

JUSTICIABILITY OF ECONOMIC, SOCIAL, AND CULTURAL RIGHTS: THE UN COMMITTEE ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS' REVIEW OF CHINA'S FIRST PERIODIC REPORT ON THE IMPLEMENTATION OF THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS

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"The world must move from an area of legislation to implementation"¹

I. INTRODUCTION

One of the most debated issues surrounding State parties' implementation of their obligations under the International Covenant on Economic, Social and Cultural Rights (the "ICESCR" or "the Covenant")² is the possibility for aggrieved citizens—including particularly vulnerable or disadvantaged ones—to seek redress for violations of their rights under the Covenant. All State parties are not only required to implement the Covenant on a non-discriminatory basis, but are also obligated to give effect to the ICESCR in their domestic legal order by using "all appropriate means, including legislative measures" to achieve "progressively the full realization of the rights recognized."³ Thus, in its *General Comment n°9* (1998), on the domestic application of the Covenant, the UN Committee on Economic, Social and Cultural Rights considered that "appropriate means of redress, or remedies, must be available to any aggrieved individual or group, and appropriate means of ensuring governmental accountability must be put in place."⁴

Justiciability, defined as the possibility for domestic courts to "take account of Covenant rights where this is necessary to ensure that the State's conduct is consistent with its obligations under the Covenant,"⁵ could serve as a good indicator for assessing State party compliance with the ICESCR while evaluating the degree of independence and professionalism of local judiciaries necessary for progressive realization of the rule of law.

Over the course of several meetings in April 2005, the United Nations Committee on Economic, Social and Cultural Rights ("Committee" or "ESCR Committee") reviewed the initial report of the People's Republic of China (including Hong Kong and Macao) on the implementation of the ICESCR.⁶ Upon completion of its analysis of China's compliance with the treaty and corresponding articles, the

¹ Kofi Annan, United Nations, *In Larger Freedom: Towards Development, Security, and Human Rights for All: Report of the Secretary General*, (United Nations General Assembly 59th Session, March 21, 2005).

² International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3 [hereinafter ICESCR].

³ *Id.* at art. 2(1).

⁴ *Draft General Comment No. 9: The Domestic Application of the Covenant*, U.N. ESCOR, 19th Sess., at para. 2, U.N. Doc. E/C.12/1998/24 (1998).

⁵ *Id.* at para. 14.

⁶ See *Implementation of the International Covenant on Economic, Social and Cultural Rights*, U.N. Doc. E/1990/5/Add.59 (2005) [hereinafter *PRC Initial Report*] for the initial report of the PRC and *Concluding Comments*, U.N. Doc. E/C.12/2005/SR.6-10 (2005).

Committee issued concluding observations.^{7 8} These conclusions underline the numerous and complex challenges China faces in ensuring that its international human rights obligations are taken fully into account.

One of the Committee's central concluding observations highlights the need for justiciability of the economic, social, and cultural rights enshrined in the ICESCR and their domestic application. Indeed, the Committee has urged the PRC government to "ensure that legal and judicial training takes full account of the justiciability of the rights contained in the Covenant and promotes the use of the Covenant as a source of law in domestic courts."⁹ In addition, China has been invited to include information concerning case law on the application of the Covenant in its next periodic report.

These prescriptions may seem far too vague to guide the Chinese government in judicial reform, but the government could also profit by drawing on insights from an international perspective.¹⁰ Indeed, the past decade has seen a tremendous transformation of the Chinese legal regime. The widespread use of the concept of legalization (法制化, *fazhizhua*) has resulted not only in the legitimization of the Chinese party-state, but also in an unprecedented public awareness of legal issues that progressively brings with it a new rights-consciousness and a strong desire for justice. While unprecedented, this dynamic is also incomplete and disorganized.¹¹ An international perspective on Chinese legal reform could help scholars understand the problems arising from the new relationship between the state and a society that cares a great deal for justice in challenging the arbitrariness of government administration.¹²

As China becomes more integrated into the international debate and its legal culture develops, one notices a slight and gradual evolution of its relationship with international law.¹³ The incorporation of

⁷ *Consideration of Reports Submitted by State Parties Under Articles 16 and 17 of the Covenant: Concluding Observations of the Committee on Economic, Social and Cultural Rights: People's Republic of China (Including Hong Kong and Macao)*, May 13, 2005, U.N. ESCOR, 34th Sess., U.N. Doc. E/C.12/1/Add.107 (2005) [hereinafter *Concluding Observations of the ESCR Committee*].

⁸ All documents regarding the ESCR Committee's review of China's implementation of the ICESCR (including Hong Kong and Macao) are available at <http://www.ohchr.org/english/bodies/cescr/cescr34.htm> (last visited Mar. 1, 2006). This essay specifically focuses on the People's Republic of China itself.

⁹ *Concluding Observations of the ESCR Committee*, *supra* note 7, at para. 42.

¹⁰ By "judiciary" this article refers to the Chinese court system (司法机关, *sifa jiguan*).

¹¹ See Stanley Lubman & Leila Choukroune, *L'incomplète réforme par le droit*, ESPRIT, Feb. 2004, at 122.

¹² See generally ENGAGING THE LAW IN CHINA: STATE SOCIETY AND THE POSSIBILITIES FOR JUSTICE (Neil J. Diamant et al. eds., 2005) [hereinafter ENGAGING THE LAW IN CHINA].

¹³ See generally Li Zhaojie, *Legacy of Modern Chinese History: Its Relevance to the Chinese Perspective of the Contemporary International Legal Order*, 5 SING. J. INT'L & COMP. L. 314 (2001); Li Zhaojie, *Traditional Chinese World Order*, 1 CHINESE J. INT'L L. 20 (2002); Wang

international standards into domestic law may be limited. As Pitman Potter has shown in legislative matters, "foreign influences have been limited to internal procedures and the organization of legislative organs and have not extended to the broader reach of Party dominance."¹⁴ But China's accession to the World Trade Organization ("WTO") has recently emphasized that international law can, to a certain extent, affect Chinese norms and practices by providing persuasion from external forces. The evolving nature of China's approach to international law towards a more mature relationship gives hope for a greater porosity of Chinese law to international norms and practices. Will this changing perception suffice to motivate a non-instrumentalist use of law and the development of a better understanding of human rights issues by the Chinese adjudicators? Or will this remain a naïve quest, constituting wishful thinking based on utopian ideals? What can ordinary Chinese citizens gain from the internationalization of Chinese law? Shall norm internationalization be used as a functional tool for harmonization rather than uniformization, or as an alternative route for redress of grievances against the state? Are efforts to protect economic, social, and cultural rights compatible with an authoritarian state using globalization as an engine to boost an economic development that guarantees its social stability?

A substantive analysis of justiciability must explore the nature of the rights and obligations in question. It is important not to underestimate the risk of excessive reliance on a system which invokes principles that are insufficiently defined and thus not linked to the feasibility of their implementation. Moreover, it is essential to ensure that complaints surrounding rights violations can be adjudicated and that the adjudicator's decision will be respected and implemented.

The complex issue of Chinese judicial reform lies at the heart of Stanley Lubman's work.¹⁵ In *Bird in a Cage*, he argues:

The Chinese courts can currently foster legality only within limits imposed by a hostile ideology and by institutions faithful to it. The courts could function to strengthen the rule of law but only if a Chinese leadership adopts, or yields to, a different philosophy of governance. The rule of law is an ideology. Courts

Tieya, *International Law in China: Historical and Contemporary Perspectives*, 221 RECUIEL DES COURS 195 (1990); *ESSAYS IN HONOR OF WANG TIEYA* (Ronald St. J. Macdonald ed., 1994).

¹⁴ See PITMAN B. POTTER, *THE CHINESE LEGAL SYSTEM: GLOBALIZATION AND THE LOCAL LEGAL CULTURE* 35 (2001).

¹⁵ See generally STANLEY LUBMAN, *BIRD IN A CAGE: LEGAL REFORM IN CHINA AFTER MAO* (1999).

truly dedicated to promoting that ideal cannot be instruments of a government that uses them to promote changing political tasks; they must have a more passive interest in solving conflict to attain a social equilibrium.¹⁶

Professor Lubman's work is also part of a constant effort to educate Western and Chinese peoples about possible judicial responses to the desire for justice in a society undergoing extraordinary changes, especially in a fast-changing economy and under an authoritarian regime. He writes:

Legal reform and its heavily propagandized popularization have heightened individual consciousness in China about legal concepts, legal rights, and substantive justice. This heightening of consciousness is due partly to the influx into China of Western ideas and partly to the legal reforms themselves. On numerous occasions in China, especially in the last ten years, I have repeatedly heard ordinary Chinese express values consistent with Western ideals of equality, justice and legality, and research provides additional albeit impressionistic evidence of belief in those values.¹⁷

In homage to Stanley Lubman's remarkable scholarship on these many roads to justice, this essay aims to contribute to the debate that centers on justice in China from an international perspective.

The essay begins in Part II by giving an overview of the review of China's first periodic report. It outlines the process for the review of country reports under the ICESCR by the Committee on Economic, Social and Cultural Rights and then discusses the Chinese report and the Committee's response. Part III discusses the issue of China's obligation to make rights under the Covenant justiciable in its domestic legal system. Part IV offers a conclusion.

¹⁶ *Id.* at 297.

¹⁷ *Id.* at 307.

II. ENSURING CHINA'S COMPLIANCE WITH THE ICESCR

There are various international mechanisms for ensuring compliance with treaty obligations related to economic, social, and cultural rights, but the main compliance mechanism remains reporting.¹⁸

Under Articles 16 and 17 of the ICESCR, State parties must submit reports on "the measures which they have adopted and the progress made" in implementing the rights enshrined in the Covenant.¹⁹ These reports are examined by the Committee, which the international community trusts to monitor State parties' compliance with the provisions of the Covenant.²⁰

Although it functions as a treaty body, the Committee was not established by the ICESCR itself. Rather, it was created in 1985 by the Economic and Social Council ("ECOSOC"). The Committee is thus a subsidiary organ of the ECOSOC, from which it derives formal authority. The Committee is composed of eighteen independent experts of high moral character and recognized competence in the field of human rights, who serve in their personal capacities and not on behalf of their home nations.²¹ Its primary function is to monitor the adequate implementation of the ICESCR by State parties while assisting governments in fulfilling their obligations by publishing specific legislative policy and other recommendations. Since 1988, the Committee has also generated some interpretative clarity by issuing a number of "General Comments" on the rights and provisions contained in the Covenant.²²

¹⁸ For a critical examination of the collective complaints system established under the European Social Charter, see Robin R. Churchill & Urfan Khaliq, *The Collective Complaints System of the European Social Charter: An Effective Mechanism for Ensuring Compliance with Economic and Social Rights?*, 15 EUR. J. INT'L L. 417 (2004). An interesting comparative study has been published by The Center for Housing Rights and Evictions. See *Litigating Economic, Social and Cultural Rights: Achievements, Challenges and Strategies*, (Centre on Housing Rights & Evictions 2003), available at <http://www.cohre.org/library/Litigating%20ESCR%20Report.pdf> (last visited Mar. 1, 2006).

¹⁹ ICESCR, *supra* note 2, at art. 16(1) ("The State parties to the present Covenant undertake to submit in conformity with this part of the Covenant reports on the measures which they have adopted and the progress made in achieving the observance of the rights recognized herein.").

²⁰ For a general presentation of the Committee's work, see Fact Sheet No.16 (Rev.1), The Committee on Economic, Social and Cultural Rights, at <http://www.unhchr.ch/html/menu6/2/fs16.htm#6> (last visited Mar. 1, 2006).

²¹ The members of the Committee are elected for a four year term by State parties in accordance with Articles 28 to 39 of the Covenant. Members may be re-elected if nominated. For the current membership of the Committee, see <http://www.ohchr.org/english/bodies/cescr/members.htm> (last visited Mar. 1, 2006).

²² For a comprehensive list of the General Comments issued by the Committee, see <http://www.ohchr.org/english/bodies/cescr/comments.htm> (last visited Mar. 1, 2006).

Under Articles 16 and 17 of the ICESCR, State parties must submit “periodic reports” to the ESCR Committee within two years of entering the Covenant, and once every five years thereafter.²³ In that report, State parties must indicate the degree to which the rights enshrined in the Covenant have been implemented to date and the difficulties that they have faced in this respect.²⁴ However, the Committee does not work solely on the basis of these reports. Indeed, it analyzes many sources of information, including literature transmitted by specialized United Nations agencies such as the International Labor Organization (“ILO”), the United Nations Educational, Scientific and Cultural Organization (“UNESCO”), and the World Health Organization (“WHO”), as well as alternative reports from non-governmental and international human rights organizations.²⁵

²³ Article 16 of the ICESCR states:

1. The State parties to the present Covenant undertake to submit in conformity with this part of the Covenant reports on the measures which they have adopted and the progress made in achieving the observance of the rights recognized herein.
2. (a) All reports shall be submitted to the Secretary-General of the United Nations, who shall transmit copies to the Economic and Social Council for consideration in accordance with the provisions of the present Covenant; (b) The Secretary-General of the United Nations shall also transmit to the specialized agencies copies of the reports, or any relevant parts therefrom, from State parties to the present Covenant which are also members of these specialized agencies in so far as these reports, or parts therefrom, relate to any matters which fall within the responsibilities of the said agencies in accordance with their constitutional instruments. *See ICESCR, supra* note 2, at art. 16.

Article 17 of the ICESCR provides general comments on the reporting process:

1. The State parties to the present Covenant shall furnish their reports in stages, in accordance with a program to be established by the Economic and Social Council within one year of the entry into force of the present Covenant after consultation with the State parties and the specialized agencies concerned.
2. Reports may indicate factors and difficulties affecting the degree of fulfillment of obligations under the present Covenant. *See id.* at art. 17.
3. Where relevant information has previously been furnished to the United Nations or to any specialized agency by any State party to the present Covenant, it is not necessary to reproduce that information, but a precise reference to the information so furnished is sufficient. *See id.*

²⁴ *See id.* at art. 17(2).

²⁵ Two excellent alternative reports concerning China were published by Human Rights in China and the International Federation for Human Rights. *See Human Rights in China, Implementation of the International Covenant on Economic, Social and Cultural Rights in the People's Republic of China: A Parallel NGO Report by Human Rights in China*, April 14, 2005, available at http://www.hrichina.org/fs/view/downloadables/pdf/downloadable-resources/CESCR_Report_Final_4_22_ALL.pdf; Federation for Human Rights, *China: At a*

In its first General Comment issued in 1989, the Committee underlined seven key objectives for State parties to fulfill through the reporting process. State parties should undertake a comprehensive review of national legislation, administrative rules and procedures, and practices; monitor the situation of rights enshrined in the Covenant; provide a basis for policy formulation; enhance public scrutiny of government policies; provide a basis of evaluation for the State party and the Committee; help the State party to understand shortcomings and difficulties impeding the implementation of rights; and facilitate information exchange.²⁶ The Committee's analysis of the reports draws on these general guidelines. Upon completion of its analytical work, the Committee issues "concluding observations." They are generally divided into five sections, following the same analytical order: introduction; positive aspects; factors and difficulties impeding the implementation of the Covenant; principal subjects of concern; and suggestions and recommendations. The Committee's concluding observations on China's initial report on the implementation of the ICESCR follow this very pattern.²⁷

While the Committee's concluding observations are not legally binding, they have symbolic power to induce the State party to implement its international obligations in good faith. Thus, the Committee's review process is largely considered an "unofficial petition procedure."²⁸

As noted by the Committee, China has indeed taken its exercise of implementation seriously.²⁹ China's report was submitted on time, prepared "in general conformity with the Committee's guidelines," and included comprehensive written replies to the UN experts' list of issues. The Committee welcomed the constructive dialogue with China's delegation and appreciated the members' expertise in areas covered by the Covenant.³⁰

Critical Stage, Violations of the Rights to Health in the Context of the Fight Against AIDS, Alternative Report to the Committee on Economic, Social and Cultural Rights, n°413/2, April 2005, available at <http://www.fidh.org/IMG/pdf/cn413a.pdf> (last visited Feb. 27, 2006).

²⁶ *General Comment No. 1*, U.N. ESCOR, 3rd Sess., Annex 3, at paras. 2-9, U.N. Doc. E/1989/22 (1989).

²⁷ See *Concluding Observations of the ESCR Committee*, *supra* note 7, at paras. 2-70. The Committee's conclusions for the Hong Kong Special Administrative Region and Macao Special Administrative Region follow the same divisions. See *id.* at paras. 71-102; see also *id.* at paras. 103-31.

²⁸ See Matthew Craven, *Towards an Unofficial Petition Procedure: A Review on the Role of the UN Committee on Economic, Social and Cultural Rights*, in *SOCIAL RIGHTS AS HUMAN RIGHTS* 91 (Krzysztof Drzewicki et al. eds., 1994).

²⁹ *Concluding Observations of the ESCR Committee*, *supra* note 7, at paras. 2-3.

³⁰ The Chinese delegation was composed of the following delegates from the PRC government: H.E. Sha Zukang, Head of the Delegation, Permanent Representative of the Chinese Mission to the UN Geneva Office; Liu Jieyi, Director General of the Department of International Organizations of the Ministry of Foreign Affairs; Shao Wenhong, Director General of the Research Office of the

A. *China's First Periodic Report on the Implementation of the ICESCR*³¹

The Chinese government signed the International Covenant on Economic, Social and Cultural Rights on October 27, 1997.³² On February 28, 2001, the ICESCR was ratified by the Standing Committee of the Ninth National People's Congress, and the Permanent Mission of the People's Republic of China to the United Nations deposited its instrument of ratification with the UN Secretary-General on March 27, 2001.³³ The Covenant entered into force in China on June 27, 2001.

In June 2002, the Chinese government established a working group composed of fifteen organs, including the Ministry of Foreign Affairs, the Ministry of Health, the Ministry of Labor, and the Ministry of Education, to draft its initial report to the ESCR Committee.³⁴ According to China's initial report, "Chinese non-governmental organizations, and academics, and experts in relevant areas" also contributed to the drafting.³⁵ On June 27, 2003, the Chinese government submitted its initial report through the UN Secretary-General to the Committee. In May 2004, having considered China's first draft, the Committee transmitted a "List of Issues" to the Chinese government.³⁶ By November 2004, the Chinese government submitted its final report.

Supreme People's Court, Mao Gongning, Director General of the Department of Policies, Laws and Regulations of the State Ethnic Affairs Commission; Gao Weizhong, Deputy Director General of the Department of Health Policies and Legislations of the Ministry of Public Health; Dong Zhihua, Division Director of the Department of International Organizations and Conferences of the Ministry of Foreign Affairs; Huang Xingsheng, Deputy Division Director of the Department of Policy and Regulation of the Ministry of Education; You Xueyun, Deputy Division Director of the Seventh Bureau of the Information Office of the State Council; Zhang Yongqing, Deputy Division Director of the General Office of the Ministry of Labor and Social Security; Wu Xuyan, Section Chief of the Department of Housing and Real Estate Industry of the Ministry of Construction; Tian Ni, Third Secretary at the Department of Treaty and Law at the Ministry of Foreign Affairs; Zhou Xianfeng, Attaché at the Department of International Organizations and Conferences of the Ministry of Foreign Affairs; and Fan Yong, Attaché at the Department of International Organizations and Conferences of the Ministry of Foreign Affairs. Eleven delegates from Hong Kong and six delegates from Macao attended the hearings as well.

³¹ See *PRC Initial Report*, *supra* note 6, for the initial report of the PRC (including Hong Kong and Macao).

³² See *Signatories of the International Covenant on Economic, Social and Cultural Rights*, available at <http://www.ohchr.org/english/countries/ratification/3.htm> (last visited Mar. 1, 2006).

³³ *Id.*

³⁴ See Sha Zukong, H.E. Ambassador, Introductory Statement by the Head of the Chinese Delegation, H.E. Ambassador Sha Zukang at the United Nations Committee on Economic, Social and Cultural Rights Hearing on China's Initial Report (Apr. 27, 2005), available at <http://www.china-un.ch/eng/xwdt/t194934.htm>. The complete list of government agencies that have contributed to the report has not been provided.

³⁵ See *PRC Initial Report*, *supra* note 6, at para. 5.

³⁶ See *Concluding Observations of the ESCR Committee*, *supra* note 7.

The Chinese report relies on nationally aggregated data and focuses on urban areas (fewer than 40% of the population).³⁷ Divided into three parts (China, Hong Kong Special Administrative Region, and Macao Special Administrative Region), the report aims at presenting the general situation of rights implementation, with “an emphasis on achievements in the legislative and judicial fields including areas of difficulty and problems that exist.”³⁸ It lists twenty four legislative enactments relating to economic, social, and cultural rights that are considered to have strengthened the PRC’s normative framework and that, together, constitute “a legal system that provides important legal safeguards for [the] promotion and the protection of citizens economic, social and cultural rights.”³⁹ As impressive as this list may be, the broader debate is familiar to every Chinese law scholar. Despite this legislative inflation, many of these norms are not even minimally enforced.⁴⁰

The report acknowledges that the government has encountered difficulties in implementing the rights enshrined in the ICESCR and that not all of its articles can be fully realized.⁴¹

The Chinese report does not directly address the justiciability of economic, social, and cultural rights. Rather, it reports on general developments in formal legislative changes relating to a limited selection

³⁷ The statistical data provided are generally old, unclear, incomplete, and suffer from a lack of clear sourcing. See *PRC Initial Report*, *supra* note 6, at 95-111.

³⁸ See *id.* at para. 4.

³⁹ *Id.* at para. 9. Along with the Chinese Constitution, these norms include: the General Principles of Civil Law; the Inheritance Act; the Consumer Protection Act; the Mineral Resources Act; the Land Administration Act; the Water Act; the Water and Soil maintenance Act; the Coal Act; the Environmental Protection Act; the Labor Act; the Trade Union Act; the Mine and Safety Act; the Regulations on Minimum Livelihood Security for City Residents; the State Council Regulations on the Establishment by Enterprises of Old-Age Pension Insurance; the Education Act; the Compulsory Education Act; the Higher Education Act; the Cultural Objects [Protection] Act; the Progress in Science and Technology Act; the Law on the National Languages and its Writing; the Protection of Minors Act; the Women’s Rights and Interests Act; the Rights and Interests of the Elderly Act; and the Protection of the Handicapped Act.

⁴⁰ See IMPLEMENTATION OF LAW IN THE PEOPLE’S REPUBLIC OF CHINA (Jianfu Chen et al. eds., 2002).

⁴¹ Notably, the provisions related to the income gap, equality between men and women, work safety, HIV/AIDS and public health, and disparities between urban and rural areas:

China is still a developing country. In view of constraints relating to the level of the country’s economic and social development, even though the Covenant has come into force in China, not all its articles have been fully realized. The degree of enjoyment of certain rights does not yet reach the requirements of the Covenant. China still has a duty to reduce poverty and the gap between the wealthy and the poor, while it also faces such pressures as population growth and resource depletion. See *PRC Initial Report*, *supra* note 7, at para. 13.

of the Covenant's provisions that deal with self-determination,⁴² measures taken to guarantee the full realization of rights,⁴³ gender equality,⁴⁴ the right to work,⁴⁵ the right to favorable working conditions,⁴⁶ the right to join a trade union,⁴⁷ the right to social security,⁴⁸ protection of the family,⁴⁹ the right to an adequate standard of living,⁵⁰ the right to good health,⁵¹ the right to education,⁵² and the right to cultural life and the benefits of science.⁵³

Further, the report does not address the incorporation into Chinese domestic law of the Covenant's provisions and the possibility for aggrieved citizens to enforce these rights in domestic courts. Despite the promulgation of the Administrative Litigation Law ("ALL") in 1989 and the recent developments in administrative litigation, the report does not mention the possibility of administrative remedies for individuals to seek redress of rights violations.⁵⁴ According to a study published during the Tenth National People's Congress in March 2005, the Supreme People's Court handled nearly 150,000 petition cases in 2004, and petition cases in the local courts reached 4.22 million.⁵⁵ But the Chinese report remains silent on the traditional complaint procedure. While labor disputes have risen exponentially in recent years (180,000 cases in 2002), the report provides no statistical data on the number of cases involving labor norms.⁵⁶

In giving an impressionistic picture of China's reality, the report fails to provide a complete and up to date description of the ICESCR's implementation and an analysis of the difficulties—especially in judicial matters—that China has encountered in this respect.

⁴² ICESCR, *supra* note 2, at art. 1.

⁴³ *Id.* at art. 2.

⁴⁴ *Id.* at art. 3.

⁴⁵ *Id.* at art. 6.

⁴⁶ *Id.* at art. 7.

⁴⁷ *Id.* at art. 8.

⁴⁸ *Id.* at art. 9.

⁴⁹ *Id.* at art. 10.

⁵⁰ *Id.* at art. 11.

⁵¹ *Id.* at art. 12.

⁵² *Id.* at arts. 13, 14.

⁵³ *Id.* at art. 15.

⁵⁴ See Kevin J. O'Brien & Lianjiang Li, *Suing the Local State: Administrative Litigation in Rule China*, in *ENGAGING THE LAW IN CHINA*, *supra* note 12, at 31-53. According to the authors, "about 100,000 administrative suits have been filed annually in recent years and there are signs that rights consciousness is on the rise." *Id.* at 45.

⁵⁵ See 10th National People's Congress and Chinese People's Political Consultative Conference, *Chinese Courts Report Increasing Number of Petitions in 2004*, XINHUA NEWS AGENCY, (March 9, 2005) available at <http://www.china.org.cn/english/2005lh/122232.htm>.

⁵⁶ See Mary E. Gallagher, *Use the Law as Your Weapon! Institutional Change and Legal Mobilization in China*, in *ENGAGING THE LAW IN CHINA*, *supra* note 12, at 54-83.

B. *The ESCR Committee's Concluding Observations*

The Committee on Economic, Social and Cultural Rights considered the initial Report of the People's Republic of China (including Hong Kong and Macao) on the implementation of the International Covenant on Economic, Social and Cultural Rights at its sixth to tenth meetings, held April 27, 28, and 29, 2005.⁵⁷ The Committee then adopted some concluding observations at its twenty seventh meeting held on May 13, 2005.⁵⁸

As usual, the Committee's experts began by introducing the general situation and commending a selection of positive developments. For example, the Committee welcomed the State Council's promulgation of the Regulation on Supervision of Labor Security and their amended Regulations on Collective Contracts and Regulations on Minimum Wages, the establishment of a new social security system based on a communal pension fund and individual pension accounts, and the adoption of the Framework for Education Development into 2020.

The Committee's conclusions regarding the "factors and difficulties impeding the implementation of the Covenant" very clearly emphasized its position towards the Chinese government. While recognizing "the sizeable population in the vast expanse" of Chinese territory, the Committee considered that "there are no significant factors and difficulties" impeding China's capacity to "effectively implement the Covenant."⁵⁹ The Committee goes on to list no fewer than twenty seven "Principal Subjects of Concern" dealing with the insufficient dissemination of the Chinese report, the lack of comparative statistical data in the fields of economic, social, and cultural rights, the absence of constitutional guarantees on the Covenant rights for "non-citizens" including asylum seekers, refugees, and stateless persons, the "*de facto*" discrimination against internal migrants that indirectly results, *inter alia*, from the *hukou* system, discrimination against disabled persons, discrimination against ethnic minorities, gender inequalities and discriminations against women and children, unemployment in rural areas, large scale redundancies, forced labor under the Re-education Through Labor program (劳动教养, *laodong jiaoyang*), the insufficient implementation of labor legislation, the prohibition on the right to organize and join a trade union, sexual exploitation and human trafficking, forced evictions, public aid and HIV/AIDS issues, safe water shortages

⁵⁷ ICESCR, *supra* note 2.

⁵⁸ *Concluding Observations of the ESCR Committee*, *supra* note 7.

⁵⁹ *See id.* at para. 11.

and environmental problems, and religious freedom and freedom of information.⁶⁰

Finally, the Committee's conclusions set forth suggestions and recommendations.⁶¹ Among the thirty suggestions and recommendations, the Committee paid particular attention to the "full realization" of the ICESCR's rights in China's domestic legal order.⁶² The Committee not only requested that China "submit updated, annually collected comparative data disaggregated by sex, age, and rural/urban regions in the fields of all the provisions of the Covenant,"⁶³ but also urged it to effectively implement its international and domestic obligations, specifically in the areas of non-discrimination, unlawful employment of children, labor legislation for protection of the rights of all workers—including migrants workers—to just and favorable working conditions, minimum wages, human trafficking, forced evictions, and the right to education.

To summarize, the Committee has urged China "to ensure that legal and judicial training takes full account of the justiciability of the rights contained in the Covenant and promotes the use of the Covenant as a source of law in domestic courts."⁶⁴ To do so, the Committee urged the Chinese government to provide proper training to law enforcement officials and judges.⁶⁵

The quest for the justiciability of the economic, social, and cultural rights enshrined in the ICESCR is, indeed, deeply related to the reform of the Chinese judiciary itself.

III. JUSTICIABILITY AND THE QUEST FOR EFFECTIVE ADJUDICATION

According to Article 8 of the Universal Declaration of Human Rights, "Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law."⁶⁶ Article 2(3) of the International Covenant on Civil and Political Rights urges State parties to ensure that "any person whose rights or freedom" recognized by the Covenant are violated

⁶⁰ *Id.* at paras. 12-39

⁶¹ *Id.* at paras. 40-70.

⁶² *Id.* at paras. 42, 43, 45, 46, 52, 53, 54, 57, 58, and 61.

⁶³ *Id.* at para. 40.

⁶⁴ *Id.* at para. 42.

⁶⁵ *Id.* at para. 57. For example, to educate them regarding the criminal nature of domestic violence against women.

⁶⁶ See Universal Declaration of Human Rights art. 8, G.A.Res. 217A (III) (10 Dec. 1948), available at <http://www.unhcr.ch/udhr/lang/eng.htm>.

shall be able "to develop the possibilities of judicial remedies" enforceable, when granted, by "competent authorities."⁶⁷ The ICESCR contains no clear counterpart to these provisions, but Article 2(1) of the ICESCR is usually interpreted as referring indirectly to justiciability.⁶⁸ Thus, much of the debate on the justiciability of the ICESCR derives from the various interpretations of Article 2(1), which provides:

Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.⁶⁹

In China, the process of institutionalization has been intertwined with considerable borrowing from other countries and, to a certain extent, a progressive harmonization based on a selective application of international standards. One of China's most ambitious undertakings upon accession to the WTO is its commitment to institute judicial review of administrative actions.⁷⁰ Knowing the modest effect that China's

⁶⁷ Cf. International Covenant on Civil and Political Rights art. 2(3), Dec. 16, 1966, 999 U.N.T.S. 171, available at http://www.unhchr.ch/html/menu3/b/a_ccpr.htm (last visited Mar. 1, 2006) ("Each State Party to the present Covenant undertakes:

(a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity; (b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy; (c) To ensure that the competent authorities shall enforce such remedies when granted.").

⁶⁸ The current proposal to establish an optional protocol to the ICESCR that will create an individual complaints mechanism, see U.N. Doc. E/CN.4/1997/105, is based on the First Optional Protocol to the International Covenant on Civil and Political Rights, Mar. 23, 1976, G.A. Res. 2200A (XXI), 21 U.N. GAOR, 21st Sess., Supp. No. 16, at 59, U.N. Doc. A/6316 (1966). Other communications procedures are available under different U.N. human rights treaties: the International Convention on the Elimination of All Forms of Racial Discrimination, Dec. 21, 1965, G.A. Res. 2106 (XX), U.N. GAOR, 20th Sess., Annex, Supp. No. 14, at 47, U.N. Doc. A/6014 (1966), the Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment, Dec. 10, 1984, G.A. Res. 39/46, U.N. GAOR, 39th Sess., Annex, Supp. No. 51, at 197, U.N. Doc. A/39/51 (1984), and the Optional Protocol to the Convention on the Elimination of Discrimination Against Women, Mar. 12, 1999, G.A. Res. 54/4, U.N. GAOR, 54th Sess., Annex, Supp. No. 49, at 5, U.N. Doc. A/54/49 (Vol. I) (2000).

⁶⁹ ICESCR, *supra* note 2, at art. 2(1).

⁷⁰ Under its protocol of accession to the World Trade Organization, "China shall establish or designate and maintain tribunals, contact points and procedures for the prompt review of all disputes relating to the implementation of laws, regulations, judicial decisions and administrative

accession to the WTO has had, to date, on the independent review of administrative acts, one should be quite skeptical about the effective implementation of this commitment. Still, there is no doubt that it has raised awareness amongst the Chinese leadership and the judiciary of the need for reform and the complexities of the rule of law.⁷¹ Hence, international law may be considered an inspiration.

A. *International Law as an Inspiration*

Despite increasing international emphasis on the indivisibility, interdependence, and interrelatedness between civil and political rights on one hand and social and cultural rights on the other, the issue of their justiciability remains controversial.⁷² Civil and political rights are often considered as the only rights that can be judicially enforceable.

The usual reasons given for this contention are that economic, social, and cultural rights are couched too imprecisely to be enforced by a court and their realization is progressive in nature. They have traditionally been considered as lacking justiciability. As a matter of fact, the UN Commission on Human Rights' ("CHR") recent initiative to establish a working group discussing the feasibility of elaborating an optional protocol to the ICESCR which would provide for the adjudication of individual and collective complaints under the 1966 Covenant has been passionately debated.⁷³ In an attempt to question the effectiveness of such a complaints mechanism, Michael J. Dennis and David P. Stewart argue persuasively that the viability of an optional protocol to the ICESCR is subject to a large number of substantives queries. They write:

rulings of general application . . . Such tribunals shall be impartial and independent of the agencies entrusted with administrative enforcement." See Accession of the People's Republic of China art. 2(D-1), WT/L/432 (Nov. 23, 2001).

⁷¹ See generally Veron Mei-Ying Hung, *China's WTO Commitment on Independent Judicial Review: Impact on Legal and Political Reform*, 52 AM. J. COMP. L. 77, 77-132 (2004); see also Leïla Choukroune, *China's Accession to the WTO and the Building of a Rule of Law by Internationalization* (2004) (unpublished Ph.D. dissertation, Université de Paris I Panthéon-Sorbonne) (on file with author).

⁷² The indivisibility of human rights has been systematically reaffirmed since the adoption of the Universal Declaration of Human Rights in 1948. See *Basic Documents*, U.N. Doc. A/811 (1948), at 18. The 1993 Vienna Declaration and Programme of Action-World Conference on Human Rights stressed that all human rights and fundamental freedoms are "universal, indivisible and interdependent and interrelated" while considering that "democracy, development and respect for human rights and fundamental freedoms are interdependent and mutually reinforcing." See World Conference on Human Rights, June 14-25, 1993, *Vienna Declaration and Programme of Action*, para. 5, 8, U.N. Doc. A/CONF.157/24 (July 12, 1993).

⁷³ For the decision of UN Commission on Human Rights ("CHR") to establish a Working Group, see CHR Res. 2002/24, at para. 9(f) (Apr. 22, 2002).

Vexing questions of content, criteria, and measurement lie at the heart of the debate over “justiciability”, yet are seldom raised or addressed with any degree of precision From the outset, and for good reason, economic, social and cultural rights unlike civil and political rights have been defined primarily as aspirational goals to be achieved progressively. The drafters of the Universal Declaration of Human Rights and the two Covenants well understood the difficulties and obstacles relating to justiciability. The decision to put the two sets of rights within different treaties with different supervisory mechanisms was well considered, and the underlying reasons for those distinctions and decisions appear to remain valid today.⁷⁴

As brilliant as the above demonstration is, it does not, however, avoid oversimplification. First, numerous economic, social, and cultural rights—as well as the obligations they impose upon states—are drafted in a sufficiently precise manner to be justiciable. Second, there is now a large body of jurisprudence illustrating how methodological and theoretical difficulties in determining whether a state is complying with its international obligations can be overcome. Indeed, in its *General Comment n°3* (1990) on the nature of State parties’ obligations the Committee made clear that it considers a large number of ICESCR provisions capable of immediate implementation in domestic law.⁷⁵ It cited, by way of example, some key articles of the ICESCR, including equal rights for men and women;⁷⁶ the right to “fair wages and equal remuneration for work of equal value without distinction of any kind, in particular women being guaranteed conditions of work not inferior to those enjoyed by men, with equal pay for equal work”;⁷⁷ the right to join a trade union of one’s choice;⁷⁸ the right to special measures of protection and assistance for all children and young persons without discrimination (working conditions and protection from social exploitation);⁷⁹ the right

⁷⁴ Michael J. Dennis & David P. Stewart, *Justiciability of Economic, Social, and Cultural Rights: Should there be an International Complaints Mechanism to Adjudicate the Rights to Food, Water, Housing, and Health?*, 98 AM. J. INT’L L. 462, 464–65 (2004). A different and convincing analysis can be found in Philip Alston, *Out of the Abyss: The Challenges Confronting the New UN Committee on Economic, Social and Cultural Rights*, 9 HUM. RTS. Q. 332 (1987).

⁷⁵ See U.N. ESCR COMM., GENERAL COMMENT N°3, THE NATURE OF STATE PARTIES OBLIGATIONS, U.N. Doc. E/191/23, Annex III (1990).

⁷⁶ ICESCR, *supra* note 2, at art. 3.

⁷⁷ *Id.* at art. 7(a)(i).

⁷⁸ *Id.* at art. 8.

⁷⁹ *Id.* at art. 10(3).

to education (primary education shall be compulsory and available free to all; liberty of parents to choose for their children schools and ensure their religious and moral education; liberty of individuals and bodies to establish and direct educational institutions);⁸⁰ and respect by State parties of the freedom indispensable for scientific research and creative activity.⁸¹

Nevertheless, I tend to agree with the authors when they stress that supranational adjudication is not the sole response to economic, social, and cultural rights violations: "International adjudication . . . is certainly not the only or even the best means of holding government 'accountable' for their human rights obligations." But I remain quite skeptical about the second part of the demonstration: "One need not believe that domestic courts are always or *per se* 'ill equipped to run a railroad'—that is disqualified from deciding issues of the entitlement to, or adequacy of economic, social, and cultural rights—in order to take the position that in many, if not most, countries, legitimate political processes offer a more likely pathway than international litigation to achieving the goals of the Covenant."⁸²

The Committee then clarified the statement it made in *General Comment n°3* in *General Comment n°9* (1998) on the domestic application of the Covenant by distinguishing between justiciability, which "refers to those matters which are appropriately resolved by the courts," and self-executing norms, which are "capable of being applied by the courts without further elaboration."⁸³ Hence, the Committee considers that "there is no Covenant right which could not, in the great majority of systems, be considered to possess at least some significant justiciable dimensions."⁸⁴ Consequently, the courts should play a central part in the domestic application process of the ICESCR by taking account, "within the limits of the appropriate exercise of their functions of judicial review . . . of Covenant rights where this is necessary to ensure that the State's conduct is consistent with its obligations under the Covenant."⁸⁵

⁸⁰ *Id.* at arts. 13(2)(a)(3), 13(2)(a)(4).

⁸¹ *Id.* at art. 15(3).

⁸² Dennis & Stewart, *supra* note 75, at 467.

⁸³ See ESCR COMM., GENERAL COMMENT N°9, THE DOMESTIC APPLICATION OF THE COVENANT, U.N. Doc. E/C.12/1998/24 (1998) available at [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/E.C.12.1998.24,+CESCR+General+comment+9.En?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/E.C.12.1998.24,+CESCR+General+comment+9.En?Opendocument) (hereinafter ESCR N°9). On the domestic applicability of the Covenant, see MATTHEW C. R. CRAVEN, THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS: A PERSPECTIVE ON ITS DEVELOPMENT (1995); see also Matthew C. R. Craven, *The Domestic Application of the International Covenant on Economic, Social and Cultural Rights*, 40 NETH. INT'L L. REV. 40, 367 (1993).

⁸⁴ ESCR N°9, *supra* note 83, at para. 10.

⁸⁵ *Id.*

The Committee concludes by arguing that "neglect by the courts of this responsibility is incompatible with the principle of the rule of law, which must always be taken to include respect for international human rights obligations."⁸⁶

The role played by international law in advancing economic, social, and cultural rights often remains marginal. It will, nevertheless, provide inspiration and authority in assisting the development of a domestic legal and judicial framework that may guarantee the effective implementation of international obligations. When apprehended constructively and in a non-selective manner, international law, used as a catalyst, could have a significant impact on Chinese legal reform.

B. The Need for a Domestic Translation of International Obligations

In its *General Comment n°9* on domestic application of the Covenant the Committee argues that "there is no Covenant right which could not, in the great majority of systems, be considered to possess at least some significant justiciable dimensions."⁸⁷ Hence, State parties must give effect, "by all appropriate means," to the rights enshrined in the Covenant.⁸⁸ If the Covenant adopts a broad and flexible approach which conflicts with the operations of a specific legal system, State parties should, nevertheless, modify their domestic legal orders to incorporate their treaty obligations, while also providing effective judicial remedies for violations of the ICESCR.⁸⁹

Once we admit that the nature of the rights and obligations enshrined in the ICESCR is no obstacle to their justiciability, the next step is to find an adequate adjudicating body. In the absence of an authoritative international mechanism capable of adjudicating rights, one could rely on domestic courts. As mentioned above, we tend to consider international mechanisms a less-than-perfect solution. But relying on Chinese tribunals to adjudicate economic, social, and cultural rights is, of course, a difficult task that could eventually bring uncertain, if not dangerous results for aggrieved Chinese citizens. Several measures should be taken to ensure that Chinese citizens can, one day, even if not

⁸⁶ *Id.* at para. 14.

⁸⁷ *Id.*

⁸⁸ See ICESCR, *supra* note 2: "Each State party is committed to achieve "progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures."

⁸⁹ ESCR N°9, *supra* note 83, at para. 14: ("Within the limits of the appropriate exercise of their functions of judicial review, courts should take account of Covenant rights where this is necessary to ensure that the State's conduct is consistent with its obligations under the Covenant.")

in the very near future, seek redress for violations of the rights protected by the ICESCR in domestic courts.

First, the Chinese government should respect the minimum core obligations incumbent on State parties to the ICESCR, as the Committee takes into account a certain margin of discretion in reviewing efforts made in implementing the Covenant.

Second, China should respect the typology developed by the Committee for the fulfillment of economic, social, and cultural rights; that is, an obligation to respect, requiring the state from preventing an individual from using available resources to satisfy his basic needs, an obligation to protect, requiring the State to implement measures necessary to prevent other individuals or groups from violating individual rights, and an obligation to fulfill, requiring the State to take measures to ensure that each individual can satisfy basic needs that cannot be obtained through personal efforts.

Third, in developing a legal order consistent with the core principles of rule of law, China should incorporate ICESCR provisions in domestic norms which litigants might invoke in domestic courts.

Fourth, while reforming its judiciary, the Chinese government should ensure that law enforcement officials and judges—especially those who specialize in administrative and labor issues—are sufficiently well-versed on the PRC's international obligations under human rights treaties.

Finally, China should develop an independent and transparent reporting process involving every level of Chinese society, including NGOs and the media, as well as international actors.

These steps would increase the possibility of justice for Chinese citizens in confronting the state for human rights violations.

IV. CONCLUSION

In China, the effective realization of economic, social, and cultural rights remains a tremendous challenge of paramount importance. To reach this goal, the adoption of a pragmatic yet determined approach is crucial. The Committee's review of China's implementation of the ICESCR gives an example of the interplay between the international legal system and its transposition—or the lack thereof—into Chinese law. It highlights a subtle intersection between law and policy.

According to He Weifang, Professor of Law at Peking University and a prominent public intellectual, China still has “a long way to go in terms of rule of law and democratization.”⁹⁰ He argues:

We are probably still in the initial stage of this process. Judicial reform appears to be proceeding apace and to be penetrating social relations even more deeply, but at the same time, we are discovering that people's most basic demands from the rule of law, including legal certainty and predictability and equality before the law, have not yet been met.⁹¹

But how exactly can this morally based quest for justice turn into adjudicated disputes based on the implementation of China's international human rights obligations? The road to adjudication may not necessarily go through an international body, but could take a different, though equally risky, path. The translation of international law to a domestic level is not an easy task and the reported difficulties reveal the Chinese government's perspective on international standards.

The general evolution of the Chinese court system has, nevertheless, shown some limited but encouraging signs. The Chinese judiciary will undoubtedly undergo further changes in the direction of a more independent and professionalized system. Yet, in the absence of consensus on the role that law has to play in building a different Chinese society, this subtle interplay between law and policy remains a question of political priorities.

⁹⁰ See generally Human Rights in China, *The Legal Scholar As Public Intellectual: An Interview with He Weifang*, CHINA RTS. F., Mar. 17, 2005, at 70, available at <http://www.hrichina.org/fs/view/downloadables/pdf/downloadable-resources/1.2005TheLegalScholar.pdf> (last visited Mar. 1, 2006).

⁹¹ *Id.*