

IMPLEMENTATION OF INTERNATIONAL ECONOMIC, SOCIAL AND CULTURAL OBLIGATIONS AND RIGHT TO EDUCATION IN HONG KONG AND MACAU AND THE SUCCESSION OF ONE COUNTRY TWO SYSTEMS

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ABSTRACT

The People Republic of China resumed the exercise of its sovereignty over Hong Kong and Macau in 1997 and 1999 respectively under the 'One Country Two Systems' Principle. As a consequence of the transfer of sovereignty of the two SARs, the international treaties and obligations applied in the two territories under the colonial rule were not affected, but increased. The continued application and expansion of international obligations in the two territories raises the curiosity of how international obligations in the two SARs have evolved during their colonial era? This will inevitably be a crucial question in any assessment of the post-handover status of a given set of international obligations. Any prospective evaluation will require a close scrutiny of the origin, and scope and limitation of application of the relevant international obligations in the territories during the colonial period and status of their succession subsequent to the transfer of sovereignty. The present paper traces the origin and implementation of a specific set of economic, social and cultural obligations, as reflected in the International Covenant on Economic, Social and Cultural Rights (ICESCR), in Hong Kong and Macau during their respective colonial period. The paper examines the scope of application of different international obligations arising out of ICESCR in Hong Kong and Macau. It identifies how related obligations were transformed into actual implementation measures and traces pertinent challenges and concerns. The paper examines how international obligations were ultimately sought to be succeeded under the one country two systems model. The right to education is taken up for a closer analysis in order to study the specific challenges faced and improvements achieved in the two SARs in the relevant periods. The paper concludes with a comparison of two territories and examines the prospects for continued improvement in the implementation of international obligations in the two SARs under the one country two systems principle.

Keywords: ICESCR, Right to Education, One Country Two Systems, Hong Kong and Macau SARs.

A. Introduction

Hong Kong and Macau are special administrative regions (SARs) of People Republic of China (PRC) and are governed by One Country Two Systems Principle. The two territories, which were under the British and Portuguese Administrative respectively, reverted to the Chinese Sovereignty in 1997 (Hong Kong Handover) and 1999 (Macau Handover). The Sino-British Joint Declaration¹ along with the Basic Law of Hong Kong² and the Sino-Portuguese Joint Declaration³ along with the Basic Law of Macau⁴ ensures the continued autonomy of the two territories respectively. In spite of the handovers, the international treaties and obligations that were applied to the two territories under the colonial rule were not affected. On the contrary, the international treaty obligations governing the two territories indeed increased since the handover.

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¹ See Joint Declaration of the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the People's Republic of China on the Question of Hong Kong, 19 December 1984, *International Tax & Business Lawyer* Vol. 5 (1987) p.424 available online at <http://scholarship.law.berkeley.edu/bjil/vol5/iss2/6> (herein after referred as 'Sino-British Joint Declaration 1984').

² See the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China, adopted at the Third Session of the Seventh National People's Congress on 4 April 1990 and promulgated by Order No. 26 of the President of the People's Republic of China on 4 April 1990, and effective as of 1 July 1997 available online at http://www.basiclaw.gov.hk/en/basiclawtext/images/basiclaw_full_text_en.pdf (herein after referred as 'Hong Kong Basic Law').

³ See the Joint Declaration of the Government of the Portuguese Republic and the Government of the People's Republic of China on the Question of Macau, 13 April 1987, available online at <http://bo.io.gov.mo/bo/I/88/23/dc/en/default.asp#I> (herein after referred as 'Sino-Portuguese Joint Declaration 1987').

⁴ The Basic Law of the Macao Special Administrative Region of the People's Republic of China, adopted at the First Session of the Eighth National People's Congress on March 31, 1993 and promulgated by Order No.3 of the President of the People's Republic of China on March 31, 1993, and effective as of December 20, 1999 available on line at http://bo.io.gov.mo/bo/i/1999/leibasica/index_uk.asp (herein after referred as 'Macao Basic Law').

The continued application and expansion of international obligations in the two territories should be attributed to the position taken by the PRC. Firstly, the PRC has declared its intention to continue to honor the international treaties applied to the two territories before handover. Secondly, the PRC has since extended the application of new treaties, which were not applied to the two territories before the handover. While this position could be perceived as a double shot in the arm, the issue of how the implementation of international obligations in the two SARs has evolved will be a crucial question in any assessment of the post-handover situation. Any such prospective evaluation will require a close scrutiny of the origin, and scope and limitation of application of the relevant international obligations in the territories during the colonial period and status of their succession subsequent to the transfer of sovereignty. The objective of the present research is to examine the implementation history of economic, social and cultural rights in Hong Kong and Macau in order to identify the scope and limitations of the domestic implementation of related international obligations during the respective colonial periods. The paper also aims to study domestic measures implementing the specific right to education to determine the level of progress in translating the relevant international obligations into concrete results in the two territories during or subsequent to the colonial rule.

The present paper first traces the origin and implementation of specific set of economic, social and cultural obligations as reflected in International Covenant on Economic, Social and Cultural Rights (ICESCR) in Hong Kong and Macau during their respective colonial period. The importance of examining the evolution during the colonial periods becomes particularly crucial for jurisdictions like Hong Kong and Macau, which were under the colonial administration almost close to the end of the last century. Unlike other British colonies in East Asia like Malaysia, which had their independence before the ICESCR was drafted in 1966 and became a party to the Covenant themselves, the ICESCR was first extended to the two jurisdictions by their respective colonial power. Hence, the need to examine the origin and scope of ICESCR during colonial periods in the two jurisdictions gains significance, particularly for any prospective assessment of the success of implementation of the ICESCR rights and obligations in the two SARs. In this regard, the paper also examines the scope of application of different international obligations arising out of ICESCR in Hong Kong and Macau with a specific reference to the limitations triggered by any relevant reservations made by their colonial powers. The paper then identifies how the specific international obligations were transformed into actual implementation measures in the two territories, which will serve as a benchmark for any prospective study intending to evaluate the evolution of the same right or obligation subsequent to the handover. In this process, the paper traces the implementation challenges and concerns faced in the two territories.

The paper then examines how relevant obligations previously applied in the two territories were sought to be succeeded under the one country two systems model. The paper analyzes the right to education as a specific example to identify how the international obligations in this regard have transformed into concrete implementation measures in the two territories. Among various rights enshrined in the ICESCR, the right to education is taken up for a closer analysis in order to study the specific challenges and improvements achieved in Hong Kong and Macau during the period before and after the handover respectively. The concluding part of the paper compares the findings relating to the two territories and examines the prospects for continued improvement in the implementation of the rights enshrined in ICESCR in the two SARs under the one country two systems principle.

B. International Obligations relating to Economic, Social and Cultural Rights in Hong Kong

The application of ICESCR was first extended to Hong Kong during the British administration of the territory, subsequent to the ratification of the Covenant by the UK in August 1976. However, the application of the ICESCR to Hong Kong was subjected to certain reservations. First and foremost, the UK made a reservation not to apply Article 8 (1) (b) of the ICESCR to Hong Kong⁵. As a consequence, the right of trade unions to establish national federations or confederations and the right to form or join international trade-union organizations were not extended to colonial Hong Kong⁶. Moreover, UK reserved its right to post pone the application of Article 7 (a) (i), which pertains to the issue of equal pay to men and women for equal work in the private sector. The UK also made a general reservation subjecting the right to work guaranteed in Article 6 of the ICESCR to possible imposition of restrictions on the grounds of place of birth or residence qualifications⁷. In as much as the above reservations impacted the application of ICESCR to Hong Kong, it is interesting to note that the UK reservations relating to the postponement of implementing certain rights to some of its other territories were not extended to Hong Kong. This included the postponement of implementation of the right to social security⁸; right to protection and assistance to family and free consent to marriage⁹; right

⁵ It is important to note that, while other reservations made by UK at the time of ratification of the ICESCR covered different overseas territories under the British Administration, this reservation regarding the application of Article 8(1)(b) was restricted only to Hong Kong.

⁶ At the time of signature of the ICESCR, the UK declared that Article 8 (1) (b) of the Covenant will not be applied to Hong Kong in as much as it may involve the right of trade unions not engaged in the same trade or industry to establish federations or confederations. See United Nations, *Treaties and international agreements registered or filed and recorded with the Secretariat of the United Nations*, Vol.993, Nos. 14531-14537, (1976) at p.83.

⁷ This purpose of such restriction was however specifically limited to the need for safeguarding the employment opportunities of workers the region or territory in question.

⁸ The right as guaranteed under Article 9 of the ICESCR was postponed for implementation only in Cayman Islands and the Falkland Islands.

⁹ The UK postponed the implementation of the relevant Article 10 (1) of the ICESCR only with regard to a small number of customary marriages in the Solomon Islands.

to paid maternity leave¹⁰ and right to education¹¹. Hong Kong was also excluded from the list of British administered territories for which the UK sought developing economy status for the purpose of the limited application or non-application of the ICESCR¹².

Subsequent to the ratification of the ICESCR by UK, specific provisions of the Covenant were implemented in Hong Kong and reported to the UN through the UK periodic reports. One of the earliest substantive reports on Hong Kong could be found in the UK report with regard to the implementation of articles 10 to 12 of the ICESCR in its dependent territories in 1981¹³. Firstly, with regard to the protection of family, mothers and children as enshrined in Article 10 of the ICESCR, the report enumerated various implementation measures in Hong Kong. Notable ones include, the establishment of a family welfare program, a network of casework units and family service centers and a plan to create a comprehensive program for family life education.

The legislative guarantee of right of men and women to enter into marriage with their full and free consent as well as legislative reforms prohibiting certain practices of bigamy and betrothal of a child bride without consent were achieved. However, with regard to the maternity protection, unlike the right of a female employee to receive a paid maternity leave recognized under the current Employment Ordinance of Hong Kong¹⁴, the right of the female employee by then was limited only for an unpaid maternity leave¹⁵. However, a right of working mothers to receive a 'Public Assistance' during the maternity leave in the event of their total family income dropping below particular level set by the Public Assistance Scheme was recognized. Pre and post-natal care for a pregnant female prisoner was recognized with the new born child allowed to stay with the mother during the normal period of lactation.

With regard to the protection of children, they were guarded against moral and physical danger by the Protection of Women and Juveniles Ordinance, while adequate care and supervision of children were granted under the Child Care Centres Ordinance and Regulations 1975. While, the minimum age for full time employment of children was set at 14, children at the age of 13 were permitted to take up some part time employment in non-industrial sector¹⁶. However, children were not allowed to be employed in a prescribed set of prohibited occupations¹⁷. In order to implement the right to an adequate standard of living guaranteed in Article 11 of the ICESCR, measures aimed at continuously improving the living conditions¹⁸, providing a right to adequate food¹⁹ and clothing²⁰, and right to housing²¹ were introduced.

¹⁰ Article 10(2) of the ICESCR, which affords special protection to working mothers paid leave or leave with adequate social security benefits for a reasonable period preceding and after childbirth was postponed for implementation in Bermuda and the Falkland Islands.

¹¹ The application of Article 13(2) (a) and Article 14 of the ICESCR specifically pertaining to their requirement of compulsory primary education was postponed in three British administered territories namely Gilbert Islands, the Solomon Islands and Tuvalu.

¹² See United Nations, *Treaties and international agreements registered or filed and recorded with the Secretariat of the United Nations*, Vol. 1007, Nos. 14763-14785 (1976) at p.389.

¹³ See UN, ECOSOC, *Implementation of International Covenant on Economic, Social and Cultural Rights, Reports Submitted by States Parties to the Covenant, Concerning Rights Covered by Articles 10-12, Addendum United Kingdom of Great Britain and Northern Ireland*, (E/1980/6/Add.25) 13 April 1981 (herein after referred as 'UN, ECOSOC, E/1980/6/Add.25, 1981') at Annex VII.

¹⁴ See Section 14 of the Employment Ordinance of Hong Kong, cap.57.

¹⁵ See UN, ECOSOC, E/1980/6/Add.25, 1981, *op.cit.* at Annex VII, P.1.

¹⁶ However, by virtue of the Employment (Miscellaneous Provisions) Ordinance 1979 the minimum age of employment in Hong Kong was raised to 15 with effect from 1 September 1980. Currently, although a child is defined to be a person under the age of 15 (a person from 15-18 is defined as a young person), children aged 13 and 14 could still be legally employed in non-industrial sector subject to certain conditions. Moreover, for the purpose of development of art or training, the employment of children of different ages as entertainers is possible through obtaining a special permission from Commissioner for Labor. The children under the age of 15 are prohibited from being employed only in the industrial sectors. See Employment of Children Regulations made under the Employment Ordinance of Hong Kong, Cap. 57, *op.cit.*

¹⁷ Enlisted in the Schedule of the Employment of Children Regulations 1979 of Hong Kong.

¹⁸ This included new Town Development Programs and the Public Housing Program and measures to promote external trade relations of Hong Kong to sustain such programs. Interestingly, the inability to guarantee a continuous improvement of living conditions was expressed due to the susceptibility of Hong Kong to large number of immigration, trade restrictions and import quotas

¹⁹ This right was sought to be guaranteed through a Development Plan on Food Supply Program implemented since 1975 and a combination of imported food and primary production. Although, measures to improve specific food sectors like agriculture and fishing were undertaken, the increasing loss of the limited agricultural land to urban development was distantly noted.

²⁰ Sufficient supply of all articles of clothing and its affordability for the general public in Hong Kong were pointed out as the major reasons for absence of situation of inadequate clothing in the territory.

²¹ The specific circumstances in Hong Kong like the scarce supply of land and the globally highest rents and prices of flats in the private sector were attributed for creating the need to develop public subsidized housing programs by the government in order to fulfill this right. Other measures to implement this right included a subsidized home ownership program, grant of mortgage loans below market rates, engagement of modern techniques to develop multi-storey housing, design and construction of self-contained public housing estates and development of necessary infrastructure facilities. While rent control measures were introduced under the Landlord and Tenant (Consolidation) Ordinance to limit the burden of rental increases, a balance was achieved to encourage the continuous development of new private housing by exempting them from rental control measures for a fixed number of years.

In achieving the Right to Physical and Mental Health enshrined in article 12 of the ICESCR, key facilities for family planning, maternal and child health were introduced in Hong Kong. In addition a comprehensive Family Health Service providing routine and special observation for all infants was implemented. To protect the public from pollution and environmental degradation, special units like the Air Pollution Control Unit under the Clean Air Ordinance and a new Environmental Protection Unit were introduced. Industrial hygiene and occupational health were sought to be improved through the expansion and reorganization of the Industrial Health Division of the Labor Department respectively. Continued offering of effective medical and health care was ensured through a long term medical development program²².

To implement the Right to take part in cultural life as enshrined in Article 15 (1)(a) of the ICESCR, the British administration took a two pronged approach of developing policies to encourage free participation of people in all aspects of cultural life and at the same time encouraging creative works by protecting their copyrights. Focusing on the developmental aspects of cultural promotion, various specific measures were introduced. Notable measures includes the establishment of a Council and an Academy for the Performing Arts in 1982 and 1984 respectively, recording and conservation of important aspects of cultural heritage, construction and operation of various facilities and subsidization of cultural programs.

To promote the Right to enjoy the benefit of scientific progress and its applications, teaching of science subjects at schools, promoting research in universities, providing services to achieve technological upgrading in industries and diffusing of scientific information to the public were some of the initiatives implemented in the British administered Hong Kong. Interestingly, a conscious balance between the scientific and technical progress and the protection of human rights, including information privacy and data protection was sought to be maintained by the British administration in Hong Kong, while enforcing the right under Article 15 (1)(b) of the ICESCR. Finally, to protect the interest of the authors under Article 15(1) (c), the British administration extended various international intellectual property rights (IPR) instruments to Hong Kong that covered both economic and moral rights of authors. The domestic IPR mechanism was also strengthened to offer effective protection for different forms of IPRs.

The ICESCR Committee in response to the Second Periodic Report of UK in 1993 commended the terms of the Sino-British Joint Declaration and the Basic Law of Hong Kong for upholding the principle of continuity with regard to the continued application of the ICESCR obligations in Hong Kong subsequent to the hand over under one-country two systems model. In particular, the specific incorporation of ICESCR in Article 39 of the Basic Law of Hong Kong and the resulting justiciability was appreciated²³. As the PRC was not a party to ICESCR by then, the Committee acknowledged the possible challenges in reporting the implementation of ICESCR in Hong Kong after handover and made relevant suggestions²⁴.

The ICESCR Committee observed several factors that might affect the implementation of the Covenant in Hong Kong. First and foremost was the reluctance of the Hong Kong government to seek the implementation of the rights under ICESCR with its maximum capacity due to the uncertainties arising out of the prospective handover. It also expressed several important concerns including the adverse impact on the implementation caused by the non-incorporation of the ICESCR into domestic law; low awareness and interest of the judiciary in international human rights law and the resulting inadequacy of consideration of the Covenant under the common law; the absence of a comprehensive anti-discrimination legislation; the government's objection for establishing a human rights commission; the prevalence of the problem of split families caused by Hong Kong immigration law, inconsistent with the obligations under Article 10 of ICESCR; refusal of right to education to the children of Vietnamese asylum seekers; the legal and social position granted to foreign domestic helpers without regard to relevant rights under the Covenant; and sub-human conditions of living especially of elderly and the insufficiency of security payments to elderly to enable them to enjoy the rights guaranteed in the ICESCR²⁵.

In response, the ICESCR Committee recommended the Government of Hong Kong to establish procedures for adjudication of complaints of infringements of rights under Covenant; establish a human rights commission; provide continuous training and update to judges on the developments of international human rights law; introduce a comprehensive anti-discrimination law; review immigration policy to prevent split families; accord the children in the refugee camps and those released enjoyment of rights under ICESCR; address the plight faced by foreign domestic helpers; improve the deplorable living conditions in cage homes and provide a right to housing; and address the inadequacies of benefits of older persons²⁶.

²² See UN, ECOSOC, E/1980/6/Add.25, 1981, *op.cit.* at Annex VII, P.9.

²³ However, it is important to note that the ICESCR Committee expressed regrets for Hong Kong not incorporating the Covenant within the domestic law of Hong Kong unlike the case of ICCPR, which was incorporated into the Hong Kong Bill of Rights in 1991. See Hong Kong Bill of Rights Ordinance, Cap.383. The Committee also disagreed with the view that the rights enshrined in the ICESCR are distinct in nature in comparison with civil and political rights and hence cannot be subjected to enforcement procedure under the domestic law. See Observations on the 1993 Second Periodic Report of UK, 1994, *op.cit.* at p.5., para 22.

²⁴ See UN, ECOSOC, Committee on Economic, Social and Cultural Rights, *Consideration of Reports Submitted by States Parties under Articles 16 and 17 of the Covenant, Concluding observations of the Committee on Economic, Social and Cultural rights, United Kingdom of Great Britain and Northern Ireland*, (E/C.12/1994/19) 21 December 1994 (herein after referred as "Observations on the 1993 Second Periodic Report of UK, 1994") at p.4, para 20.

²⁵ See Observations on the 1993 Second Periodic Report of UK, 1994, *op.cit.* at paras 22-31.

²⁶ See Observations on the 1993 Second Periodic Report of UK, 1994, *op.cit.* at paras 32-41.

When PRC and UK started to discuss the restoration of Chinese sovereignty over Hong Kong, the question of continued application of ICESCR arose. The Sino-British Joint Declaration entered into in 1984 contained 'general' and 'specific' provisions ensuring the continued implementation of the ICESCR subsequent to the handover of Hong Kong to PRC. Firstly, the PRC and Hong Kong generally agreed for the continued application of the international agreements to which PRC was not a party but which were being implemented in Hong Kong before the handover²⁷. This obligation under taken by the PRC is further reflected under Hong Kong Basic Law²⁸. Moreover, the Sino-British Joint Declaration specifically agreed that the ICESCR will remain in force in Hong Kong subsequent to the handover²⁹, which is also guaranteed under the Hong Kong Basic Law³⁰. Therefore, above legal instruments categorically demonstrate the PRC succession of ICESCR obligations in Hong Kong under the one country two systems model.

On 10 June 1997, the UK notified the United Nations that it will cease to be responsible for the international rights and obligations arising from the application of ICESCR to Hong Kong from 1 July 1997 as Hong Kong will be restored to PRC on that day³¹. Subsequently, on 20 June 1997, the PRC notified the United Nations that it will resume the exercise of sovereignty over Hong Kong with effect from 1 July 1997 and the provisions of ICESCR as applied to Hong Kong will continue to be in force since that day.

C. The Scope of Application of International Obligations relating to Economic, Social and Cultural Rights in Macau

The UK signed and ratified ICESCR and extended its application to Hong Kong before Portugal became a party to the Covenant. The Portuguese signed the ICESCR only in 1976, which was eight years after the Covenant was signed by the British. However, unlike the British who took almost eight years to ratify the ICESCR, the Portuguese ratified the Covenant in less than two years subsequent to their signature³². Moreover, the signature and ratification of the ICESCR by Portugal did not contain any reservation pertaining to the non-application or postponement of implementation of rights and obligations arising out of the Covenant. However, the manifestly unreserved acceptance of the ICESCR by Portugal did not translate into an equally enthusiastic application of the Covenant to the territory of Macau. Firstly, in spite of the Portuguese ratification of the Covenant, it took nearly another fifteen years before Portugal formally extended ICESCR to Macau. Secondly, unlike the unqualified ratification of the Covenant, the formal extension of ICESCR to Macau was marked by several admonitions. Such characteristics are visible even in a cursory reading of the Portuguese communication text that formally extended the application of ICESCR to Macau.

In Macau legal system that is characterized by the monist school of thought, international law should have been placed at a higher pedestal and its implementation should not have required legislating international obligations into domestic laws as in case of common law legal systems. However, the Portuguese extension of ICESCR to Macau called for implementation of the relevant provisions through specific legal documents issued by the organs of government of Macau³³. Moreover, the Portuguese declaration of extension of ICESCR raised two specific caveats regarding the application of the ICESCR as well as the ICCPR (International Covenant on Civil and Political Rights). It cautioned that the application of the two covenants should in no way affect the status of Macau³⁴ and the provisions of the Sino-Portuguese Joint Declaration 1987³⁵.

²⁷ Similarly, the PRC also undertook to facilitate the continued participation of the Hong Kong in international organizations in which Hong Kong was a participant before the handover but in which the PRC was not a member. See Sino-British Joint Declaration 1984, *op.cit.* at Annex 1, Section XI.

²⁸ See Article 153, Hong Kong Basic Law, *op.cit.*

²⁹ See Sino-British Joint Declaration 1984, *op.cit.* at Annex 1, Section XIII.

³⁰ See Article 39, Hong Kong Basic Law, *op.cit.*

³¹ See the notification relating to Hong Kong sent by the United Kingdom of Great Britain and Northern Ireland dated 10 June 1997 to the United Nations in United Nations, *Treaties and international agreements registered or filed and recorded with the Secretariat of the United Nations*, Vol. 1979, Nos. 33835-33839 (1997) at p.425.

³² The ICESCR was signed by the UK and Portugal in 1968 and 1976 respectively, while the former ratified it only in 1976 the later achieved its ratification by 1978.

³³ It is interesting to note that such a doubt on the monist characteristic of Macau legal system could be traced even during the Portuguese administration of Macau although similar concerns with regard to application of the international covenants have been mainly expressed in the context of legal framework designed to govern Macau subsequent to the Portuguese handover of the territory. For example, the relevant provisions of the Macau Basic Law, which is the highest law of Macau SAR addressing the application of the international covenants are said to have created doubts on Macau as a monist system. For an interesting doubt cast on whether Macau continues its monist tradition or has already changed into a dualist system in the light of Article 40 of Macau Basic Law see Paulo Cardinal (2013) *Macau: Transformation of an Historic Autonomy* in Yash Ghai and Sophia Woodman ed. (2013) *Practicing Self Government: A Comparative Study of Autonomous Regions*, Cambridge: Cambridge University Press at p.408. See also for the highlight of a related discourse that the specific provisions of Article 40 of the Macau Basic Law requiring the implementation of international human rights instruments through the laws of Macau SAR is a reflection of the dualist position that avoids the monist general rule as reflected under Article 138 of the Basic Law of MSAR, A.M. de Magalhaes (2009) *The Validity of International Agreements of Human Right in the Juridical Order of the Special Administrative Region of Macau* in Jorge Oliveira and Paulo Cardinal (eds.) (2009) *One Country, Two Systems, Three Legal Orders-Perspective of Evolution, Essays on Macau's Autonomy after the Resumption of Sovereignty by China*, Berlin Heidelberg: Springer-Verlag at p.609.

³⁴ As recognized under the Portuguese Constitution and the Organic Statute of Macau.

³⁵ See the Sino-Portuguese Joint Declaration 1987 signed on 13 April 1987 in which the agreement was reached that the PRC will resume the exercise of sovereignty over Macau from 20th December 1999.

The timing of the formal extension of the ICESCR to Macau subsequent to the agreement to restore Chinese sovereignty over the territory and the ensuing political and diplomatic circumstances at that time could be attributed for the need to make explicit reference (reassurance) as to the status of Macau. Moreover, it is important to point out that in a declaration, which was meant to notify the extension of application of ICESCR to Macau, there were two explicit reservations relating to the application of specific provisions from ICCPR. The Portuguese declaration notified that Article 25(b)³⁶ as well as Articles 12(4)³⁷ and 13³⁸ of the ICCPR will not be applied to certain bodies³⁹ and individuals respectively⁴⁰. Such exclusions could also be seen as the measures aimed ensuring consonance with the civil and political system envisioned for the future governance of Macau subsequent to the handover, which was by then already in the making.

After the conclusion of the Sino-Portuguese Joint Declaration that agreed on the restoration of Chinese Sovereignty over Macau, Portugal reported it as the reflection of its implementation of Article 1 of the ICESCR, which provides for the right of self-determination. In its Second Periodic Report under the ICESCR in 1994⁴¹, Portugal reiterated its obligation to promote self-determination of the Trust Territories under the Covenant and pointed out to its decision that Macau will be integrated with PRC in 1999. Unlike the periodic reports of UK submitted to ICESCR Committee that widely reported the implementation measures of ICESCR in Hong Kong, the periodic reports of Portugal contained only scarce reference to the implementation status of the ICESCR obligations in Macau. This could also be attributed to the relatively shorter timeframe between formal extension of the application of ICESCR to Macau and Macau handover to the PRC. Moreover, that period was mainly dominated by the issues arising out of the Sino-Portuguese Joint Declaration and the incorporation of the ICESCR obligations under the Basic Law of Macau that were focused on the principle of continuity of obligations subsequent to the handover. This is evident from the fact that the only major reference made by Portugal in its 1994 Second Periodic Report about Macau was related to the transfer of its sovereignty. Moreover, the response to this Report made by Committee on Economic, Social and Cultural Rights was pertaining to the principle of continuity. The ICESCR Committee expressed its appreciation for the Portuguese efforts to secure possible guarantees from the PRC for the continued respect to the ICESCR obligations subsequent to the handover in 1999⁴².

Subsequent to the Sino-British Joint Declaration concluded in 1984, the PRC concluded the Sino-Portuguese Joint Declaration with Portugal in 1987. However, a comparison of the two joint declarations reveals a conspicuous difference with regard to the provisions governing the continuity of ICESCR obligations. Unlike in the Sino-British Joint Declaration, the dual set of provision governing the continuity of obligations under ICESCR is missing in the Sino-Portuguese Joint Declaration. The general provisions governing the continued application of the international agreements to which PRC was not a party but which were being implemented in Macau before the handover is present in the Sino-Portuguese Joint Declaration⁴³ and the same was also subsequently incorporated into Macau Basic Law⁴⁴. However, the specific provisions obliging the continued application of the ICESCR as seen in the Sino-British Joint Declaration cannot be found in the Sino-Portuguese Joint Declaration. But this obvious omission cannot be seen as a lack of significance attached to the ICESCR obligations, as the general undertaking to honor international instruments applied to the territory before the handover would have in any case supported the continued implementation of ICESCR in Macau SAR. Moreover, the Basic Law of Macau included a specific provision guaranteeing the implementation of ICESCR in Macau⁴⁵. Therefore, the absence of the explicit reference to ICESCR obligations in the Sino-Portuguese Joint Declaration in itself cannot cast any doubt over the motivation to apply ICESCR obligations in Macau under the one country two systems model.

On 18 November 1999, Portugal notified the United Nations that PRC will resume the exercise of sovereignty over Macau from 20 December 1999 and from that day Portugal will cease to be responsible for the international rights and obligations arising from the application of conventions to Macau. In turn, the PRC notified the United Nations on 13 December 1999 that it will resume the exercise of sovereignty over Macau from 20 December 1999 and pointed out its intention to continue the

³⁶ Article 25 (b) of the ICCPR provides the right and the opportunity to vote and to be elected in elections through universal and equal suffrage, and secret ballot.

³⁷ Article 12 (4) of the ICCPR provides individuals the right to enter their own country.

³⁸ Article 13 of the ICCPR provides aliens lawfully in the territory of a member state the right not be expelled except under specific conditions.

³⁹ The reservation precluded the application of Article 25 (b) with respect to the composition of elected bodies and the method of choosing and electing their officials.

⁴⁰ See the Portuguese Declaration of Extension of Application of ICESCR to Macau 27 April 1993 in United Nations, Treaties and international agreements registered or filed and recorded with the Secretariat of the United Nations, Vol. 1720, Nos. 29907-29981 (1993) at p.308.

⁴¹ See UN, ECOSOC, *Implementation of International Covenant on Economic, Social and Cultural Rights, Second periodic reports submitted by States parties to the Covenant concerning rights covered by articles 16 to 17 of the Covenant, Addendum-Portugal, 17 May 1994*, (E/1990/6/Add.6) 22 July 1994 (herein after referred as 'Second Periodic Report of Portugal 1994') at p.4, para.11.

⁴² UN, ECOSOC, Committee on Economic, Social and Cultural Rights, *Consideration of Reports Submitted by States Parties under Articles 16 and 17 of the Covenant, Concluding observations of the Committee on Economic, Social and Cultural Rights, Portugal*, (E/C.12/1995/4), 7 June 1995 (herein after referred as "Observations on the 1994 Second Periodic Report of Portugal, 1994") at p.2, para.7.

⁴³ See Sino-Portuguese Joint Declaration 1987, *op.cit.* at Annex 1, Section VIII.

⁴⁴ See Article 138, Macau Basic Law, *op.cit.*

⁴⁵ See Article 40, Macau Basic Law, *op.cit.*

implementation of international agreements to which the PRC was not yet a party but which were in force in Macau before the handover. ICESCR was one such instrument, which PRC explicitly listed for continued implementation.

D. Right to Education in Hong Kong

The conditions promoting access to education were introduced in Hong Kong much before the British ratification of ICESCR in 1976 as most government and aided schools offered free primary education since 1971. However, whether the conditions promoting the right to education as enshrined in ICESCR had improved in Hong Kong subsequent to the British ratification of the covenant is debatable. This is mainly due to the debate that surrounded the question of compulsory primary education in Hong Kong. Although, a nine-year free and compulsory education is said to be offered in Hong Kong since 1978⁴⁶, the lack of legal certainty in this regard is explicitly conceded by the British even during the colonial administration. For example, the Second Periodic Report of UK⁴⁷ in 1993, reporting the implementation of Article 13 of the ICESCR in Hong Kong, observed that primary education in Hong Kong was not compulsory and this could be seen as a failure to implement the requirement of Article 13 (2) (a) of the ICESCR which requires “Primary education shall be compulsory ...”. This is particularly striking given the fact that Hong Kong was not one of the territory for which the requirement of compulsory primary education was not postponed by the UK in its reservation to ICESCR⁴⁸.

Hong Kong sought to introduce compulsory education through conferring of coercive power to the administrative head of education. Although, the Director of Education in Hong Kong was granted the power to serve upon any parent (withholding their child from attending primary school without a reasonable excuse) an attendance order requiring the regular attendance of a child, the resulting situation was conceded as not equating to compulsory primary education in a strict legal sense⁴⁹. However, it was argued that such a power conferred on the Director of Education was nevertheless intended substantially to achieve the same effect. Such circumstances creating legal uncertainty regarding the compulsory nature of primary education in Hong Kong, especially subsequent to the British ratification of the ICESCR, could arguably be seen as not very congenial for realizing the right to education in the exact spirit and text of the Covenant.

Additionally, in response to the obligation to achieve progressive implementation of free compulsory primary education under Article 14 of the ICESCR, the British administration sought to equate the powers conferred on the Director of Education as amounting to the achieving of the compulsory primary education in colonial Hong Kong. This was in spite of its own earlier admission that the powers granted to the Director of Education cannot be equated to compulsory primary education in a strict legal sense.

The significance of the apparent dichotomy on the compulsory nature of primary education arising from the Second Periodic Report of UK 1993 arguably is put to rest after the handover of Hong Kong. The post hand over review of the compulsory education in Hong Kong categorically claims that in Hong Kong “...compulsory education is provided free. It is coercive and enforced by the Government through legislation.”⁵⁰ This post hand over assertion by Hong Kong SAR as to the coercive nature of primary and junior secondary education implemented through legislative enforcement should put aside concerns as to the legal uncertainty surrounding compulsory education raised by the Second Periodic Report of UK 1993 discussed earlier.

Apart from the primary education, the junior secondary education was also provided free in governmental and aided schools in Hong Kong during the British administration. However, the senior secondary education was not free albeit it enjoyed some subsidization since 1978, which was subsequent to the British ratification of ICESCR. Moreover, the British administration introduced a fee remission scheme in public schools to assist persons who successfully secured admission but lacked financial resources to join. Technical and vocational education were on offer and specific measures were implemented to expand the number of places in tertiary education. Education at tertiary level was supported with some financial assistance including scholarships and loans. Adult education in the form of retrieval courses for persons who dropped out or deprived of primary education was available. Professional development training opportunities for school teachers were created. Interestingly, while the government employed teachers were required to participate in professional development, it was left for determination by the private contract between the private teachers and the schools that employed them.

⁴⁶ Education and Manpower Bureau, “Legislative Council Panel on Education Provision of Free Education in Hong Kong and Overseas Countries”, LC Paper No. CB (2)1721/04-05(01), May 2005 at para 2 available online at <http://www.legco.gov.hk/yr04-05/english/panels/ed/papers/ed1029cb2-1721-1e.pdf>. The statement of Education and Manpower Bureau could be traced to the developments in September 1978, when primary school students were offered 3 years of free junior secondary education in all public sector schools and the power of the Director of Education to enforce school attendance was further extended to junior secondary. See Education Sub-committee, Board of Education, *The Report on Review of 9-year Compulsory Education* (Revised Version) October 1997, chapter 3, para 3.6 available online at <http://www.edb.gov.hk/en/about-edb/publications-stat/major-reports/consultancy-reports/9-year-compulsory-edu-review-report/ch3.html>

⁴⁷ See UN, ECOSOC, *Implementation of International Covenant on Economic, Social and Cultural Rights, Second periodic reports submitted by States parties to the Covenant concerning rights covered by articles 13 to 15, Addendum, United Kingdom of Great Britain and Northern Ireland and Dependent Territories, 23 September 1993*, (E/1990/7/Add.16) 24 November 1993 (herein after referred as ‘Second Periodic Report of UK 1993’) at p.48.

⁴⁸ See *supra* n.11.

⁴⁹ The Second Periodic Report 1993 itself concedes that the powers the Director of Education in this regard did not in a strict legal sense constitute compulsory attendance. See Second Periodic Report of UK 1993, *op.cit.* at para 268.

⁵⁰ See Education Sub-committee, Board of Education, *The Report on Review of 9-year Compulsory Education* (Revised Version) October 1997, *op.cit.* at chapter 3, para 3.2.

In spite of the apparent progress of British administered Hong Kong in effectively implementing the right to education for local residents, it still faced criticism due to its policy towards the right to education of children of asylum seekers. As mentioned earlier, Hong Kong's past record relating to the protection of right to education of children of asylum seekers was subjected to criticism by the ICESCR Committee⁵¹. In 1994, the ICESCR Committee expressed deep concerns on the position taken by the local Hong Kong government, which argued that the children of asylum seekers did not have any entitlement to enjoy the right to education by virtue of their status as illegal immigrants. It is important to note that the ICESCR Committee found that the position of Hong Kong was inconsistent with the obligations of the Covenant.

E. Right to Education in Macau

The right to education subsequent to the handover is guaranteed under Macau Basic Law, which provides that "Macau residents shall have freedom to engage in education, academic research, literary and artistic creation, and other cultural activities"⁵². Interestingly, the Macau Basic Law also guarantees the freedoms to choose educational institutions and pursue education outside Macau SAR⁵³. With regard to the issue of compulsory education, the Macau Basic Law mandates the government to "gradually institute a compulsory education system"⁵⁴. Similarly, the PRC Initial ICESCR Report, submitted subsequent to its restoration of sovereignty over Macau, reiterated that the "phased setting up of a compulsory education system" as one of the two essential target of Macau's educational policy⁵⁵.

The Report added that the 'generalization' of the concept of universal and free education as the second policy goal. Although, the above provisions could create an impression that the free and compulsory in Macau as future goals, subsequent elements in the same report indicate the prevalence of free and compulsory education in Macau. For example, the PRC Initial ICESCR Report affirmed "Basic education is universal, free of charge and compulsory in public educational institutions and in those subsidized by the MSAR Government."⁵⁶ The Report also pointed out that compulsory education in Macau not only consisted of three stages (namely the pre-school education, primary school and general secondary school) covering 5 to 15 year old children but is also supported by a legislative mandate⁵⁷.

The fact that Macau public schools constituted only less than 20 percent of the total number of schools could raise concerns relating to the right to free education. However, free schooling was gradually expanded in Macau. Initially, a school tuition subsidy scheme for students from low income families enrolled in private schools and a subsidy for learning materials for low income students were introduced. But these benefits were ultimately extended to all Macau residents along with a free education subsidy provided to participating private schools to enable them to offer free education to Macau residents. A free education policy providing the above benefits was introduced since 2007-2008 academic year that comprehensively covered a total of 15 years spanning from kindergarten to senior secondary education. Interestingly, the Macau free education system has transcended beyond the primary schools not only to secondary levels⁵⁸ but also to continuing and adult education levels. Subsequently, a meal and stationary allowance for school students from low income families and a study allowance for Macau resident students attending tertiary education were also introduced to facilitate access to education.

Macau also provides right to education to prisoners aged less than 25 years, who are illiterate or not completed compulsory education. In order to enhance the quality of education, Macau SAR has also implemented various measures. In this regard, it is interesting to note that teachers in Macau are legally conferred the right and duty to seek professional training, and the government is mandated for providing conditions and creating means to realize the same. A small class room policy was also introduced since 2007 to improve the student-teacher ratio in schools in order to enhance the effectiveness of education. Promotion of important values like human rights and freedoms, respect to cultural identity, environment and healthy lifestyles form part of the educational policy of Macau.

The Second Periodic Report submitted by PRC in 2010 provided further updates on the implementation of right to education in Macau. It reported the creation of a new Non-Tertiary Education System Legal Framework in 2006 and the introduction of two general principles namely the right to education without discrimination and the obligation to ensure effective equality of opportunities in education⁵⁹. In order to strengthen the full utilization of educational opportunities, Macau introduced a school

⁵¹ See Observations on the 1993 Second Periodic Report of UK, 1994, *op.cit.* at p.6, para.28.

⁵² See Article 37 of Macau Basic Law, *op.cit.*

⁵³ See Article 122 of Macau Basic Law, *op.cit.*

⁵⁴ See Article 121 of Macau Basic Law, *op.cit.*

⁵⁵ UN, ECOSOC, *Implementation of the International Covenant on Economic, Social and Cultural Rights, Initial reports submitted by States parties under articles 16 and 17 of the Covenant by People's Republic Of China on 27 June 2003, Addendum, (E/1990/5/Add.59)*, 4 March 2004 (herein after referred as 'PRC Initial ICESCR Report 2003') at p.260, para.1097.

⁵⁶ PRC Initial ICESCR Report 2003, *op.cit.* at para.1119.

⁵⁷ Under the Decree Law 42/99/M of Macau SAR, see PRC Initial ICESCR Report 2003, *op.cit.* at para.1100.

⁵⁸ Macau is claimed to be the first region in Greater China providing 15 years of free education. See Macau Government Information Bureau, *Education*, (September 2014) p.1, available online at http://www.gcs.gov.mo/files/factsheet/Education_EN.pdf

⁵⁹ UN, ECOSOC, Committee on Economic, Social and Cultural Rights, *Implementation of the International Covenant on Economic, Social and Cultural Rights, Second periodic report submitted by States parties under articles 16 and 17 of the Covenant, Macao, China on 30 June 2010, (E/C.12/CHN-MAC/2)* 6 July 2012 (herein after referred as 'Second Periodic Report of PRC 2010') at p.32, para.174.

dropouts' notification mechanism involving the cooperation of parents, schools and NGOs and achieved a decrease in school dropouts. The Second Periodic Report of PRC 2010 also reported the establishment of study grants (consisting of loans, scholarships and subsidies) aimed at encouraging outstanding students with financial difficulties to continue with tertiary education.

New measures aimed at combating and preventing school violence were introduced to improve learning environment. It is also important to note that Macau introduced scholarships to improve access to higher studies for students (who are permanent residents) not only within Macau but also abroad. While the conditions for realizing the right to education in Macau are generally commendable, its limitation in benefitting the children of migrant workers is subjected to criticism. In spite of the ICESCR Committee recommendation to provide free compulsory education to all school-age children, including children of migrant workers, the response of Macau in this regard has been lukewarm. Although, the Second Periodic Report of PRC 2010 stressed that children of legal and illegal migrant workers are entitled to education in Macau they were not offered a free education.

F. Concluding Remarks

A close scrutiny of the implementation history of rights and obligations under the ICESCR in Hong Kong and Macau reveals distinct characteristics, which arguably are the result of unique diplomatic circumstances faced by their respective colonial powers. First of all, it is important to note that both European powers have taken a considerable time in becoming a party to the ICESCR. As noted, in spite of the earlier signature of the Covenant, the British took longer to ratify, while the Portuguese took longer to sign but ratified it sooner. The decision to extend the application of the Covenant to the two territories by their respective colonial powers also witnessed differences. While the British extended the application of the Covenant to Hong Kong soon after the UK ratified and became a party to the ICESCR, the Portuguese took almost a decade and a half to formally extend the application of ICESCR to Macau.

The longer period taken by the British to ratify the Covenant and the delay in the Portuguese signing and becoming a party to the Covenant demonstrates the initial hesitation in accepting the relevant obligations under the ICESCR even among the two European powers. In an era, where western powers tend to urge other nations to improve the implementation of international human rights standards in which ICESCR is considered as a fundamental instrument, the initial hesitation of UK and Portugal is hard to explain. However, the said hesitation of the two colonial powers could be attributed as one of the important causes for the delay in the implementation of relevant human rights in the two colonies. This finding on the initial hesitation of the respective colonial powers in becoming a party to the ICESCR should be taken cognizance in any investigation related to the evolution of the implementation measures in the two territories. Moreover, the explicit reservations made by the two colonial powers with regard to the scope of application of the Covenant to Hong Kong and Macau could also be seen as a reason for the lack of evolution of certain specific rights in the two territories. In determining the scope and limitations of related international obligations in the two territories, which is one of the objectives of the present research, the above findings related to the reservations will play a crucial role. However, the present paper only examined the reservations from the perspective of the circumstances related to handover negotiations of the two territories. The present paper does not examine the implications of the historical reservations on the status of the related rights in the two territories subsequent to the handover.

In the case of Macau, the long delay in formally extending the Covenant after Portugal becoming a party, arguably has added further repercussions. Firstly, such a delay only left a very short period for the colonial administration in Macau to take concrete implementation measures in Macau. Moreover, the fact that such an extension happened subsequent to the Sino-Portuguese Joint Declaration and the enactment of the Basic Law, indicates a high possibility that they would have prompted a cautious approach in choice of obligations as well as the vigor of their implementation. Any assessment of the evolution of ICESCR obligations in Macau subsequent to the handover should take note of such historical predilections. In case of Hong Kong, even though the time of formal extension of the application of ICESCR does not suffer from such constraints, the nature of the reservations made by UK seem to have been influenced by the careful consideration of maintaining the Sino-British relations. The British were fully aware of the impending lapse of the lease of the new territories in 1997 and the increasing assertion of PRC sovereignty over Hong Kong. Although, the Sino-British Joint Declaration was only concluded in 1984, when the British decided to extend the application of ICESCR to Hong Kong in 1976 they were already seeking to resolve the question of Hong Kong. This arguably would have influenced the choice of reservations made by the UK with regard to the rights and obligations to be extended to Hong Kong under the ICESCR as well as the vigor of its implementation in Hong Kong. The failure to introduce specific domestic legislation in Hong Kong to implement ICESCR and the consequential concerns expressed by the ICESCR Committee regarding the limitations of justiciability of the ICESCR rights in Hong Kong, are some of the examples that supports the above argument.

The rationale of the British decision to postpone the implementation of certain rights in Hong Kong, like the right relating to equal pay, is difficult to justify especially in the light of the fact that the UK did not seek a developing economy status for Hong Kong. In such circumstances, the reason for the absence of the right for a paid maternity leave for women workers in Hong Kong is also difficult to justify. The implementation of other specific obligations in Hong Kong that were reviewed earlier in this paper shows a satisfactory realization of related rights in Hong Kong. However, the seriousness of some of the concerns expressed by the ICESCR Committee regarding the implementation of ICESCR in Hong Kong during the British rule undermined any substantive gains achieved in that period. The concerns relating to the denial of right to education of children of people seeking asylum, the disadvantaged legal and social position of foreign domestic helpers, immigration policy causing split families and

sub-human living conditions of elderly were particularly damaging. Many of these concerns expressed during the colonial era seem to be taunting Hong Kong even subsequent to the handover especially issues like the split family and the status of domestic helpers. It is crucial to effectively address such continued concerns and any such attempt in contemporary Hong Kong cannot ignore the origin and related developments identified in this paper. The one country two systems principle as well as the relevant provisions of the Sino-British Joint Declaration and the Basic Law of Hong Kong not only provide an effective succession of the ICESCR obligations but also a rare opportunity to address the concerns of its implementation originating from the British era.

In the case of Macau, the issue of circumstances influencing the reservation is much more obvious as the formal extension of ICESCR took place only after the conclusion of the Sino-Portuguese Joint Declaration as well as the enactment of the Basic Law of Hong Kong. Therefore, the Portuguese reservations and the implementation measures of ICESCR to Macau most likely would have been influenced by its diplomatic priorities aimed at achieving a smooth handover of Macau. The choice of rights enumerated in the reservations as well as the potential deviation from the monism school of international law pointed out in this paper strongly indicate a cautious approach in Portuguese formal extension of ICESCR obligations to Macau. Moreover, the lack of any concrete implementation measures subsequent to the formal extension of ICESCR is also discernable from the scant reference to Macau in the later periodical reports of Portugal to the ICESCR Committee.

The succession of ICESCR obligations ensured under the Sino-Portuguese Joint Declaration and Macau Basic Law along with the autonomy enjoyed by Macau under one country two systems principle have provided a much stronger platform to realize the goals of the ICESCR in Macau. The need to nurture and develop this is much stronger than in Hong Kong given the fact that only limited time and opportunity was available between the formal extension of ICESCR and the end of Portuguese administration to achieve effective implementation of relevant obligations. The impressive evolution of the right to education in Macau, in spite of the educational policy mandating only a gradual realization of the key elements of the right, is a clear example of how any missed opportunity in the past to strengthen the implementation of specific ICESCR obligations in Macau could be effectively redressed by Macau SAR under one country two systems principle with the support of the motherland.

As indicated in the beginning, the objective of the present paper is to take stock of key agenda, measures and challenges relating to the implementation of some international obligations under the ICESCR during the colonial era in Hong Kong and Macau. As a result, the paper limits its enquiry to a select set of historical implementation measures. It does not deal with how those implementation measures have transformed since handover of the two territories, except a brief reference to the post-handover evolution of the right to education in Macau. It is therefore suggested that any future study on the subject matter should systematically investigate whether the implementation measures relating to the two territories examined in this paper have witnessed any advancements or faced new challenges since the handover. Such a study is highly recommended for conclusively ascertaining the effectiveness of the contemporary implementation of ICESCR obligations and the guaranteed rights in Hong Kong and Macau SARs.

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