stock VP).
  \item \textsuperscript{17} Article 12, Basic Law.
  \item \textsuperscript{18} Article 138, Basic Law.
  \item \textsuperscript{19} Fok Chun Wa v Hospital Authority [2008] HKEC 2161 (CFI), paras 103–104 (Poon J). \textit{See also Catholic Diocese of Hong Kong v Secretary for Justice} [2007] 4 HKLRD 483 (CFI), para 119 (Andrew Cheung J).
  \item \textsuperscript{20} Hong Kong courts have engaged with Art 13 of the ICESCR on two previous occasions, \textit{see Catholic Diocese of Hong Kong v Secretary for Justice} [2010] HKEC 163 (CA), paras 96–102 (Stock VP); \textit{see} n 19 above, paras 192–195 (Andrew Cheung J).
\end{itemize}
formulate policies on the “development and improvement of education”. 21 This invariably has involved review of the proposed changes as against the previous educational system, rather than a classic rights-based approach that focuses more closely on the impact any change would have on the individual.22

Likewise, the right to family life under the Basic Law is narrower than under the ICESCR. Article 10 of the ICESCR recognises the importance of the family, according special employment and social security protection to mothers during a reasonable period before and after childbirth. Children should be protected from discrimination and economic and social exploitation. This is to be contrasted with the narrower formulation in Art 37 of the Basic Law, which protects the “freedom of marriage and their right to raise a family freely.” This embodies the idea that residents have a right to procreate and foster children, preserving Hong Kong’s differences from China on family planning policy. 23 Article 37 essentially places negative restraints on State intervention but apparently does not require affirmative action by the government to enhance the right to a family. This was noted in Fok Chun Wa v Hospital Authority, where the Court of First Instance found that Art 37 was not intended to confer on spouses a right to free obstetric services.24

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21 Article 136, Basic Law.
24 See n 19 above, paras 134–134 (Poon J).
Cultural rights are also protected under both instruments. Article 34 of the Basic Law protects the freedom to engage in literary and artistic creation, and other cultural activities. Similarly, Art 15 of the ICESCR recognises the right to take part in cultural life; to enjoy the benefits of scientific progress and its applications; and to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author. Outside of Chapter III of the Basic Law, a number of duties are placed on Hong Kong to guarantee some of the rights mentioned in Art 15. Thus Chapter VI provides in different articles that Hong Kong shall “on its own” formulate policies on science, technology and culture and protect by law rights of authors to literary and artistic creation.25

In some respects, the Basic Law goes further than the ICESCR, in constructing socio-economic rights that reflect the particular circumstances of Hong Kong. Article 40 embraces the rights of indigenous inhabitants of the New Territories to enjoy their lawful traditional rights and interests.26 Furthermore, having regard to the number of Hong Kong residents opting to study abroad, Art 137 provides that residents have free choice of education, which includes being able to pursue education outside the territory.

Unlike the Basic Law, the ICESCR provides a general limitation clause to assess restrictions on rights. States may “subject such 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

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25 Articles 139–140, Basic Law.
26 Article 40, Basic Law.
and solely for the purpose of promoting the general welfare in a democratic society.”\textsuperscript{27} This would suggest that a proportionality test should be employed, requiring the government to use measures that are appropriate to the aim to be achieved.

By contrast, there has been some inconsistency in the case law with respect to the applicable test to apply in assessing restrictions to socio-economic rights under the Basic Law. Socio-economic rights contained in the Basic Law are \textit{prima facie} without limitation. However, this does not mean that these are absolute and may be subject to restriction where justified.\textsuperscript{28} In \textit{Fok Chun Wa v Hospital Authority}, Poon J applied the conventional proportionality test in reviewing limitations placed on the right to social welfare under Art 36 of the Basic Law.\textsuperscript{29} By contrast, Andrew Cheung J in \textit{Kong Yun Ming} observed that proportionality was not appropriate in assessing restrictions to this right. Rather, the appropriate formula to assess changes to the system is found in Art 145, which provides that any policy must be a “development and improvement” to which the courts should be slow to interfere.\textsuperscript{30} As Karen Kong has noted, Art 145 offers a weaker form of review than proportionality.\textsuperscript{31} The courts are unlikely to subject Art 145 to hard-edged review, instead they will more readily defer to the judgment of the executive as to what constitutes a “development and improvement” to the social welfare system. By reading Arts 36 and 145 together, it effectively diminishes Art 36 as a self-standing right.\textsuperscript{32} Therefore, whilst the text of the ICESCR mandates a proportionality enquiry, assessment of restrictions to at least one Basic Law socio-economic right has been

\textsuperscript{27} Article 4, ICESCR.
\textsuperscript{28} See n 16 above, paras 36–51, 65, 135 (Andrew Cheung J).
\textsuperscript{29} See n 19 above, paras 124–125 (Poon J).
\textsuperscript{30} See n 16 above, paras 36–51, 65, 135 (Andrew Cheung J).
\textsuperscript{32} \textit{Ibid.}
interpreted in a way that underplays the interests of the individual in assessing whether an
interference with rights was justified.

A number of conclusions can be drawn from this brief comparison of the Basic Law and
ICESCR. The Basic Law essentially provides a summarised version of select ICESCR
rights and prefers to express such rights in more general terms. The Basic Law is
narrower in its protection of socio-economic rights, particularly in restricting the
enjoyment of such rights to “residents” and also in omitting from its ambit key rights
such as Arts 7 and 11 of the ICESCR. That said, a small number of Basic Law provisions
give more specific and contextualised protection of socio-economic rights than that found
in the ICESCR. Some provisions that address economic, social and cultural issues in the
Basic Law are underpinned by the need for Hong Kong to enjoy autonomy from China in
these areas rather than to directly endow individuals with socio-economic rights. The
ICESCR also sets out more defined criteria to assess the legality of any restrictions on
these rights, contrasted to the Basic Law which leaves it to the court to develop its own
justificatory standards. This may in turn lead the courts to abandon a proportionality style
enquiry common in rights-based review in favour of a standard highly deferential to the
political branches.

3. Usages of the ICESCR in Hong Kong Law

a. ICESCR as a Source of Constitutional Rights under the Basic Law
Whether the ICESCR is a source of constitutional rights in Hong Kong, which can be used to assess the compatibility of legislative and executive acts, will ultimately turn on interpretation of Art 39 of the Basic Law. This article provides in full:

“The provisions of the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, and international labour conventions as applied to Hong Kong shall remain in force and shall be implemented through the laws of the Hong Kong Special Administrative Region.

The rights and freedoms enjoyed by Hong Kong residents shall not be restricted unless as prescribed by law. Such restrictions shall not contravene the provisions of the preceding paragraph of this Article.”

Article 39 embodies several points of constitutional importance, of which three are relevant here. First, the words “as applied to Hong Kong” refer to the human rights treaties not as they are written, but rather to the specific application and history in Hong Kong. As the Court of Appeal held in *Ubamaka v Director of Immigration*, this includes reservations entered by the United Kingdom to these treaties when extending them to Hong Kong. Thus in assessing the domestic applicability of the ICESCR, it is first necessary to look at the reservations entered to the covenant by the United Kingdom on behalf of Hong Kong. The Court of First Instance in *MA v Director of Immigration* confirmed this. Accordingly, Andrew Cheung J held that the reservation entered to Art

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33 *Ubamaka v Secretary for Security* [2011] 1 HKLRD 359 (CA), paras 134–136 (Fok J).
6 of the ICESCR was dispositive of the issue as to whether mandated refugees and screened-in torture claimants had a right to work in Hong Kong.\(^{35}\)

Second, the words “shall be implemented through the laws” of the region place a duty on Hong Kong to give effect to the ICCPR, ICESCR and labour conventions in domestic law.\(^{36}\) So far, the legislature has failed to directly incorporate the ICESCR in its entirety. That said, many ICESCR rights have been incorporated into domestic legislation. In its second report under the ICESCR, the Hong Kong executive stated that the covenant had been given effect through provisions in over 50 ordinances. It was the executive’s view that specific measures of this kind “more effectively protect Covenant rights than would the mere re-iteration in domestic law of the Covenant provisions themselves.”\(^{37}\) Hong Kong judges have also noted that the ICESCR has been implemented in specific pieces of legislation. Bokhary PJ observed in *obiter* that the principle of affordable housing in the Housing Ordinance (Cap 283) reflected Art 11 of the ICESCR on the right to an adequate standard of living, including housing.\(^{38}\) There is of course an inherent weakness in locating the source of rights and freedoms in ordinary legislation. There is a risk that the ICESCR guarantees are watered down following political contestation and compromise in the Legislative Council. However, a role for the legislature in implementing the ICESCR is not necessarily a negative feature of Art 39(1). How the balance is to be struck on issues that engage the ICESCR can be politically contentious. Having the

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\(^{36}\) *Lau Cheong v HKSAR* [2002] 2 HKLRD 612 (CFA), 626 (Li CJ and Ribeiro PJ); Simon Young, “Restricting Basic Law Rights in Hong Kong” (2004) 34 *HKLJ* 109, 114.


\(^{38}\) *Ho Choi Wan v Hong Kong Housing Authority* [2005] 4 HKLRD 706 (CFA), para 67 (Bohkary PJ).
legislature involved in setting out the limits of ICESCR rights at a level of specificity can serve to confer democratic legitimacy on these rights in a manner that judicial interpretation on its own may not.

Third, the final sentence in Art 39(2) provides that any restrictions on rights and freedoms “shall not contravene” provisions of Art 39(1). Given that the ICESCR has not been directly incorporated into domestic law by way of legislation, how Art 39(2) is interpreted will be crucial to a finding that the covenant can be relied on as a source of constitutional rights. The courts have yet to resolve this issue. Some judges have assumed that the ICESCR is part of Hong Kong law, instead opting to address whether any restriction on ICESCR rights was engaged or justified. They appeared to do this because it was easier to resolve the substantive question (invariably finding there had been no ICESCR violation) rather than address the complex issue of incorporation. Hartmann J has suggested that the Basic Law constitutionally underpins the ICESCR. By contrast, Andrew Cheung J and Lam J have observed that for the ICESCR to apply in Hong Kong there is a need for implementing legislation.

There are two discernible constructions. On a narrow approach, the ICESCR can only be relied on to monitor restrictions under Art 39(2) where the covenant has been directly implemented into local law as mandated by Art 39(1). The legislative act of

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39 See n 20 above, paras 98–101 (Stock VP); See n 19 above, paras 192–195 (Cheung J); Xie Xiaoyi v Director of Immigration [2000] 2 HKLRD 161 (CA), pp168H-J, 175B-H (Mayo VP and Leong JA); See n 38 above, para 66 (Bokhary PJ).  
40 Chan Noi Heung v Chief Executive in Council [2007] HKEC 885, para 73 (Hartmann J).  
41 See n 34 above, para 45 (Andrew Cheung J); Comilang Milagros Tecson v Commissioner of Registration [2012] HKEC 869 (CFI), para 54 (Lam J).
transformation accordingly triggers application of the relevant treaty in domestic law and with it the constitutional underpinning of the Basic Law. 42 This accords with the accepted view that the Bill of Rights Ordinance (Cap 383) gave the ICCPR a domestic foothold and generated enforceable legal rights underpinned by the Basic Law. 43 As the ICESCR has yet to be directly incorporated into domestic law by way of legislation, the covenant is not a valid source of constitutional law in Hong Kong. 44

A broader approach is to read Arts 39(1) and 39(2) separately. Paragraph 1 mandates implementation by legislative act, but this does not affect the interpretation of para 2 which recognises the ICESCR as a source of constitutional law. In other words, Art 39(1) ensures protection for ICESCR rights by having them directly implemented in local law, whereas Art 39(2) provides a separate constitutional jurisdiction for the courts to monitor restrictions on ICESCR rights.

Whether the broad or narrow approach is adopted will ultimately turn on the purpose served by Art 39. The position taken here is that a broad approach is preferable and is consistent with the generous interpretation given to fundamental rights under Chapter III of the Basic Law. Taking into account that Arts 25–38 are essentially selectively summarised versions of the ICCPR and ICESCR, Art 39 provides constitutional protection for human rights in a more extensive and all-rounded way than other Basic

42 As to the doctrine of transformation, see n 8 above, pp 7–8, 404, 478.
43 See HKSAR v Ng Kung Siu and Another (1999) 2 HKCFAR 442 (CFA) at 455 (Li CJ); Lau Cheong v HKSAR (2002) 5 HKCFAR 415 (CFA), p 626 (Li CJ and Riberio PJ).
44 For further support of this view, see a report from LegCo: “The Implementation of the International Covenant on Economic, Social and Cultural Rights in Overseas Jurisdictions and Hong Kong, Research and Library Services Division”, Legislative Council Secretariat, Hong Kong, Apr 1995.
Law provisions. Accordingly, Art 39(2) serves to fill in any gaps in rights-protection by conferring constitutional jurisdiction on the courts to review legislative and executive acts according to the standards embodied in the ICCPR, ICESCR and labour conventions.

There is a line of authorities that support this broader reading of Art 39, albeit in relation to unincorporated labour conventions. This was the approach adopted in \textit{Lau Kwok Fai v Secretary for Justice}, which concerned the compatibility of the Public Officers Pay Adjustment Ordinance (Cap 606) with the Basic Law. Following the financial downturn, this legislation was passed to reduce the rate of civil service pay. The applicants relied on the Labour Relations (Public Service) Convention 1978 to support their contention that the executive should have followed a procedure for the settlement of disputes arising from the determination of the terms and conditions of their employment. Hartmann J in turn went on to assess whether the legislation breached this convention.

Similarly, in \textit{Julita F Raza v Chief Executive in Council}, Stock JA observed in \textit{obiter} that it seemed to the Court of Appeal “arguable” that the International Labour Convention No 97 had domestic effect for the purpose of testing the constitutionality of any restrictions.

\footnote{46 See also the comments of Young (n 36 above), p 115, noting that the ICCPR as applied to Hong Kong has a “…unique dual quality. It is entrenched only for the purpose of monitoring restrictions on rights and freedoms, but has no legal effect in providing for enforceable rights and freedoms.”}
\footnote{47 It would also appear that legal counsel for the Hong Kong executive has accepted this broader interpretation of Art 39 during the course of submissions. In \textit{Gurung Kesh Bahadur v Director of Immigration} [2001] HKEC 772 (CA) at para 129, Rogers VP noted the respondent’s contention that a legislative restriction on freedom to enter Hong Kong was justified “because it does not contravene the provisions of the ICCPR, the ICESCR or the labour conventions”.
\footnote{48 [2003] HKEC 711 (CFI).}
\footnote{49 \textit{Ibid.}, paras 140–172.}
to the provisions in Art 39(1).\textsuperscript{50} It is submitted that these authorities are highly persuasive and should shape the future development of jurisprudence under Art 39(2). In order to ensure maximum protection for rights and freedoms in Hong Kong, the courts should find that the ICESCR enjoys constitutional status for the purpose of assessing the compatibility of government restrictions on rights recognised under Art 39 of the Basic Law.

\textbf{b. ICESCR as an Aid in Constitutional Interpretation}

Even if the ICESCR is not a source of constitutional rights, then at the very least the covenant is relevant to how Basic Law rights and freedoms are interpreted. In constitutional interpretation, the Hong Kong courts adopt a purposive approach that reads the provisions of the Basic Law in conjunction with the broader principles contained within the Basic Law itself. The Basic Law will be read generously in order to give the fullest measure of protection to rights and freedoms guaranteed by the constitution to Hong Kong residents.\textsuperscript{51} Given the express mention of the ICESCR in the Basic Law, it can be readily inferred that one of its purposes was to realise and protect ICESCR rights to the extent that they have been applied to Hong Kong. A further basis for using the ICESCR in this way derives from the principle that the courts can take into account unincorporated conventional obligations in constitutional interpretation.\textsuperscript{52} Given that the constitutional adjudication of socio-economic rights is relatively new in Hong Kong, the

\textsuperscript{50} [2006] HKEC 1339 (CA), para 27.
\textsuperscript{51} See Michael Ramsden and Oliver Jones, \textit{Hong Kong Basic Law: Annotations & Commentary} (Hong Kong: Sweet & Maxwell, 2010), para 158/2.
courts can also derive considerable benefit from looking at international and comparative commentary on the ICESCR in developing its jurisprudence.⁵³

There has been some reference to the ICESCR in interpretation of Basic Law rights so far. In particular, this was the approach taken by the Court of Appeal in Kong Yunming v Director of Social Welfare, where the ICESCR informed the court’s interpretation of Art 36 of the Basic Law. The issue was whether a seven-year continuous residence requirement to obtain social welfare was a reasonable restriction on Art 36. Prior to the introduction of this measure in 2004, the residency requirement to obtain social welfare was only one year. The issue to be decided was whether this increase was a justified restriction on the right to social welfare under the Basic Law. Stock VP drew upon a General Comment of the Committee on Economic, Social and Cultural Rights (CESCR), the body responsible for monitoring compliance with the ICESCR, which noted that any welfare scheme should “be sustainable, including those concerning provision of pensions, in order to ensure that the right can be realised for present and future generations.”⁵⁴ The ICESCR prohibition on adopting deliberately retrogressive measures was also read into Art 145 of the Basic Law, requiring “development and improvement” of the system. Accordingly, a retrogressive measure as defined under the ICESCR could not amount to development and improvement. However, Stock VP ultimately found that “regression is not, in this context, a snapshot concept and it is relevant to note the [CESCR’s] concern that measures must be designed to render the system sustainable not only for present but

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⁵³ As to the role of comparative law in Hong Kong, see Sir Anthony Mason, “The Place of Comparative Law in Developing the Jurisprudence on the Rule of Law and Human Rights in Hong Kong” (2007) 37 HKLJ 299.

⁵⁴ General Comment No 19 para 11; see n 16 above, para 82.
Accordingly, the need for a sustainable welfare system justified the lengthier continuous residence requirement. This example demonstrates that the ICESCR can provide greater texture to judicial reasoning on the content of socio-economic rights in the Basic Law. Given the general observations in section 2 above, that the ICESCR provides greater detail on the content of socio-economic rights than the Basic Law, Hong Kong courts could derive considerable assistance from the text of the covenant and also commentary of the CESCR.

c. ICESCR as an Aid in Statutory Interpretation

The ICESCR can also be a tool in statutory interpretation, especially for pieces of social legislation that are reflective of rights under the covenant. As Bokhary PJ noted in *Ho Choi Wan v Housing Authority*, it was possible, although unnecessary in the circumstances, to “pray powerfully in aide” of the ICESCR to find a duty of affordable housing in the Housing Ordinance. This interpretive principle was also applied in *Chan Noi Heung v Chief Executive in Council*, a case that concerned the powers of the Chief Executive to set a fixed minimum wage for particularly low-paid occupations under the Trade Boards Ordinance (Cap 63). The applicants argued that the Chief Executive had a legal duty to exercise his statutory powers to fix a minimum wage for those on unreasonably low wages. They sought to read Art 7 of the ICESCR, concerning the right

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55 Ibid., para 83.
56 See n 38 above, p 653 (Bokhary PJ). For the influence of socio-economic rights under the Basic Law on statutory interpretation, see *HKSAR v So Chun Chau Andrew* (unrep., 9 Sept 2010, ESS19669/2010). The Eastern Magistrates Court held that Art 34 of the Basic Law did not confer a right on residents to play music in the streets, but nonetheless this provision was relevant to the reasonableness assessment under s.4(28) of the Summary Offences Ordinance (Cap 228).
to fair wages, into the ordinance to support their claim. Hartmann J accepted as a general principle that legislation should accord with the ICESCR. However, Art 7 was of no avail because it did not impose an obligation to set up legal machinery for fixing minimum wages. This was because Art 7 “does not specify what these measures must be nor does it specify that, even if other effective measures are available, a regime of minimum wages must nevertheless – absent good (or exceptional) reasons otherwise – be fixed”. The ICESCR could not therefore colour the wording of the Trade Boards Ordinance (Cap 63) to require the Chief Executive to set a fixed minimum wage.\textsuperscript{58}

Using the ICESCR in statutory interpretation is explicable on numerous grounds. Assuming that the ICESCR is a source of constitutional law, there is a general principle that legislation should be read consistently with the constitution. In the absence of “express language or necessary implication” to the contrary, the courts presume that even the most general words are intended to be subject to fundamental rights.\textsuperscript{59} Furthermore, if a piece of legislation serves to implement parts of the ICESCR pursuant to Art 39(1), then protection of covenant rights forms part of the general legislative intent behind such social legislation. Further, even on the assumption that the ICESCR has not been incorporated into Hong Kong law, there is an established common law principle that legislation should be read harmoniously with unincorporated treaties where possible, which would include the ICESCR.\textsuperscript{60}

\textsuperscript{58} Ibid., paras 63–74 (Hartmann J).
However, the extent to which the ICESCR can influence statutory interpretation will depend on the prior question as to the covenant’s domestic constitutional status. If the ICESCR is a source of Hong Kong constitutional law, then it is open to the courts to apply the powerful principle of legality, that is to read down or strain statutory language that would otherwise conflict with ICESCR rights. By contrast, if the ICESCR does not have constitutional status and is merely characterised as an unincorporated conventional obligation, then any scope for an ICESCR compliant interpretation is weakened. The general position in Hong Kong, as confirmed in *C v Director of Immigration*, is that unincorporated international law can help inform interpretation but only in the event of statutory ambiguity or omission. In such circumstances, it is to be assumed that the Legislative Council would not intend to legislate in breach of its international obligations. However, where legislation is expressed in clear terms and conflicts with an unincorporated treaty, there is no room to use the treaty in statutory interpretation.

*d. ICESCR as an Aid to Development of the Common Law*

61 *HKSAR v Lam Kwong Wai* [2006] 3 HKLRD 808 (CFA), paras 67–79 (Mason NPJ).
63 See n 2 above, p 402. For example, it would not be open to the courts to read down provisions in the Minimum Wage Ordinance (Cap 608) excluding domestic helpers from the statutory minimum wage, notwithstanding that this provision raises discrimination issues under Art 2 of the ICESCR. For further analysis, see Michael Ramsden and Luke Marsh, *The Hong Kong Minimum Wage Ordinance* (Hong Kong: Sweet & Maxwell, 2011).
Hong Kong courts have taken the position that the common law can draw upon its own values and sources in protecting rights and freedoms.\(^{64}\) In this regard, as a source of rights, the ICESCR can aid the development of the common law in at least three interrelated ways.

First, the rights embodied in the ICESCR can help develop the standards of administrative judicial review.\(^{65}\) The courts have on several occasions used unincorporated treaties as an aid to inform the standard of scrutiny and reasonableness of executive discretion.\(^{66}\) The *Wednesbury* principle, mandating judicial intervention where an administrative decision is manifestly unreasonable, is modified to constitute a “sliding scale of review, more or less intrusive according to the nature and gravity of what is at stake.”\(^{67}\) Generally, the more substantial the interference with human rights, the more the court will require by way of justification before it is satisfied that the decision is reasonable.\(^{68}\) In such cases, a substantial and objective justification for the interference must be furnished.\(^{69}\) The Hong Kong courts have applied this anxious scrutiny approach in a variety of scenarios, primarily to decisions affecting the duty of *non-refoulement*, the right to life and freedom from torture.\(^{70}\) By contrast, the courts will tend to apply the


\(^{65}\) See generally Swati Jhaveri, Michael Ramsden and Anne Scully-Hill, *Hong Kong Administrative Law* (Hong Kong: Lexis Nexis, 2010), Ch 12.

\(^{66}\) *Secretary for Security v Sakthevel Prabakar* [2005] 1 HKLRD 289 (CFA), pp 302–303 (Li CJ); see n 34 above, para 86 (Andrew Cheung J).

\(^{67}\) *R v Department for Education and Employment, Ex p Begbie* [2000] 1 WLR 1115, 1130B (Laws LJ).

\(^{68}\) *R v Ministry of Defence, Ex p Smith* [1996] QB 517, 554 (Sir Thomas Bingham MR); *R v Secretary of State for the Home Department Ex p Bugdaycay* [1987] 1 AC 514, p 351F-G (Lord Bridge).

\(^{69}\) *R (Mahmood) v Secretary of State for the Home Department* [2001] 1 WLR 840 at 848–489, para 19 (Laws LJ).

\(^{70}\) See eg n 66 above, p 306 (Bokhary PJ); Michael Ramsden, “Hong Kong’s ‘High Standard of Fairness’ and New Statutory Torture Screening Mechanism” (anticipated April 2013) *Public Law; The Refugee*
classic *Wednesbury* standard to rights that engage sensitive questions on the allocation of scarce resources.71

ICESCR rights can give rise to anxious scrutiny review. In *MA v Director of Immigration*, four screened-in torture claimants and mandated refugees sought permission to work in Hong Kong pending their resettlement to a safe third country.72 Andrew Cheung J denied that the applicants had domestically enforceable constitutional rights, but did recognise that an executive decision refusing permission to work called for enhanced review.73 The right to work contained in the ICESCR was characterised as an “important, fundamental right” which was “closely related to the inherent dignity of a human being.”74 That said, the right to work was only one factor justifying anxious scrutiny, with the major one being the risk that denying refugees the opportunity to work could amount to cruel, inhuman or degrading treatment.75 This would tend to suggest that anxious scrutiny applies where a public act or decision has a particularly severe impact on an individual’s rights and dignity. It would also seem that the key to using the ICESCR in anxious scrutiny review will ultimately turn on how these rights are characterised, which will be addressed in the next section.

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71 See generally *Hong Kong Administrative Law* (n 65 above), Ch 10.
73 Ibid., para 92.
74 Ibid., paras 81, 101–103.
75 Ibid., para 103.
Second, the doctrine of relevant considerations requires administrators to take into account the ICESCR when making decisions that engage covenant rights. The legal basis for this proposition is manifold. If the ICESCR enjoys constitutional status under the Basic Law, then it will most certainly be a relevant consideration. However, even without constitutional underpinning, the ICESCR would still form part of the decision-making framework that administrators are obliged to have regard to. In *R v Director of Immigration, Ex p Yin Xiang-jiang*, the Court of Appeal held that Hong Kong’s obligations under the Convention Relating to the Status of Stateless Persons was a mandatory relevant consideration in exercising administrative discretion whether to permit the applicant to remain in the territory. This was despite the fact that the executive never actually elected to take the convention into account when exercising its discretions. Based on the approach expounded in *Yin Xiang-jiang*, it can therefore be said that the ICESCR forms part of the framework for assessing administrative decision-making to ensure all relevant covenant-based considerations are taken into account. This view would appear to be supported by Cheung J who observed in *Chan Mei Yee v Director of Immigration* that “…even though promotional in nature, it does not mean that the ICESCR cannot be used as a framework in which government decisions or discretions are to be considered.” The doctrine of relevant considerations provides a valuable way for the courts to ensure that administrators engage in a conscientious deliberation about all factors that may have a bearing on their decision. However, this doctrine provides, as

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76 As to the doctrine, see n 65 above, pp 334–341; *Capital Rich Development and Another v Town Planning Board* [2007] 2 HKC 542 (CA) (Cheung JA), para 63.

77 [1994] 2 HKLR 101, p 105 (Bokhary JA).

78 [2000] HKEC 788, para 25 (Cheung J). See also *Yao Man Fai George v Director of Social Welfare* [2011] 1 HKLRD A2 (CFI), paras 132–136 (Andrew Cheung J) (where the relevant considerations submission was canvassed but not ruled upon).
will be explored further below, only a “weak” form of review; that whilst the court’s role is to identify relevant considerations, it will generally remain within the power of officials to decide what weight to prescribe to these factors.\textsuperscript{79}

Third, Hong Kong courts have, following influential Australian jurisprudence, been receptive to finding that an unincorporated treaty such as the ICESCR can give rise to a legitimate expectation.\textsuperscript{80} The doctrine will be particularly relevant where an applicant has no other legal basis to challenge a decision. Non-residents who enjoy limited rights in the context of immigration decisions under the Basic Law are therefore most likely to be the category that relies on the doctrine and have done so in a number of cases. In particular, families separated because one member was the subject of a removal order have claimed to benefit from a legitimate expectation arising from Hong Kong’s ratification of the ICESCR.\textsuperscript{81} However, all of these applicants encountered difficulties in that Hong Kong’s “unique circumstances” supported broad discretion for the authorities in immigration matters. Rightly or wrongly, the courts have consistently held that no legitimate expectation can arise from the ICESCR because of the extensive discretionary power conferred on immigration officials and also given the reservations entered to the ICCPR. The fact that there was no ICESCR-specific reservation pertaining to immigration decisions should not be looked at in isolation given the special circumstances of Hong Kong and measures taken in other instruments to limit the effect of human rights review.\textsuperscript{82} Assuming that the ICESCR can generate a legitimate expectation, the key

\textsuperscript{79} See eg \textit{Chu Hoi Dick and Another v Secretary of Home Affairs} [2007] HKEC 1471, para 21 (Lam J).

\textsuperscript{80} \textit{Mok Chi Hung v Director of Immigration} [2001] 2 HKLRD 125 (CFI), p 133C-J (Cheung J), following \textit{Minister of State for Immigration and Ethnic Affairs v Ah Hin Teoh} (1995) 183 CLR 273.

\textsuperscript{81} See n 41 above; \textit{Chan To Foon v Director of Immigration} [2001] 3 HKLRD 109; \textit{Mok Chi Hung v Director of Immigration} [2001] 2 HKLRD 125.

\textsuperscript{82} See in particular, \textit{Chan To Foon} (n 81 above), pp 131D–132H (Hartmann J).
question that remains is how this expectation is protected. The ambit of legitimate expectations in Hong Kong is still developing. It seems that Hong Kong recognises legitimate expectations of a substantive character, although this will only likely require the decision-maker to take into account the expectation as a relevant consideration. On this basis, a legitimate expectation would not differ materially in effect from the second point made above on relevant considerations and in consequence provides only a weak form of protection to the ICESCR in Hong Kong.84

Having considered three possible avenues to give effect to ICESCR rights in the common law, some conclusions are warranted. These approaches demonstrate that the common law can draw upon its own sources and values to protect human rights independent from other domestic sources of human rights law. Common law rights review can provide on occasion more protection for rights than other domestic sources. If the ICESCR does not give rise to enforceable constitutional rights, then through the common law the covenant can find expression to govern administrative discretions. There are of course limitations with the common law approach. It can provide only a weak means to give effect to the ICESCR. It must invariably give way in the face of conflicting constitutional and legislative provisions. Thus whilst in MA the right to work under the ICESCR informed the standard of anxious scrutiny, the dispositive factor in assessing the reasonableness of a policy generally denying permission to work to the applicants was the fact that Hong

83 See Ng Siu Tung v Director of Immigration [2002] 1 HKLRD 561 (CFA), p 601 (Li CJ, Chan and Ribeiro PJJ and Sir Anthony Mason NPJ); Lam Yuet Mei v Permanent Secretary for Education and Manpower [2004] 3 HKLRD 524 (CFI), p 553 (C Chu J). For an analysis, see Kevin KF Tam and Benny YT Tai, “The advent of substantive legitimate expectations in Hong Kong: two competing visions” (2002) Public Law 688.
84 For the development of legitimate expectations in Hong Kong, see generally Hong Kong Administrative Law (n 65 above), Ch 13.
Kong’s constitutional order deprived non-residents of the right to work.\(^{85}\) Likewise, where legislation is sufficiently clear in excluding the ICESCR, there will be less scope for the common law to factor in the covenant as a relevant consideration in the exercise of discretionary power. There will also be less scope to apply the powerful principle of legality found in constitutional adjudication. Despite these drawbacks, it will be argued in the next section that in certain types of cases resort to a weak form of review may actually be the most constitutionally desirable means to ensure the ICESCR is upheld whilst respecting separation of powers.

4. Characterisation of ICESCR Obligations in Hong Kong

Irrespective of the various usages to which the ICESCR can be put in Hong Kong law, the biggest obstacle faced in realising these rights through the courts is the general judicial perception that the covenant is merely “aspirational” or “promotional” in nature.\(^{86}\) This reasoning runs as follows. The ICESCR does not set out rights which the parties are required to implement immediately, but rather lists standards which they undertake to secure progressively, to the greatest extent possible, having regard to their resources. A comparison of the ICCPR and ICESCR reveals differences in the way their respective provisions are formulated. The rights contained in the ICCPR are stated in the classic form, “everyone has the right to” or “no one shall be subject to”. ICESCR articles adopt a different formulation, usually “the State parties to the present covenant recognise the right” or “the State parties to the present covenant undertake to ensure”. Whilst the

\(^{85}\) See n 34 above, para 104 (Andrew Cheung J).
\(^{86}\) See in particular Chan To Foon (CFI) (n 81 above), pp 133–134 (Hartmann J).
ICCPR is said to primarily impose negative restraints of State non-intervention, the ICESCR is formulated positively, setting out obligations on the State to take action to fulfil socio-economic rights. Article 2(1) of the ICESCR recognises this progressive element, where States undertake, “to the maximum of its available resources, with a view to achieving progressively the full realisation of the rights recognised in the present Covenant by all appropriate means.” The obligation differs significantly from that contained in Art 2 of the ICCPR, which embodies an immediate obligation to respect and ensure all of the relevant rights. By contrast, ICESCR rights are only to be attained “as and when those difficulties are overcome” and thus may not be achieved in a short period of time.87

Doubt is also cast on the court’s legitimacy to enforce socio-economic rights given that such norms are said to suffer from a lack of precision at the level of specific application.88 Rather it is said that socio-economic issues are better subjected to, rather than insulated from, the political processes. On this reasoning, the political authorities, rather than the judiciary, are in a democratically superior position to make the value judgments necessary to decide on the allocation of finite public resources.89 Similarly, there is doubt about the court’s institutional competencies. The judiciary lacks the knowledge and expertise to manage social policies. Without full information before the courts, they are not equipped to fully appreciate the ramifications of their decisions on the

87 Ibid. See also Ian Brownlie, Principles of Public International Law (Oxford University Press, 4th edn, 1990), p 572.
88 For the concept of justiciability in Hong Kong, see generally Hong Kong Administrative Law (n 65 above), Ch 7. As to arguments about vagueness of the ICESCR, see Craig Scott and Patrick Macklem, “Constitutional Ropes of Sand or Justiciable Guarantees? Social Rights in a New South African Constitution” (1992) 141 University of Pennsylvania Law Review 1.
allocation of resources.\textsuperscript{90} Whilst deciding whether, for example, a hospital patient with a life-threatening illness should receive treatment may seem justified, the courts are unable to properly measure whether that money could have been better spent on other priorities.\textsuperscript{91} These reasons have led the court to find, as a general proposition, that socio-economic policies fall within the executive’s discretionary area of judgment.\textsuperscript{92}

The view that the ICESCR was aspirational was criticised by the CESCR. The Committee noted that this view was based on a mistaken understanding of legal obligations arising from the covenant.\textsuperscript{93} Whilst Art 2(1) qualifies some rights in being realised progressively, there were a number of rights that demanded immediate compliance. These included the provisions on equality, fair wages, right to form and join trade unions, protection of children from economic and social exploitation, right to free primary education, liberty of parents to choose their children’s schools and freedom of scientific research and creative activity.\textsuperscript{94} There is also a general prohibition on taking retrogressive measures that restrict the content of socio-economic entitlements already guaranteed by law.\textsuperscript{95} In a series of General Comments, the CESCR has taken steps to further define socio-economic rights and thus narrow the State’s discretion to interpret these rights according to their own national interests.\textsuperscript{96} The CESCR also noted that there

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  \item \textsuperscript{90} Lon Fuller, “The Forms and Limits of Adjudication” (1978) 92 Harvard Law Review 395.
  \item \textsuperscript{91} See eg R v Cambridge District Health Authority, Ex p B [1995] 2 All ER 129 (CA), p 906 (Bingham LJ).
  \item \textsuperscript{92} See n 16 above, paras 127–129. For an analysis of deference in the socio-economic sphere, see Cora Chan “Judicial Deference at Work: Some Reflections on Chan Kin Sum and Kong Yun Ming” (2010) 40 HKLJ 1.
  \item \textsuperscript{93} “Concluding observations of the Committee on Economic, Social and Cultural Rights (Hong Kong) China”. E/C.12/1/Add.58. (05/21/2001), para 16.
  \item \textsuperscript{94} “General Comment No. 3: The nature of States parties obligations (Art 2, par 1), CESCR, E/1991/23 (12/14/1990), paras 3–5.
  \item \textsuperscript{95} Ibid., para 9.
  \item \textsuperscript{96} For all General Comments, see Office of the United Nations High Commissioner for Human Rights, Committee on Economic, Social and Cultural Rights – General Comments <http://www2.ohchr.org/english/bodies/cescr/comments.htm> at 7 September 2012.
\end{itemize}
is a minimum core obligation of at the very least “minimum essential levels” of each
ICESCR right. Derogation from these core obligations would be justified only where the
State can demonstrate that every effort has been made to use all resources that are at its
disposition in an effort to satisfy, as a matter of priority, those minimum obligations.97

The notion that the ICESCR is merely aspirational flows from a misconception that the
covenant solely serves to impose positive (and it seems by implication, financially
onerous) obligations on the State. In fact, as noted in section 2 above, the ICESCR also
imposes negative duties.98 Like the ICCPR, there are many requirements under the
ICESCR of State non-intervention in socio-economic rights where such rights have
already been realised. For example, the ICESCR prohibits forced evictions, interruption
to existing levels of State medical treatment, retrogressive measures in social security and
arbitrary termination of employment in the public sector.99 Indeed, the courts have shown
a willingness to scrutinise with some intensity executive decisions to remove or restrict
the socio-economic entitlements of residents. For example in *Yao Man Fai George v
Director of Social Welfare*, the Court of First Instance found that the imposition of a one-
year continuous residence requirement, subject to a 56-day grace period, before
permanent residents were able to obtain social security assistance violated the Basic
Law.100 The Court of First Instance subjected the government’s reasons for the residency

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97 See n 94 above, para 10.
98 For a good example from South Africa, see *Jaftha v Schoeman; Van Rooyen v Stoltz*, (2005) 1 BCLR 78
(CC) 8 Oct 2004 (sale of individual’s home to discharge a debt without sufficient judicial oversight
breached the right to adequate housing).
99 See eg “General Comment No 7: The right to adequate housing (Art 11.1): forced evictions”, CESCR,
E/1998/22 (20/05/1997).
100 See n 78 above, paras 44–46 (Andrew Cheung J). This case was decided using civil and political rights
in the Basic Law, although there is no reason why the freedom from interference analysis would be any
different under the ICESCR.
restrictions to searching and comprehensive examination, ultimately finding that all justifications lacked rational basis.\footnote{Ibid., paras 72–84.} This demonstrates that the ICESCR, far from the perception that it is an unenforceable instrument, actually embodies standards that already fall within the court’s institutional competencies and experience.

The greatest challenge in making ICESCR rights judicially enforceable is finding a means for the courts to adjudicate on the affirmative steps that must be taken to realise covenant rights. It is, after all, the positive obligations arising from the ICESCR that are perhaps most identifiable with views that the covenant is aspirational. This positive duty to fulfil ICESCR rights requires examination of whether the State has allocated sufficient resources towards the attainment of socio-economic rights for those in need. By way of example, the CESCR noted its concern about the “widespread and unacceptable incidence of poverty in Hong Kong” and the absence of an effective anti-poverty strategy. It called upon Hong Kong to devote more resources towards addressing the problem.\footnote{See n 93 above, paras 18 and 19.}

It seems difficult taking into account the constitutional objections stated above to see what role the court can play in supervising the fulfillment of a State’s positive obligations under the ICESCR. The difficulties can be illustrated in a challenge to Hong Kong’s air pollution policies in \textit{Clean Air Foundation Ltd v Government of HKSAR}.\footnote{[2007] HKEC 1356.} The applicants argued that the executive had failed to take more stringent steps to combat air pollution in Hong Kong. They argued that a number of rights were violated, including the

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\item \footnotesize\textit{Ibid.}, paras 72–84.
\item \footnotesize See n 93 above, paras 18 and 19.
\item \footnotesize [2007] HKEC 1356.
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right to life (Art 27 of the Basic Law) and the right to the highest attainable standards of health under Art 12 of the ICESCR. The applicants noted various shortcomings of government policy, including a failure to rationalise bus routes and service scheduling to increase passenger occupancy and to provide better ventilation for bus termini. The applicants also claimed there was a failure to “impose a mandatory requirement that all diesel vehicles move to Euro IV and Euro V standards and a failure to impose a moratorium on the use of sulphur rich fuels in power generation.” A failure to plan for the long term by creating rail lines in the most congested parts of Hong Kong was also said to breach the applicants’ rights.

In *Clean Air Foundation*, the applicants sought what Mark Tushnet has called “strong form” judicial review, where courts will interpret and enforce rights without giving substantial deference to legislative and executive judgments. Remedies under this strong form are exacting, spelling out in detail what officials must do to give effect to rights within a definable time frame.\(^ {104}\) It is perhaps unsurprising then that Hartmann J refused to grant relief on the basis that it was not the role of the court to “manage the environment”.\(^ {105}\) His lordship noted that any examination of the adequacy of air quality objectives will go to the merits of the policies adopted by government and involve the courts in pre-empting political questions about when and how to pursue certain policies.\(^ {106}\)

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\(^ {105}\) See n 103 above, para 9. See also Ng Ngau Chai *v* The Town Planning Board (unrep., HCAL 64/2007 dated 4 July 2007) (Reyes J).

Undoubtedly, a key concern in *Clean Air Foundation* was the lack of definable legal standards to evaluate Hong Kong’s compliance with its obligations relating to air pollution under instruments such as the ICESCR. Hartmann J noted that Art 12 of the ICESCR did impose “some sort of duty on state authorities to combat air pollution even if it cannot be an absolute duty to ensure with immediate effect the end of all pollution.”107 It is clear from this excerpt that there was a general reluctance to define whether the Art 12 required specific steps to be taken by the executive and what those specific steps were to be when tackling air pollution.

In developing its jurisprudence in this area, the Hong Kong courts would derive considerable benefit from looking to international and comparative law.108 In particular, Art 8(4) of the Optional Protocol to the ICESCR, which creates a mechanism for individual complaints to the CESCR, provides that the committee “shall consider the reasonableness of the steps taken” by the State, bearing in mind that the State “may adopt a range of possible policy measures for the implementation of the rights.”109 In assessing reasonableness, the CESCR identified numerous considerations, including whether the authorities had taken into account the precarious situation of disadvantaged groups; whether the policies prioritised grave situations or situations of risk; whether discretion was exercised in a non-discriminatory and non-arbitrary manner.110

108 Indeed, the use of international and comparative law in Hong Kong courts has thrived since 1997, of which see n 53 above.
Similarly, the South African Constitutional Court has also developed legal standards to review the attainment of positive socio-economic rights under the national constitution. In *Government of South Africa v Grootboom*, evictees from private land claimed that the government failed to provide them with adequate housing.\(^{111}\) South Africa’s housing policy at the time focused on providing low-cost housing and took no account of the needs of the homeless for temporary shelter. The court held that whilst the constitution did not create a right to “shelter or housing immediately upon demand”, it did require the government to show that it had taken measures designed “to provide relief for people who have no access to land, no roof over their heads, and who are living in intolerable conditions or crisis situations.”\(^{112}\) A programme that excludes a significant segment of society “in desperate need” cannot be said to be reasonable.\(^{113}\) Instead of ordering a remedy compelling the government to provide housing to the applicants, the court made a declaratory order to the effect that the State’s housing programme should include “reasonable measures” to provide relief for this group of housing beneficiaries.\(^{114}\) The court will not enquire whether other more desirable measures could have been adopted to achieve the objective, or whether public money could have been better spent.\(^{115}\) Rather, the scope of the court’s role is to examine whether the measures taken fell within the spectrum of reasonableness. In this respect, the court outlined criteria to assess the reasonableness of government policy. This included examination of whether the social

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\(^{111}\) *The Government of the Republic of South Africa and others v Irene Grootboom and others* 2001 (1) SA 46 (CC), 4 Oct 2000 (Yacoob J). Grootboom has received brief judicial consideration in Hong Kong, see *Lam Wo Lun v Director of Social Welfare* [2012] HKEC 670 paras 55–57 (Lam J).

\(^{112}\) Ibid., para 99.

\(^{113}\) Ibid., para 43.

\(^{114}\) Ibid., para 99.

\(^{115}\) Ibid., para 42.
programme was balanced and flexible; made appropriate provision for short, medium and long-term objectives; was under continuous review and addressed the needs of those most urgent and in peril.116

The *Grootboom* approach may be characterised as a “weak form” of judicial review, typified by the following characteristics: a judicial standard that allows the government to adopt reasonable programmes to achieve socio-economic rights, a willingness to find some programmes unreasonable, and a remedial system that does not guarantee that any particular applicant receive individualised relief.117 In essence, the South African court used standards from administrative law to assess fulfillment of socio-economic rights. On this basis provided that the executive had devised its policies in a rational way, taking into account its human rights obligations as relevant considerations, then it has acted lawfully.118 Where the government’s policy was unreasonable, the court’s role was to order that the executive and legislative branches reconsider their policy objectives and priorities to accommodate the socio-economic rights at issue. By choosing to employ an administrative law approach, the court ensured that the separation of powers was not imbalanced; it retains a supervisory role for the courts whilst respecting the judgement of the political branches on matters of policy and priority setting.119

116 *Ibid.*, para 43. For further analysis, see n 31 above, pp 598–599.
117 See n 105 above, pp 227–264.
To be clear, it is not being suggested that a weak form of review should be used in the adjudication of all socio-economic rights cases, but rather this approach will be particularly useful with respect to the supervision of positive rights given the constitutional tensions that arise in using the courts for their enforcement. Conversely, in cases involving interferences with negative socio-economic rights, such as the removal or restriction of pre-existing social welfare entitlement, a stronger form of review is more likely to be justified. Nor is it being suggested that Hong Kong courts should embrace the terminology of reasonableness as the general test in socio-economic rights review. If, as is argued in this article, the ICESCR is a source of constitutional law, then the uniform test for constitutional review of rights under Chapter III of the Basic Law should apply. Adopting the language of legitimacy and proportionality will better promote uniformity in constitutional adjudication and clearer judicial reasoning in the review and enforcement of socio-economic rights. Embracing the standard test in constitutional review does not mean, however, that a strong form of review will necessarily follow, rather the justification test can be applied with varying degree of intensity, having regard to the concept of deference. The justification test found in constitutional review is therefore able to accommodate the factors that were at play in Grootboom to justify weak review of positive rights.\(^{120}\)

This section has shown that the characterisation of the ICESCR as “aspirational” and thus unenforceable is misconceived. A more nuanced approach is called for taking into

\(^{120}\) Indeed the versatility of the justification test in constitutional review was evident recently. In Fok Chun Wa v Hospital Authority [2012] HKEC 471 (CFA), a Wednesbury type approach was used in the constitutional review of socio-economic issues, per Ma CJ at para 76: “…unless the solution or alternative in question is manifestly to beyond the spectrum of reasonableness (or manifestly without reasonable foundation) the court will not interfere.”
account the distinction between negative and positive rights; the concept that each right comprises a “minimum core”; that some rights are of immediate effect whilst some are to be progressively realised; that the form of review and remedies available can be modified to respect the separation of powers.\(^\text{121}\) Recently in *obiter* the Court of Appeal has gone beyond simply dismissing the ICESCR as aspirational to recognise that the extent to which the covenant can be enforced depends on the nature of the socio-economic right at issue. Stock VP in *Kong Yunning v Director of Social Welfare* noted that it is not a question of the ICESCR being a set of “second class rights”. Rather, “it is always a question of the particular right in issue and what measures are required to fulfil the obligations under the Covenant in respect of that right.” His lordship noted that some rights, which are not “resource sensitive”, are immediately enforceable, although in the circumstances the right to social welfare under Art 9 of the ICESCR was not amongst these.\(^\text{122}\) The views taken in the Court of Appeal on the legal nature of the covenant, while modest, are a step in the right direction towards using the ICESCR along more principled lines in the adjudication of public law matters.

5. Conclusion

This article has sought to take stock of jurisprudential developments in Hong Kong relating to the ICESCR. It has argued that the ICESCR is a source of Hong Kong law that can be drawn upon in the adjudication and interpretation of constitutional rights, in


\(^{122}\) See n 16 above, paras 79–84.
statutory interpretation and in the development of the common law. The extent to which the ICESCR will influence judicial review will depend on whether the courts find the covenant to have a constitutional underpinning, to which a good argument can be made grounded in Art 39 of the Basic Law. In order to have proper regard to the constitutional status of the ICESCR, the courts should also avoid unwarranted generalisations about the covenant as being merely aspirational and engage more closely with the obligations owed under particular rights.